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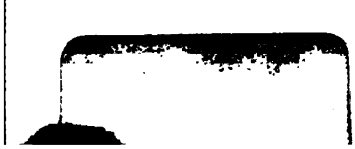
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THE

LAWYERS REPORTS

ANNOTATED

BOOK XXIX.

ALL CURRENT CASES OF GENERAL VALUE AND IMPORTANCE WITH FULL ANNOTATION BURDETT A. RICH, EDITOR, HENRY P. FARNHAM, ASSISTANT

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SUPPLEMENTAL TABLE

OF ALL

CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED,

BOOK 29,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.)

Alpine Twp. Sch. Dist. No. 11 v. Batsche (106 Mich. 330) - - - 576
American Nat. Bank v. American Wood Paper Co. (19 R. I. 149) - - 103
Amoskeag Mfg. Co. v. Concord (66 N. H. 562) - - - - - 57
Anderson v. Bell (140 Ind. 375) - - 541
Armstrong v. Austin (45 S. C. 69) - 772
Atchison, T. & S. F. R. Co. v. Henry (55 Kan. 715) - - - - - 465
Bald Eagle Valley R. Co. v. Nittany Valley R. Co. (171 Pa. 284) - 423
Bank of Newport v. Cook (60 Ark. 288) - - - - - - 761
Barber Asphalt Pav. Co. v. Harrisburg (64 Fed. Rep. 283) 12 C. C. A. 100, 28 U. S. App. 108 - - 401
Barchard v. Kohn (157 Ill. 579) - 803
Belford v. Woodward (158 Ill. 122) - 593
Bell v. Cassem (158 Ill. 45) - - 571
Bibbins v. Clark (90 Iowa, 230) - 278
Bickerdike v. Allen (157 Ill. 95) - 782
Bills v. Hibernia Ins. Co. (87 Tex. 547) 706
Bissell v. Davison (65 Conn. 183) - 251
Bloxham v. Consumers' Electric Light & Street R. Co. (36 Fla. 519) - 507
Brim v. Jones (11 Utah, 200) - 97
Brownell v. Old Colony R. Co. (164 Mass. 29) - - - - - 169
Buist v. Bryan (44 S. C. 121) - 127
Burrows v. Delta Transp. Co. (106 Mich. 582) - - - - - 468
Cady v. Schultz (19 R. I. 193) - 524
Capital City Water Co. v. State, McDonald (105 Ala. 406) - - 743
Capital Gas Co. v. Young (109 Cal. 140) - - - - - - 463
Carpenter's Appeal (170 Pa. 203) - 145
Central Trust Co. v. Moran (56 Minn. 188) - - - - - - 212
Chessman's Appeal (14 Mont. 153) - 622
Chicago v. Burcky (153 Ill. 103) - 568
Chicago & A. R. Co. v. People, Windmiller (153 Ill. 409) - - - 69
Chicago, B. & Q. R. Co. v. West Chicago Street R. Co. (156 Ill. 255) - 485
Cole v. Tucker (164 Mass. 486) - - 668
Commercial Nat. Bank v. Matherwell Iron & S. Co. (95 Tenn. 172) - 164
Com. v. Forrest (170 Pa. 40) - - 365
Com. v. Henderson Bridge Co. (99 Ky. 623) - - - - - - 73
Com. v. McCance (164 Mass. 162) - 61
Com. v. Petty (96 Ky. 452) - - 786
Davis v. Dodson (95 Ga. 718) - - 496

Dell Rapids v. Irving (7 S. D. 310) - 861
Dennis v. Caughlin (22 Nev. 447) - 731
Denver City R. Co. v. Denver (21 Colo. 350) - - - - - - 608
Donovan v. Hartford Street R. Co. (65 Conn. 201) - - - - - 297
Durkin v. Kingston Coal Co. (171 Pa. 193) - - - - - - 808
Duval County Comrs. v. Jacksonville (36 Fla. 196) - - - - - 416
Eaton v. Robinson (19 R. I. 146) - 100
Edwards & W's Estate, Re (122 Mo. 426) - - - - - - 681
Ellison v. Albright (41 Neb. 93) - 737
Ellsworth v. Chicago, B. & Q. R. Co. (95 Iowa, 98) - - - - - 173
Eversmann v. Schmitt (53 Ohio St. 174) 184
Fairly v. Wappoo Mills (44 S. C. 227) 215
Farmers' Co-Operative Mfg. Co. v. Albemarle & R. R. Co. (117 N. C. 579) - - - - - - 700
Farrell v. St. Paul (62 Minn. 271) - 778
Ferchen v. Arndt (26 Or. 121) - 664
Findlay v. Pertz (66 Fed. Rep. 427) 13 C. C. A. 559, 31 U. S. App. 340 - - - - - - - 188
French v. State, Harley (141 Ind. 618) 113
Fulton v. Fulton (52 Ohio St. 229) - 678
Funk v. St. Paul City R. Co. (61 Minn. 435) - - - - - - 208
Goddard-Peck Grocery Co. v. McCune (122 Mo. 426) - - - - - 681
Goodloe v. Memphis & C. R. Co. (107 Ala. 233) - - - - - 729
Graybill v. Penn Twp. Mut. F. Ins. Asso. (170 Pa. 75) - - - 55
Hare v. Murphy (45 Neb. 809) - 851
Hart v. Washington Park Club (157 Ill. 9) - - - - - - 492
Hickman v. Green (123 Mo. 165) - 39
Hocking Valley Coal Co. v. Rosser (53 Ohio St. 12) - - - - - 386
Hodges v. Western U. Teleg. Co. (72 Miss. 910) - - - - - 770
Hooper v. Central Trust Co. (81 Md. 559) - - - - - - - 262
Ireland v. Globe Milling & R. Co. (19 R. I. 180) - - - - - 429
Irvin v. Irvin (169 Pa. 529) - - 292
Jones v. Aspen Hardware Co. (21 Colo. 263) - - - - - - 143
Judson v. Giant Powder Co. (107 Cal. 549) - - - - - - - 718
Kernohan v. Manss (53 Ohio St. 118) 317
King v. Southern Pac. Co. (109 Cal. 96) 755

Kirkpatrick v. Brownfield (97 Ky. 558) 703
Kountze v. Kennedy (147 N. Y. 124) - 360
Krecker v. Shirey (163 Pa. 534) - 476
Kuhn v. Port Townsend (12 Wash. 605) 445
Lake Erie & W. R. Co. v. Mackey (53 Ohio St. 370) - - - - 757
Lake Shore & M. S. R. Co. v. Grand Rapids (102 Mich. 374) - - 195
Lake Shore & M. S. R. Co. v. Platt (52 Ohio St. 254) - - - - 52
Lane v. Minnesota State Agri. Soc. (62 Minn. 175) - - - - - 708
Laramie County Comrs. v. Foster (5 Wyo. 199) - - - - - 226
Lebanon Light, H. & P. Co. v. Leap (139 Ind. 443) - - - - - 342
Levy v. San Francisco Super. Ct. (105 Cal. 600) - - - - - 811
Lewis v. Daily News Co. (81 Md. 466) 59
Lynchburg Nat. Bank v. Scott (91 Va. 652) - - - - - - 827
McBurney v. Young (67 Vt. 574) - 539
McGahan v. Indianapolis Natural Gas Co. (140 Ind. 355) - - - 355
McTwiggan v. Hunter (19 R. I. 265) 526
Mason v. Union Mills Paper Mfg. Co. (81 Md. 446) - - - - 273
Montgomery v. Lansing City Electric R. Co. (103 Mich. 46) - - 287
Moyer v. Van De Vanter (12 Wash. 377) - - - - - - - 670
Muhlenberg v. Northwest Loan & T. Co. (26 Or. 132) - - - - - 667
Munzer v. Stern (105 Mich. 523) - 859
New York, N. H. & H. R. Co. v. Bridgeport Traction Co. (65 Conn. 410) - - - - - - 367
Norfolk & W. R. Co. v. Wheeler (91 Va. 700) - - - - - - - 825
O'Connor v. Clark (170 Pa. 318) - 607
Ohio Gas Fuel Co. v. Andrews (50 Ohio St. 695) - - - - - 337
Ottumwa v. Zekind (95 Iowa, 622) - 734
Parker v. Randolph (5 S. D. 549) - 33
Pattillo v. Alexander (96 Ga. 60) - - 616
Paxton & H. Irrig. C. & L. Co. v. Farmers' & M. Irrig. & L. Co. (45 Neb. 884) - - - - - - - 853
Pennsylvania Co. v. McCaffrey (139 Ind. 430) - - - - - - - 104
People, Chandler, v. McDonald (5 Wyo. 526) - - - - - - - 834
People, Hecker-Jones-Jewell Milling Co., v. Barker (147 N. Y. 31) - 393
People's Home Sav. Bank v. San Francisco Super. Ct. (104 Cal. 649) 844
Peterson v. Russell (62 Minn. 220) - 612
Philadelphia v. Public Schools (170 Pa. 257) - - - - - - - 600
Price v. Price (91 Iowa, 693) - - 150
Pryor, Re (55 Kan. 724) - - - 398
Pullman's Palace Car Co v. Martin (95 Ga. 314) - - - - - 498
Randall v. National Bldg. L. & P. Union (42 Neb. 809) - - - - - 133
Reyes v. Middleton (36 Fla. 99) - 66
Reynolds v. Great Northern R. Co. (69 Fed. Rep. 808) 32 U. S. App 577, 16 C. C. A. 435 - - - 695
Ricker's Estate, Re (14 Mont. 153) - 622
Ritchie v. People (155 Ill. 98) - 79
Roberts v. Mitchell (94 Tenn. 277) - 705
Robinson v. Clapp (65 Conn. 365) - 582
Robinson v. Rockland, T. & C. Street R. Co. (87 Me. 387) - - - - 530
St. Johns Mfg. Co. v. Munger (106 Mich. 90) - - - - - 63
San Barnardino v. Southern Pac. Co. (107 Cal. 524) - - - - 327
Sanders v. Pottlitzer Bros. Fruit Co. (144 N. Y. 209) - - - - 431
San Diego Water Co. v. San Diego Flume Co. (108 Cal. 549) - - 839
Savannah v. Mulligan (95 Ga. 323) - 303
Schroeder v. Flint & P. M. R. Co. (103 Mich. 213) - - - - - 321
Schufeldt v. Smith (131 Mo. 280) - 830
Sebree Deposit Bank v. Moreland (96 Ky. 150) - - - - - 305
Shafer v. Lacock (168 Pa. 497) - - 254
Sherwood v. Powell (61 Minn. 479) 153
Short v. State (80 Md. 392) - - 404
Skinner v. Santa Rosa (107 Cal. 464) 512
South Bend v. Martin (142 Ind. 31) 531
Southern Bldg. & L. Asso. v. Anniston Loan & T. Co. (101 Ala. 582) - 120
Spence v. Norfolk & W. R. Co. (92 Va. 102) - - - - - - - 578
State v. Barr (11 Wash. 481) - - 154
State v. Bishop (128 Mo. 373) - 200
State v. Crook (115 N. C. 760) - - 260
State v. Foster (5 Wyo. 199) - 226
State v. Haug (95 Iowa, 413) - - 390
State v. Julow (129 Mo. 163) - - 257
State v. Speyer (67 Vt. 502) - - 573
State v. Swett (87 Me. 99) - - 714
State, Kellogg, v. Missouri P. R. Co. (55 Kan. 708) - - - - - 444
State, Little, v. Regents of University (55 Kan. 389) - - - - 378
State, Realty Co., v. Cooley (62 Minn. 183) - - - - - - - 777
State Mut. F. Ins. Co. v. Brinkley Stave & H. Co. (61 Ark. 1) - - 712
Stephens v. Southern Pac. Co. (109 Cal. 86) - - - - - - - 751
Stewart v. Wheeling & L. E. R. Co. (53 Ohio St. 151) - - - - 438
Taylor v. Downey (104 Mich. 532) - 92
Tebbe v. Smith (108 Cal. 101) - 673
Tillman v. Otter (93 Ky. 600) - - 110
Todd v. Election Comrs. (104 Mich. 474) - - - - - - 330
Union P. R. Co. v. Erickson (41 Neb. 1) 137
Ward v. Ward (40 W. Va. 611) - 449
Washingtonian Home v. Chicago (157 Ill. 414) - - - - - - 798
Waterloo Milling Co. v. Kuenster (158 Ill. 259) - - - - - 794
Whittenton Mfg. Co. v. Staples (164 Mass. 319) - - - - - 600
Williamette Iron Works v. Oregon R. & Nav. Co. (26 Or. 224) - - 88
Wohlford v. Citizens' Bldg., L. & S. Asso. (140 Ind. 662) - - 177
Wood v. Auburn (87 Me. 287) - - 376

TABLE

OF

CASES REPORTED

IN

LAWYERS' REPORTS, ANNOTATED, BOOK XXIX.

A.

Albemarle & R. R. Co., Farmers' Co-Operative Mfg. Co. v. (N. C.) - 700
Albright, Ellison v. (Neb.) - - - - 737
Alexander, Pattillo v. (Ga.) - - - - 616
Allen, Bickerdike v. (Ill.) - - - - 782
Alpine Twp. School Dist. No. 11 v. Batsche (Mich.) - - - - 576
American Nat. Bank v. American Wood Paper Co. (R. I.) - - - 103
American Wood Paper Co., American Nat. Bank. v. (R. I.) - - 103
Amoskeag Mfg. Co. v. Concord (N. H.) 57
Anderson v. Bell (Ind.) - - - - 541
Andrews, Ohio Gas Fuel Co. v. (Ohio) 337
Anniston Loan & T. Co., Southern Bldg. & L. Asso. v. (Ala.) - - 120
Armstrong v. Austin (S. C.) - - - 772
Arndt, Ferchen v. (Or.) - - - - - 664
Aspen Hardware Co., Jones v. (Colo.) - 143
Atchison, T. & S. F. R. Co. v. Henry (Kan.) 465
Auburn, Wood v. (Me.) - - - - 376
Austin, Armstrong v. (S. C.) - - - 772

B.

Bald Eagle Valley R. Co. v. Nittany Valley R. Co. (Pa.) - - - - 423
Bank, American Nat. v. American Wood Paper Co. (R. I.) - - - - 103
Commercial Nat. v. Matherwell Iron & S. Co. (Tenn.) - 164
Lynchburg Nat. v. Scott Bros. (Va.) - - - - - 827
People's Home Sav. v. San Francisco Super. Ct. (Cal.) - 844
Sebree Dep. v. Moreland (Ky.) - 305
Bank of Newport v. Cook (Ark.) - 761
Barber Asphalt Pav. Co. v. Harrisburg (C. C. App. 3d C.) - - - 401
Barchard v. Kohn (Ill.) - - - - 803
Barker, People, Hecker-Jones-Jewell Mill. Co. v. (N. Y.) - - 393
Barr, State v. (Wash.) - - - - - 154
Batsche, Alpine Twp. School Dist. No. 11 v. (Mich.) - - - - 576
Belford v. Woodward (Ill.) - - - 593
Bell, Anderson v. (Ind.) - - - - 541
v. Cassem (Ill.) - - - - - 571
Bibbins v. Clark (Iowa) - - - 278
Bickerdike v. Allen (Ill.) - - - - 782
Bills v. Hibernia Ins. Co. (Tex.) - - 706
Bishop, State v. (Mo.) - - - - - 200
Bissell v. Davidson (Conn.) - - - 251
Bloxham v. Consumer's Electric Light & Street R. Co. (Fla.) - - 507
Bridgeport Traction Co., New York, N. H. & H. R. Co. v. (Conn.) - 367
Brim v. Jones (Utah) - - - - - 97
Brinkley Stave & H. Co., State Mut. F. Ins. Co. v. (Ark.) - - 712
Brownell v. Old Colony R. Co. (Mass.) - 169
Brownfield, Kirkpatrick v. (Ky.) - 703
Bryan, Buist v. (S. C.) - - - - - 127
Buist v. Bryan (S. C.) - - - - - 127
Burcky, Chicago v. (Ill.) - - - - - 568
Burrows v. Delta Transp. Co. (Mich.) 468

C.

Cady v. Schultz (R. I.) - - - - - 524
Capital City Water Co. v. State, Macdonald (Ala.) - - - - - 743
Capital Gas Co. v. Young (Cal.) - - 463
Carpenter's Appeal (Pa.) - - - - 145
Cassem, Bell v. (Ill.) - - - - - 571
Caughlin, Dennis v. (Nev.) - - - - 731
Central Trust Co., Hooper v. (Md.) - 262
v. Moran (Minn.) - - - - 212
Chandler, People, *ex rel.* v. McDonald (Wyo.) - - - - - - 834
Chessman's Appeal (Mont.) - - - - 622
Chicago v. Burcky (Ill.) - - - - 568
Washingtonian Home v. (Ill.) - 798
Chicago & A. R. Co. v. People, Windmiller (Ill.) - - - - - - 69
Chicago, B. & Q. R. Co., Ellsworth v. (Iowa) - - - - - - 173
v. West Chicago Street R. Co. (Ill.) - - - - - - 485
Citizens' Bldg. L. & S. Asso., Wohlford v. (Ind.) - - - - - - 177
Clapp, Robinson v. (Conn.) - - - - 582
Clark, Bibbins v. (Iowa) - - - - - 278
O'Connor v. (Pa.) - - - - 607
Cole v. Tucker (Mass.) - - - - - 668
Commercial Nat. Bank v. Matherwell Iron & S. Co. (Tenn.) - - 164
Com. v. Forrest (Pa.) - - - - - 365
v. Henderson Bridge Co. (Ky.) - 73
v. McCance (Mass.) - - - - 61
v. Petty (Ky.) - - - - - 786

Concord, Amoskeag Mfg. Co. v. (N. H.) 57
Consumers' Electric Light & Street R. Co., Bloxham v. (Fla.) - 507
Cook, Bank of Newport v. (Ark.) - - 761
Cooley, State, Realty Co., v. (Minn.) - 777
Crook, State v. (N. C.) - - - - - 260

D.

Daily News Co., Lewis v. (Md.) - 59
Davis v. Dodson (Ga.) - - - - - 496
Davison, Bissell v. (Conn.) - - - - 251
Dell Rapids v. Irving (S. Dak.) - - 861
Delta Transp. Co., Burrows v. (Mich.) - 468
Dennis v. Caughlin (Nev.) - - - - 781
Denver, Denver City R. Co. v. (Colo.) - 608
Denver City R. Co. v. Denver (Colo.) - 608
Dodson, Davis v. (Ga.) - - - - - 496
Donovan v. Hartford Street R. Co. (Conn.) 297
Downey, Taylor v. (Mich.) - - - - 92
Durkin v. Kingston Coal Co. (Pa.) - 808
Duval County Comrs. v. Jacksonville (Fla.) - - - - - - 416

E.

Eaton v. Robinson (R. I.) - - - 100
Edwards & W.'s Estate, *Re* (Mo.) - 681
Election Comrs., Todd v. (Mich.) - - 330
Ellison v. Albright (Neb.) - - - - 737
Ellsworth v. Chicago, B. & Q. R. Co. (Iowa) - - - - - - 178
Erickson, Union P. R. Co. v. (Neb.) - 187
Eversmann v. Schmitt (Ohio) - - - 184

F.

Fairly v. Wappoo Mills (S. C.) - - 215
Farmers' & M. Irrig. & L. Co., Paxton & H. Irrig. Canal & L. Co. v. (Neb.) - - - - - - 853
Farmers' Co-Operative Mfg. Co. v. Albemarle & R. R. Co. (N. C.) - 700
Farrell v. St. Paul (Minn.) - - - - 778
Ferchen v. Arndt (Or.) - - - - - 664
Findlay v. Pertz (C. C. App. 6th C.) - 188
Flint & P. M. R. Co., Schroeder v. (Mich.) 321
Forrest, Com. v. (Pa.) - - - - - 365
Foster, Laramie County Comrs. v. (Wyo.) 226
State v. (Wyo.) - - - - - 226
French v. State, Harley (Ind.) - - 113
Fulton v. Fulton (Ohio) - - - - 678
Funk v. St. Paul City R. Co. (Minn.) - 208

G.

Giant Powder Co., Judson v. (Cal.) - 718
Globe Milling & R. Co., Ireland v. (R. I.) 429
Goddard-Peck Grocery Co. v. McCune (Mo.) - - - - - - 681
Goodloe v. Memphis & C. R. Co. (Ala.) 729
Grand Rapids, Lake Shore & M. S. R. Co. v. (Mich.) - - - - - 195
Graybill v. Penn Twp. Mut. F. Ins. Asso. (Pa.) - - - - - - 55
Great Northern R. Co., Reynolds v. (C. C. App. 8th C.) - - 695
Green, Hickman v. (Mo.) - - - - 39

H.

Hare v. Murphy (Neb.) - - - - - 851
Harley, State, *ex rel.* French, v. (Ind.) 113
Harrisburg, Barber Asphalt Pav. Co. v. (C. C. App. 3d C.) - - 401
Hart v. Washington Park Club (Ill.) - 492
Hartford Street R. Co., Donovan v. (Conn.) - - - - - - 297
Haug, State v. (Iowa) - - - - - - 390
Hecker-Jones-Jewell Mill. Co., People, *ex rel.* v. Barker (N. Y.) - 393
Henderson Bridge Co., Com. v. (Ky.) - 73
Henry, Atchison, T. & S. F. R. Co. v. (Kan.) - - - - - - - 465
Hibernia Ins. Co., Bills v. (Tex.) - 706
Hickman v. Green (Mo.) - - - - - 39
Hocking Valley Coal Co. v. Rosser (Ohio) 386
Hodges v. Western U. Teleg. Co. (Miss.) 770
Hooper v. Central Trust Co. (Md.) - 262
Hunter, McTwiggan v. (R. I.) - - 526

I.

Indianapolis Natural Gas Co., McGahan v. (Ind.) - - - - - - 855
Insurance Asso., Penn Twp. Mut. F., Graybill v. (Pa.) - - - - 55
Insurance Co., Hibernia, Bills v. (Tex.) - 706
State Mut. F. v. Brinkley Stave & H. Co. (Ark.) - - - - - 712
Ireland v. Globe Milling & R. Co. (R. I.) 429
Irvin v. Irvin (Pa.) - - - - - - 292
Irving, Dell Rapids v. (S. Dak.) - - 861

J.

Jacksonville, Duval County Comrs. v. (Fla.) - - - - - - 416
Jones v. Aspen Hardware Co. (Colo.) - 143
Brim v. (Utah) - - - - - 97
Judson v. Giant Powder Co. (Cal.) - - 718
Julow, State v. (Mo.) - - - - - 257

K.

Kellogg, State, *ex rel.* v. Missouri P. R. Co. (Kan.) - - - - - 444
Kennedy, Kountze v. (N. Y.) - - - 360
Kernohan v. Manss (Ohio) - - - - 317
King v. Southern Pac. Co. (Cal.) - - 755
Kingston Coal Co., Durkin v. (Pa.) - 808
Kirkpatrick v. Brownfield (Ky.) - - 703
Kohn, Barchard v. (Ill.) - - - - 803
Kountze v. Kennedy (N. Y.) - - - 360
Krecker v. Shirey (Pa.) - - - - 476
Kuenster, Waterloo Milling Co. v. (Ill.) - 794
Kuhn v. Port Townsend (Wash.) - 445

L.

Lacock, Shafer v. (Pa.) - - - - - 254
Lake Erie & W. R. Co. v. Mackey (Ohio) 757
Lake Shore & M. S. R. Co. v. Grand Rapids (Mich.) - - - - 195
v. Platt (Ohio) - - - - - 52
Lane v. Minnesota State Agri. Soc. (Minn.) 708
Lansing City Electric R. Co., Montgomery v. (Mich.) - - - - 287

Laramie County Comrs. v. Foster (Wyo.) 226
Leap, Lebanon Light, H. & P. Co. v. (Ind.) 342
Lebanon Light, H. & P. Co. v. Leap (Ind.) 342
Levy v. San Francisco Super. Ct. (Cal.) 811
Lewis v. Daily News Co. (Md.) 59
Little, State, *ex rel.* v. Regents of University of Kansas (Kan.) 878
Lynchburg Nat. Bank v. Scott Bros. (Va.) 897

M.

McBurney v. Young (Vt.) 539
McCaffrey, Pennsylvania Co. v. (Ind.) 104
McCance, Com. v. (Mass.) 61
McCune, Goddard-Peck Grocery Co. v. (Mo.) 681
McDonald, People, Chandler, v. (Wyo.) 884
Macdonald, State, *ex rel.*, Capital City Water Co. v. (Ala.) 748
McGahan v. Indianapolis Natural Gas Co. (Ind.) 855
Mackey, Lake Erie & W. R. Co. v. (Ohio) 757
McTwiggan v. Hunter (R. I.) 526
Mauss, Kernohan v. (Ohio) 317
Martin, Pullman's Palace Car Co. v. (Ga.) 498
South Bend v. (Ind.) 531
Mason v. Union Mills Paper Mfg. Co. (Md.) 273
Matherwell Iron & S. Co., Commercial Nat. Bank v. (Tenn.) 164
Memphis & C. R. Co., Goodloe v. (Ala.) 729
Middleton, Reyes v. (Fla.) 66
Minnesota State Agri. Soc., Lane v. (Minn.) 708
Missouri P. R. Co., State, Kellogg, v. (Kan.) 444
Mitchell, Roberts v. (Tenn.) 705
Montgomery v. Lansing City Electric R. Co. (Mich.) 287
Moran, Central Trust Co. v. (Minn.) 212
Moreland, Sebree Dep. Bank v. (Ky.) 305
Moyer v. Van de Vanter (Wash.) 670
Muhlenberg v. Northwest Loan & T. Co. (Or.) 667
Mulligan, Savannah v. (Ga.) 303
Munger, St. Johns Mfg. Co. v. (Mich.) 63
Munzer v. Stern (Mich.) 859
Murphy, Hare v. (Neb.) 851

N.

National Bldg. L. & P. Union, Randall v. (Neb.) 133
New York, N. H. & H. R. Co. v. Bridgeport Traction Co. (Conn.) 867
Nittany Valley R. Co., Bald Eagle Valley R. Co. v. (Pa.) 423
Norfolk & W. R. Co., Spence v. (Va.) 578
v. Wheeler (Va.) 825
Northwest Loan & T. Co., Muhlenberg v. (Or.) 667

O.

O'Connor v. Clark (Pa.) 607
Ohio Gas Fuel Co. v. Andrews (Ohio) 837
Old Colony R. Co., Brownell v. (Mass.) 169
Oregon R. & Nav. Co., Willamette Iron Works v. (Or.) 88
Otter, Tillman v. (Ky.) 110
Ottumwa v. Zekind (Iowa) 734

P.

Parker v. Randolph (S. Dak.) 83
Patillo v. Alexander (Ga.) 616
Paxton & H. Irrig. Canal & L. Co. v. Farmers' & M. Irrig. & L. Co. (Neb.) 853
Pennsylvania Co. v. McCaffrey (Ind.) 104
Penn Twp. Mut. F. Ins. Asso., Graybill v. (Pa.) 55
People, Ritchie v. (Ill.) 79
People, *ex rel.* Chandler, v. McDonald (Wyo.) 884
Hecker-Jones-Jewell Mill. Co. v. Barker (N. Y.) 393
Windmiller, Chicago & A. R. Co. v. (Ill.) 69
People's Home Sav. Bank v. San Francisco Super. Ct. (Cal.) 844
Pertz, Findlay v. (C. C. App. 6th C.) 188
Peterson v. Russell (Minn.) 612
Petty, Com. v. (Ky.) 786
Philadelphia v. Public Schools (Pa.) 600
Platt, Lake Shore & M. S. R. Co. v. (Ohio) 52
Port Townsend, Kuhn v. (Wash.) 445
Pottlitzer Bros. Fruit Co. Sanders v. (N. Y.) 431
Powell, Sherwood v. (Minn.) 153
Price v. Price (Iowa) 150
Pryor, *Re* (Kan.) 398
Public Schools, Philadelphia v. (Pa.) 600
Pullman's Palace Car Co. v. Martin (Ga.) 498

R.

Railroad Co., Albemarle & R., Farmers' Co Operative Mfg. Co. v. (N. C.) 700
Atchison, T. & S. F. R. Co. v. Henry (Kan.) 465
Bald Eagle Valley v. Nittany Valley R. Co. (Pa.) 423
Chicago & A. v. People, Windmiller (Ill.) 69
Chicago, B. & Q., Ellsworth v. (Iowa) 173
v. West Chicago Street R. Co. (Ill.) 485
Flint & P. M., Schroeder v. (Mich.) 321
Hartford Street, Donovan v. (Conn.) 297
Lake Erie & W. v. Mackey (Ohio) 757
Lake Shore & M. S. v. Grand Rapids (Mich.) 195
v. Platt (Ohio) 52
Lansing City Electric, Montgomery v. (Mich.) 287
Memphis & C., Goodloe v. (Ala.) 729
New York, N. H. & H. v. Bridgeport Traction Co. (Conn.) 867
Nittany Valley, Bald Eagle Valley R. Co. v. (Pa.) 423
Norfolk & W., Spence v. (Va.) 578
v. Wheeler (Va.) 825
Old Colony, Brownell v. (Mass.) 169
West Chicago Street, Chicago, B. & Q. R. Co. v. (Ill.) 485
Wheeling & L. E., Stewart v. (Ohio) 438
Railway Co., Denver City v. Denver (Colo.) 608
Great Northern, Reynolds v. (C. C. App. 8th C.) 695

Railway Co., Missouri P., State, Kellogg, v. (Kan.) - - - 444
Rockland, T. & C. Street, Robinson v. (Me.) - - - - 580
St. Paul City, Funk v. (Minn.) 208
Union P. v. Erickson (Neb.) - 137
Randall v. National Bldg. L. & P. Union (Neb.) - - - - - 133
Randolph, Parker v. (S. Dak.) - - 33
Realty Co., State, *ex rel.* v. Cooley (Minn.) - - - - - 777
Re Edwards & W.'s Estate (Mo.) - 681
Regents of University of Kansas, State, Little, v. (Kan.) - - - - 378
Re Pryor (Kan.) - - - - - - 398
Re Ricker's Estate (Mont.) - - 622
Reyes v. Middleton (Fla.) - - - - 66
Reynolds v. Great Northern R. Co. (C. C. App. 8th C.) - - - - 695
Ricker's Estate, *Re* (Mont.) - - - 622
Ritchie v. People (Ill.) - - - - 79
Roberts v. Mitchell (Tenn.) - - 705
Robinson v. Clapp (Conn.) - - - 582
Eaton v. (R. I.) - - - - - 100
v. Rockland, T. & C. Street R. Co. (Me.) - - - - - - 580
Rockland, T. & C. Street R. Co., Robinson v. (Me.) - - - - - 580
Rosser, Hocking Valley Coal Co. v. (Ohio) - - - - - 386
Russell, Peterson v. (Minn.) - - - 612

S.

St. Johns Mfg. Co. v. Munger (Mich.) 63
St. Paul, Farrell v. (Minn.) - - - 778
St. Paul City R. Co. Funk v. (Minn.) 208
San Bernardino v. Southern Pac. Co. (Cal.) - - - - - 327
Sanders v. Pottlitzer Bros. Fruit Co. (N. Y.) - - - - - - 481
San Diego Flume Co., San Diego Water Co. v. (Cal.) - - - - 839
San Diego Water Co. v. San Diego Flume Co. (Cal.) - - - - - 839
San Francisco Super. Ct., Levy v. (Cal.) 811
People's Home Sav. Bank v. (Cal.) 844
Santa Rosa, Skinner v. (Cal.) - - 512
Savannah v. Mulligan (Ga.) - - - 303
Schmitt, Eversmann v. (Ohio) - - 184
School Dist. No. 11 v. Batsche (Mich.) 576
Schroeder v. Flint & P. M. R. Co. (Mich.) 321
Schufeldt v. Smith (Mo.) - - - - 830
Schultz, Cady v. (R. I.) - - - - - 524
Scott Bros., Lynchburg Nat. Bank v. (Va.) 827
Sebree Dep. Bank v. Moreland (Ky.) - 305
Shafer v. Lacock (Pa.) - - - - - 254
Sherwood v. Powell (Minn.) - - - 153
Shirey, Krecker v. (Pa.) - - - - 476
Short v. State (Md.) - - - - - 404
Skinner v. Santa Rosa (Cal.) - - 512
Smith, Schufeldt v. (Mo.) - - - 830
Tebbe v. (Cal.) - - - - 673
South Bend v. Martin (Ind.) - - - 531
Southern Bldg. & L. Asso. v. Anniston Loan & T. Co. (Ala.) - - 120
Southern Pac. Co., King v. (Cal.) - 755
San Bernardino v. (Cal.) - - 327
Stephens v. (Cal.) - - - - 751
Spence v. Norfolk & W R. Co. (Va.) 578
Speyer, State v. (Vt.) - - - - - 573
Staples, Whittenton Mfg. Co. v. (Mass.) 500
State v. Barr (Wash.) - - - - - 154
v. Bishop (Mo.) - - - - - 200
v. Crook (N. C.) - - - - 260
v. Foster (Wyo.) - - - - - 226
v. Haug (Iowa) - - - - - 390
v. Julow (Mo.) - - - - - 257
Short v. (Md.) - - - - - 404
v. Speyer (Vt.) - - - - - 573
v. Swett (Me.) - - - - - 714
ex rel. Harley, French v. (Ind.) - 113
Kellogg, v. Missouri P. R. Co. (Kan.) - - - - - - 444
Little, v. Regents of University of Kansas (Kan.) - - - - 378
Macdonald, Capital City Water Co. v. (Ala.) - - - 743
Realty Co., v. Cooley (Minn.) - 777
State Mut. F. Ins. Co. v. Brinkley Stave & H. Co. (Ark.) - 712
Stephens v. Southern Pac. Co. (Cal.) - 751
Stern, Munzer v. (Mich.) - - - - 859
Stewart v. Wheeling & L. E. R. Co. (Ohio) - - - - - - 438
Swett, State v. (Me.) - - - - - 714

T.

Taylor v. Downey (Mich.) - - - 92
Tebbe v. Smith (Cal.) - - - - - 673
Tillman v. Otter (Ky.) - - - - - 110
Todd v. Election Comrs. (Mich.) - - 330
Tucker, Cole v. (Mass.) - - - - 668

U.

Union Mills Paper Mfg. Co., Mason v. (Md.) - - - - - - 273
Union P. R. Co. v. Erickson (Neb.) - 137

V.

Van de Vanter, Moyer v. (Wash.) - - 670

W.

Wappoo Mills, Fairly v. (S. C.) - - 215
Ward v. Ward (W. Va.) - - - - 449
Washingtonian Home v. Chicago (Ill.) 798
Washington Park Club, Hart v. (Ill.) - 493
Waterloo Milling Co. v. Kuenster (Ill.) 794
West Chicago Street R. Co., Chicago, B. & Q. R. Co. v. (Ill.) - - 485
Western U. Teleg. Co., Hodges v. (Miss.) 770
Wheeler, Norfolk & W. R. Co. v. (Va.) 825
Wheeling & L. E. R. Co., Stewart v. (Ohio) - - - - - - 438
Whittenton Mfg. Co. v. Staples (Mass.) 500
Willamette Iron Works v. Oregon R. & Nav. Co. (Or.) - - - - 88
Windmiller, People, *ex rel.*, Chicago & A. R. Co. v. (Ill.) - - - 69
Wohlford v. Citizens' Bldg. L. & S. Asso. (Ind.) - - - - - - 177
Wood v. Auburn (Me.) - - - - - 376
Woodward, Belford v. (Ill.) - - 593

Y.

Young, Capital Gas Co. v. (Cal.) - - 468
McBurney v. (Vt.) - - - - 539

Z.

Zekind, Ottumwa v. (Iowa) - - 734

CITATIONS

IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

A.

Abbott v. Omaha Smelting & Ref. Co. 4 Neb. 416 145
Abeel v. Clark, 84 Cal. 226 254
Adams v. Adams, 25 Minn. 72 781
v. Iron Cliffs Co. 78 Mich. 271 323
Adams Min. Co. v. Senter, 26 Mich. 76 192
Aerkfetz v. Humphreys, 145 U. S. 418, 420, 36 L. ed. 758, 759 697
Ætna Ins. Co. v. Alton City Bank, 25 Ill. 243, 79 Am. Dec. 328 797
Ah Lim v. Territory, 1 Wash. 156, 9 L. R. A. 395 84
Akers v. Rowan, 33 S. C. 451, 10 L. R. A. 705 223
Alabama Gold L. Ins. Co. v. Thomas, 74 Ala. 582 125
Alberger v. National Bank of Commerce, 128 Mo. 313 833
Albright v. Brown, 23 Neb. 136 742
Aldrich v. Husband, 131 Mass. 480 460
v. Wright, 53 N. H. 398, 16 Am. Rep. 339 162
Aldridge v. Williams, 44 U. S. 3 How. 24, 11 L. ed. 476 210
Alleman v. Hawley, 117 Ind. 533 461
Allen v. First Nat. Bank of Xenia, 23 Ohio St. 97 320
v. Kinyon, 41 Mich. 281 290
v. Merchants' Bank, 22 Wend. 215 796
v. Pioneer Press Co. 40 Minn. 117, 8 L. R. A. 522 99
v. South Boston R. Co. 150 Mass. 200, 5 L. R. A. 716 44
American Union Exp. Co. v. St. Joseph, 66 Mo. 675, 27 Am. Rep. 382 611
Americus v. Mitchell, 79 Ga. 807 304
Ames v. Gilman, 10 Met. 243 218
Anderson v. Chicago, B. & Q. R. Co. 117 Ill. 26 71, 72
v. Norton, 15 Lea, 14, 54 Am. Rep. 400 697
v. Wellington, 40 Kan. 176, 2 L. R. A. 110. 400
Annely v. De Saussure, 12 S. C. 488 511
Anonymous, Lofft, 556 505
Antwerp v. Dell Rapids Twp. 3 S. Dak. 305 864
Applegate v. Ernst, 3 Bush, 648, 96 Am. Dec. 272 199
Appleton v. Hopkins, 5 Gray, 530 415
Appropriation Bill, *Re*, 14 Fla. 284 97
Arnold v. Slaughter, 36 W. Va. 590 461
v. Stock, 51 Ill. 407 805
Atchison & N. R. Co. v. Baty, 6 Neb. 37, 29 Am. Rep. 356 390
Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291 858
v. Moore (Kan.) 1 Pac. Rep. 644 110
v. Wilson, 33 Kan. 223 448
Atkins v. Bordman, 2 Met. 457, 462, 37 Am. Dec. 100 504
v. Byrnes, 71 Ill. 326 806
v. Phillips, 26 Fla. 281, 10 L. R. A. 158 736
Atkinson v. Rochester Printing Co. 114 N. Y. 168 666
Atlanta & R. Air-Line R. Co. v. State, 68 Ga. 483 511
Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556 504
Atlantic Nat. Bank v. Harris, 118 Mass. 147 44
Atty-Gen. v. Detroit, 78 Mich. 545, 7 L. R. A. 99 334
v. McQuade, 94 Mich. 430 675
v. May, 99 Mich. 588, 25 L. R. A. 325 334, 669, 676, 677
v. Metropolitan R. Co. 125 Mass. 515, 28 Am. Rep. 264 490
Aull Sav. Bank v. Aull, 50 Mo. 199 46
Aultman v. Stout, 15 Neb. 586 742
Auriol v. Thomas, 2 T. R. 52 764
Austerberry v. Oldham, L. R. 29 Ch. Div. 750 .. 503
Austin v. Coggeshall, 12 R. I. 329, 331, 34 Am. Rep. 648 529
v. Rutland R. Co. 45 Vt. 228 540
Avirett v. State, 76 Md. 510 69
Ayars' Appeal, 123 Pa. 266, 2 L. R. A. 877 402

B.

Babbitt v. Bumpus, 73 Mich. 331 397
Bacchus v. Moreau, 7 Rob. (La.) 539 765
Bagby v. Atlantic, M. & O. R. Co. 86 Pa. 291 168
Bailey v. Lawrence County (S. Dak.) 59 N. W. Rep. 219 863, 864
Baily v. Merrell, 3 Bulst. 95 362
Baltimore, O. & C. R. Co. v. Rowan, 104 Ind. 88-94 109
Bankhead v. Brown, 25 Iowa, 540 857
Bank of Columbia v. Okley, 17 U. S. 4 Wheat. 235, 4 L. ed. 559 33
Lindsborg v. Ober, 31 Kan. 599 797
Louisville v. First Nat. Bank, 8 Baxt. 101, 35 Am. Rep. 691 797
Tennessee v. Smith, 9 B. Mon. 609 315
Banta v. Vreeland, 15 N. J. Eq. 108, 82 Am. Dec. 269 26
Barbier v. Connolly, 113 U. S. 32, 28 L. ed. 925 .. 99
Barnard v. Campbell, 55 N. Y. 456, 58 N. Y. 73, 17 Am. Rep. 208 608
Barnes v. Camack, 1 Barb. 392 36
v. Mayo, 19 Fla. 542 68
Barnett v. Kinney, 147 U. S. 476, 481, 37 L. ed. 247, 249 167
v. Pratt, 37 Neb. 849 853
v. Wolf, 70 Ill. 76 736
Barney v. Keokuk, 94 U. S. 324, 24 L. ed. 224 91
v. Saunders, 57 U. S. 16 How. 543, 14 L. ed. 1051 661
Barry v. Merchants' Exchange Co. 1 Sandf. Ch. 307, 7 L. ed. 340 77
Bartlett v. Boston Gas Light Co. 117 Mass. 533, 19 Am. Rep. 421 360
Barton v. McKelway, 22 N. J. L. 165 223
Basset v. Nosworthy, 2 White & T. Lead. Eq. Cas. 3d Am. ed. 101 38
Batchelder v. Council Grove Water Co. 131 N. Y. 42 104
Bateman v. Blake, 31 Mich. 227 290
Bates v. Porter, 74 Cal. 224 422
v. Wilson, 14 Colo. 140 145
Battelle v. Northwestern Cement & Concrete Pav. Co. 37 Minn. 89 65
Baxter v. New England Marine Ins. Co. 6 Mass. 277, 4 Am. Dec. 125 780
Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209 853
Bayard v. Smith, 17 Wend. 88 818
Beach v. Derby, 19 Ill. 617 805
v. Leahy, 11 Kan. 23 868
Beardsley v. Hartford, 50 Conn. 529, 47 Am. Rep. 677 302
Beauchamp v. State, 6 Blackf. 299 120
Beckman v. McKay, 14 Cal. 250 818
Beckwith v. Angell, 6 Conn. 315 614
Beesley v. F. W. Wheeler & Co. (Mich.) 27 L. R. A. 266 323
Bell v. Bell, 3 W. Va. 183 122
v. Hannibal & St. J. R. Co. 72 Mo. 50, 58 ... 699
v. McConnell, 37 Ohio St. 400, 41 Am. Rep. 528 122
Belleview Trustees v. Hohn, 82 Ky. 1 408
Bellinger v. Griffith, 23 Ohio St. 619 578
Bennett v. American Exp. Co. 88 Me. 236, 13 L. R. A. 33 717
v. Bennett, 116 N. Y. 584, 6 L. R. A. 553 .. 151, 152
Berghaus v. Harrisburg, 122 Pa. 289 402
Berkshire Woolen Co. v. Proctor, 7 Cush. 424 .. 97
Berry v. Hartzell, 91 Mo. 132 43
Berryhill's Appeal, 35 Pa. 245 102
Berthold v. O'Hara, 121 Mo. 88 46
Bill v. Denver, 29 Fed. Rep. 344 403
Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533 776
v. Travis, 51 Minn. 183 781
Birchard v. Booth, 4 Wis. 67 291
Blakely v. Grant, 6 Mass. 386 619
Blanchard v. Page, 8 Gray, 281, 301 580, 582

Bloomer v. McInerney, 30 Hun, 201 765
Blount v. Spratt, 113 Mo. 48 51
Board of Trade Teleg. Co. v. Barnett, 107 Ill. 507, 47 Am. Rep. 453 489, 491
Bodertha v. Spencer, 40 Ind. 353 511
Bohanan v. State, 18 Neb. 57, 53 Am. Rep. 791 857
Bolinger v. St. Paul & D. R. Co. 36 Minn. 418 1107
Bommer v. American Spiral Spring Butt Hinge Mfg. Co. 81 N. Y. 468 65
Boogher v. Neece, 75 Mo. 383 45
Boon v. Ætna Ins. Co. 40 Conn. 575 707
Boorman v. Brown, 2 Q. B. 511 581
Booth v. Boston & A. R. Co. 73 N. Y. 38, 29 Am. Rep. 97 109
v. Clark, 58 U. S. 17 How. 322, 15 L. ed. 164 167
Borchus v. Huntington Bldg. Loan & Sav. Asso. 97 Ind. 180 182
Boston Deep Sea Fishing Ice Co. v. Ansell, L. R. 39 Ch. Div. 339 192
Boston Diatite Co. v. Florence Mfg. Co. 114 Mass. 69, 19 Am. Rep. 310 69
Boswell v. Otis, 50 U. S. 9 How. 336, 13 L. ed. 164 784
Bound v. South Carolina R. Co. 50 Fed. Rep. 812 272
Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124 504
v. Conner, 6 Cush. 132, 135 504
Bower v. Jones, 8 Bing. 65 219, 222
Bowers v. Evans, 71 Wis. 133 666
v. Smith, 111 Mo. 45, 16 L. R. A. 754 670, 676
Bowles' Case, 11 Coke, 82 480
Bowman v. Conn, 8 Ind. 58 561
Boyce v. Fitzpatrick, 80 Ind. 526 108
Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 818, 819, 821, 824
Boyer v. Clark, 3 Neb. 161 708
Brace v. Yale, 4 Allen, 393 508
Braceville Coal Co. v. People, 147 Ill. 66, 22 L. R. A. 340 82, 390
Bradlaugh v. Queen, L. R. 3 Q. B. Div. 607 62
Bradley v. Fallbrook Irrigation Dist. 68 Fed. Rep. 948 857
v. Norton, 33 Conn. 157, 87 Am. Dec. 200 207
Bradstreet v. Neptune Ins. Co. 3 Sumn. 600 780
Bradwell v. Illinois, 83 U. S. 16 Wall. 130, 21 L. ed. 442 414
Branch v. Sinking Fund Comrs. 80 Va. 427, 56 Am. Rep. 596 827
Brande v. Grace, 154 Mass. 210, 212 591
Brandreth v. Lance, 8 Paige, 24, 4 L. ed. 330, 34 Am. Dec. 368 69
Braslin v. Somerville Horse R. Co. 145 Mass. 64 172
Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719 535, 536, 538
Brewster v. Kidgell, Carth. 438 198
Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 267, 268, 4 Am. Rep. 68 373
Briggs v. Oliver, 4 Hurlst. & C. 403 495, 724
Brigham v. Fayerweather, 140 Mass. 413 780
Brimhall v. Van Campen, 8 Minn. 13 (Gil. 1) 82 Am. Dec. 118 616
Brink v. Freoff, 44 Mich. 69 290
Bristor v. Burr, 120 N. Y. 427, 8 L. R. A. 710 578
Bronson v. Coffin, 108 Mass. 175, 185, 11 Am. Rep. 335 503, 505, 506
v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 597, 598
Brooks v. Mangan, 86 Mich. 576 736
v. New York & E. R. Co. 13 Barb. 597 699
Broome v. New York & N. J. Teleph. Co. 42 N. J. Eq. 141 214
Brosee v. State, 5 Ind. 75 561
Brouwer v. Appleby, 1 Sandf. 158 144
Brown v. Banner Coal & Coal-Oil Co. 97 Ill. 214, 37 Am. Rep. 105 87
v. Grand Rapids Parlor Furniture Co. 58 Fed. Rep. 286, 22 L. R. A. 817 834
v. Houston, 114 U. S. 622, 29 L. ed. 257 537
v. Maryland, 25 U. S. 12 Wheat. 419, 6 L. ed. 678 535
v. Milwaukee & St. P. R. Co. 22 Minn. 165 607
v. Norton, 50 Hun, 248 436
v. Scottish-American Mortg. Co. 110 Ill. 235 765
v. United States, 113 U. S. 568, 28 L. ed. 1079 510
Brownlee v. Marion County, 68 Iowa, 488 236
Brownlie v. Russell, 8 App. Cas. 248 133
Bruce v. Schuyler, 9 Ill. 221, 46 Am. Dec. 447 116
Buck v. Davenport Sav. Bank, 29 Neb. 407 621
v. Hutchins, 45 Minn. 270 614
Buckley v. Humason, 50 Minn. 196, 16 L. R. A. 423 225
Buckner v. Lynip, 22 Nev. — 733
Bulger v. Roche, 11 Pick. 36, 22 Am. Dec. 359 277
Bunn v. People, 45 Ill. 397 87
Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633 504
Burger v. Missouri P. R. Co. 112 Mo. 238 760
Burke County Comrs. v. Catawba Lumber Co. 116 N. C. 736 703
Burlington v. Bumgardner, 42 Iowa, 673 734
v. Putnam Ins. Co. 31 Iowa, 108 735, 736
Burlington & M. R. R. Co. v. Saline County Comrs. 12 Neb. 396, 397 530
v. Seward County, 10 Neb. 211, 216 530
Burnham v. Grand Trunk R. Co. 63 Me. 298, 18 Am. Rep. 220 176
Burritt v. New Haven, 42 Conn. 202 374
Burrows v. Pixley, 1 Root, 362, 1 Am. Dec. 56 701
Burtis v. Bradford, 122 Mass. 129 806
Busby v. Finn, 1 Ohio St. 409 759
Bushnell v. Proprietors of Ore Bed, 31 Conn. 150 588, 589
Buss v. Dyer, 125 Mass. 291 588
Butcher v. Vaca Valley & C. L. R. Co. 67 Cal. 518 727
Butler v. Baker, 17 R. I. 552 223, 224
v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 597, 598
Buttenuth v. St. Louis Bridge Co. 123 Ill. 535 392
Butterfield v. Smith, 101 U. S. 570, 25 L. ed. 868 781
Button v. Frink, 51 Conn. 342, 351, 50 Am. Rep. 24 300, 498
Byram v. Stout, 127 Ind. 195 805, 806
Byrne v. Boadle, 2 Hurlst. & C. 722 494, 724, 726

C.

Cagill v. Wooldridge, 8 Baxt. 580, 35 Am. Rep. 716 167
Cahalin v. Cochran, 1 N. Y. S. R. 583 727
Caider v. Bull, 3 U. S. 3 Dall. 390, 1 L. ed. 650 836, 837
California v. Pacific R. Cos. 127 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 158 78
California Ins. Co. v. Union Compress Co. 133 U. S. 387, 33 L. ed. 737 755
Callahan's Appeal, 124 Pa. 138 184
Calloway v. Laydon, 47 Iowa, 456 153
Calvert v. Aldrich, 99 Mass. 74, 76, 96 Am. Dec. 698 460
Camden v. Stuart, 144 U. S. 105, 36 L. ed. 368 268
Campbell v. Dwiggins, 83 Ind. 473 120
v. Hand, 49 Pa. 234 437
Canal Comrs. v. People, 5 Wend. 423 540
Capen v. Foster, 12 Pick. 485, 23 Am. Dec. 633 699
Capener v. Hogan, 40 Ohio St. 208 193
Capron v. Hitchcock, 98 Cal. 427 464
Carmody v. Powers, 60 Mich. 26 66
Carson v. Ury, 39 Fed. Rep. 777, 5 L. R. A. 614 205
Carter v. Davis, 8 Fla. 183 708
v. Towne, 103 Mass. 507 360
Case v. Beauregard, 101 U. S. 690, 25 L. ed. 1004, 99 U. S. 119, 25 L. ed. 370 169, 697
v. Ellis, 4 Ind. App. 224 698
v. Minot, 158 Mass. 577, 585, 22 L. R. A. 586 503, 591
Casey, *Ex parte*, 71 Cal. 269 821
Casey v. Leavenworth, 17 Kan. 189 404
Caswell v. Davis, 58 N. Y. 223, 17 Am. Rep. 233 206
Cave v. Cave, L. R. 15 Ch. Div. 639 44
Cavin's Petition, *Re* v. Gleason, 105 N. Y. 262 250, 666
Cayle's Case, 8 Coke, 32 97
Central Nat. Bank of Baltimore v. Connecticut Mut. L. Ins. Co. 104 U. S. 54, 78, 26 L. ed. 693, 701 168, 666
Central Park Comrs., *Re*, 50 N. Y. 493, 497 372
Central Trust Co. v. First Nat. Bank, 101 U. S. 68, 25 L. ed. 876 620
v. New York City & N. R. Co. 110 N. Y. 250, 1 L. R. A. 260 511
Cerveny v. Chicago Daily News Co. 139 Ill. 198, 18 L. R. A. 864 60
Chaddock v. Vanness, 35 N. J. L. 517 614
Chafee v. Fourth Nat. Bank of New York, 71 Me. 514, 36 Am. Rep. 345 431
Chaffe v. Ludeling, 27 La. Ann. 607 145
Chamberlain v. Masterson, 26 Ala. 371 97
Chamberlin v. Cobb, 32 Iowa, 161 95
v. Vance, 51 Cal. 75 599
Chambers v. Chambers, 14 Am. Dec. 585, and *note* 455
v. Marks, 98 Ala. 413 104
Chamblin v. Blair, 58 Ill. 385 598
Chance v. Marion County, 64 Ill. 66 803
Chapin v. Streeter, 124 U. S. 360, 31 L. ed. 475 283
Chapman v. Dougherty, 87 Mo. 617, 56 Am. Rep. 469 49
v. Sims, 53 Miss. 154 37, 38
Charleston v. Oliver, 16 S. C. 47, 50, 53 218, 223
Chateau v. Jacob, 68 Mich. 170 334
Chatham v. Bradford, 50 Ga. 337, 15 Am. Rep. 692 776

Chestnut v. Shane, 16 Ohio, 599, 47 Am. Dec. 387 510
Chicago v. Evans, 24 Ill. 52 509
v. People, 56 Ill. 327 408
v. Union Bldg. Asso. 103 Ill. 379, 40 Am. Rep. 596 570, 571
Chicago & N. W. R. Co. v. Chicago, 140 Ill. 309 490
v. Davis, 3 C. C. A. 429, 53 Fed. Rep. 61, 10 U. S. App. 422 697
v. Moranda, 93 Ill. 302, 34 Am. Rep. 168 142
Chicago & W. I. R. Co. v. Englewood Connecting R. Co. 115 Ill. 375 492
Chicago, B. & Q. R. Co. v. Boyd, 118 Ill. 73 72
v. Chicago, 149 Ill. 457 490
v. Jones, 149 Ill. 361, 24 L. R. A. 141 88
Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 377, 28 L. ed. 787 142
Chicago Railway Equipment Co. v. Merchants' Nat. Bank of Chicago, 136 U. S. 268, 34 L. ed. 349 104
Chicago, R. I. & P. R. Co. v. Houston, 95 U. S. 697, 702, 24 L. ed. 542, 543 697
Chicago, St. L. & P. R. Co. v. Holdridge, 118 Ind. 281 176
Chichester v. Lethbridge, Willes Rep. 70, 74, 701, 702
Child v. Hudson's Bay Co. 2 P. Wms. 207 431
Childs v. Childs, 10 Ohio St. 339, 75 Am. Dec. 512 442
Chilvers v. People, 11 Mich. 43 613
Chinn v. Murray, 4 Gratt. 348 458
Chouteau v. Allen, 70 Mo. 290 47
Chouteau Spring Co. v. Harris, 20 Mo. 382 431
Cigar Makers' Protective Union No. 98 v. Conheim, 40 Minn. 243, 3 L. R. A. 125 205
Cincinnati v. Buckingham, 10 Ohio, 257 612
Citizens' Bank v. Howell, 3 Md. 530, 68 Am. Dec. 714 797
City Savings Bank v. North Alabama Lumber & Mfg. Co. 91 Tenn. 12 168
Clark v. Davenport, 14 Iowa, 494 735
v. Freeman, 11 Beav. 112 69
v. Missouri P. R. Co. 35 Kan. 350 699
v. Sprague, 5 Blackf. 412, 413 549
Clark's Estate, 53 Cal. 355 660, 661
Clarkson v. De Peyster, Hopk. Ch. 426 660, 661
Cleaveland v. Stewart, 3 Ga. 268 801
Cleaver v. Mutual Reserve Fund L. Asso. [1892] 1 Q. B. 147 149
Cleaves v. Herbert, 61 Ill. 126 805
Clegg v. Hands, L. R. 44 Ch. Div. 504 508
Clement v. Everest, 29 Mich. 19 448
Cleveland Rolling Mill Co. v. Corrigan, 46 Ohio St. 283, 3 L. R. A. 385 760
Clinton v. Cedar Rapids & M. R. R. Co. 24 Iowa, 469 771
Cloyd v. Trotter, 118 Ill. 391 784
Cocheco Mfg. Co. v. Strafford, 51 N. H. 455, 472, 473 58
Coe v. Columbus, P. & I. R. Co. 10 Ohio St. 372, 75 Am. Dec. 518 442
Coffin v. Day, 34 Fed. Rep. 657 697
Coggs v. Bernard, 1 Smith, Lead. Cas. 8th ed. p. 416 96
Cohn v. People, 149 Ill. 486, 23 L. R. A. 831 207, 208
Cole v. Cunningham, 133 U. S. 107, 129, 33 L. ed. 538, 547 167, 168
v. Grant, 2 Cal. 105 706
v. Lockhart, 2 Ind. 631 764, 765
Coleman v. Meade, 13 Bush, 358 223, 224
Collins v. Alabama G. S. R. Co. (Ala.) 16 So. Rep. 142 730
v. Bennett, 46 N. Y. 490 95
v. Blantern, 2 Wils. 341 295, 297
v. Prentice, 15 Conn. 39, 43, 38 Am. Dec. 61 588
Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579 522
Columbia Bldg. & Loan Asso. v. Bollinger, 12 Rich. Eq. 124, 126, 78 Am. Dec. 443 131, 132
Columbia Ins. Co. v. Lawrence, 35 U. S. 10 Pet. 507, 9 L. ed. 512 755
Columbian Bank's Estate, 147 Pa. 422 666
Columbus & W. R. Co. v. Witherow, 82 Ala. 190 92
Comfort v. McTeer, 7 Lea, 660 168
Commercial Ins. Co. v. Robinson, 64 Ill. 265, 16 Am. Rep. 557 707
Commissioners on Inland Fisheries v. Holyoke Water Power Co. 104 Mass. 446, 6 Am. Rep. 247 171
Com. v. Alger, 7 Cush. 67 540
v. Cornish, 13 Pa. 288 481
v. Dejardin, 126 Mass. 46, 30 Am. Rep. 653 62
v. Dowdican's Bail, 115 Mass. 136 261
v. Eastern R. Co. 103 Mass. 254, 4 Am. Rep. 555 171
v. Fitchburg R. Co. 12 Gray, 180 171
v. Hall, 97 Mass. 570 698
v. Hamilton Mfg. Co. 120 Mass. 385 86
Com. v. Hancock Free Bridge Corp. 2 Gray, 58 64 171
v. Holmes, 17 Mass. 335 62, 66
v. Moore, 25 Gratt. 951 611
v. Murray, 4 Binn. 487, 5 Am. Dec. 412 690
v. Ober, 12 Cush. 493 594
v. Perry, 155 Mass. 117, 14 L. R. A. 325 83, 84, 259
v. Tarbox, 1 Cush. 66 62
v. Wright, 1 Cush. 46 62
v. Wright, 139 Mass. 382 62
Comp v. Carlisle Deposit Bank, 94 Pa. 409, 416 95, 96
Conduitt v. Ross, 102 Ind. 168 504
Conradt v. Clauve, 93 Ind. 476, 47 Am. Rep. 398 495
Converse v. Foster, 32 Vt. 828 827
Conway v. Wilson, 44 N. J. Eq. 457 807
Cook v. Fiske, 12 Gray, 493 219
v. Jenkins, 30 Iowa, 452 786
v. Milwaukee & St. P. R. Co. 36 Wis. 45 699
v. Tullis, 85 U. S. 18 Wall. 338, 21 L. ed. 906 195
v. United States, 138 U. S. 157-183, 34 L. ed. 906, 913 838, 839
v. Walling, 117 Ind. 9, 2 L. R. A. 769 45
Cook County v. Chicago Industrial School, 125 Ill. 540, 1 L. R. A. 437 808
Cope v. Cope, 137 U. S. 682, 34 L. ed. 832 546
v. Rowlands, 2 Mees. & W. 149 228
Coppins v. New York Cent. & H. R. R. Co. 122 N. Y. 557 108
Corning v. Lowerre, 6 Johns. Ch. 439, 2 L. ed. 178 91
Costello v. Crowell, 127 Mass. 293, 34 Am. Rep. 367, 134 Mass. 280 104
Coster v. Tide Water Co. 18 N. J. Eq. 54 856, 857
Cosulich v. Standard Oil Co. 122 N. Y. 118 725, 726
Cotten v. Leon County Comrs. 6 Fla. 610 420
Coulter v. Richmond, 59 N. Y. 479 614
Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 819, 821, 824
Cox v. Keahey, 36 Ala. 340, 76 Am. Dec. 325 730
Craig v. Van Bebber, 100 Mo. 589 49
Crane v. Wheeler, 48 Minn. 207 614
Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 516 791
Crawford v. Rohrer, 59 Md. 604 266
Creamer v. West End Street R. Co. 156 Mass. 320, 16 L. R. A. 490 300
Crispin v. Babbitt, 81 N. Y. 516, 37 Am. Rep. 521 325
Criswell's Appeal, 100 Pa. 488 184
Croft v. Day, 7 Beav. 84 525
Cromwell v. Hewitt, 40 N. Y. 491, 100 Am. Dec. 527 614
v. Sac County, 94 U. S. 356, 24 L. ed. 199 781
Crooke v. Watt, 2 Vern. 124 551
Crouch v. Credit Foncier of England (1873) L. R. 8 Q. B. 374 108
Croudson v. Leonard, 8 U. S. 4 Cranch, 434, 2 L. ed. 670 780
Cruce v. Cruce, 81 Mo. 676 660, 662
Crump v. United States Min. Co. 7 Gratt. 352, 56 Am. Dec. 116 65
Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649 320
Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205 360
Cummings v. Missouri, 71 U. S. 4 Wall. 325, 18 L. ed. 363 337
v. National Furnace Co. 60 Wis. 606 724
Curran v. Clayton, 86 Me. 42 669, 732
Currier v. Boston & M. R. Co. 37 N. H. 223 706
v. Boston Music Hall Asso. 135 Mass. 414 494
Curry, *Re*, 25 Hun, 321 821

D.

Dale v. Hall (1750) 1 Wils. 281 538
Dallas v. Redman, 10 Colo. 297 144
Daly v. Butchers & D. Bank, 56 Mo. 94, 7 Am. Rep. 663 797
Dansey v. Richardson, 3 El. & Bl. 144 96
Danville Stove & Mfg. Co. v. Adsit, 88 Mich. 244 338
Dartmouth College Trustees v. Woodward, 17 U. S. 4 Wheat. 668, 4 L. ed. 667 801
Davenport v. Mississippi & M. R. Co. 12 Iowa, 539 735
Davenport Plow Co. v. Lamp, 80 Iowa, 723 606
Davidson v. Berthoud, 1 A. K. Marsh. 261 742
v. Seegar, 15 Fla. 671 68
Davis v. Central Cong. Soc. of Jamaica Plains, 129 Mass. 367, 37 Am. Rep. 368 494
v. Green, 102 Mo. 170, 11 L. R. A. 90 46
v. Hampshire County Comrs. 153 Mass. 218, 11 L. R. A. 750 570
v. Macon, 64 Ga. 128, 37 Am. Rep. 60 611
v. Memphis City R. Co. 22 Fed. Rep. 883 102
v. Providence & W. R. Co. 121 Mass. 134 172
Dawson v. Kuttner, 48 Ga. 133 304

Dayton, X. & B. R. Co. v. Lewton, 20 Ohio St. 401 371, 442
Dean v. O'Meara, 47 Ill. 120 460
v. Wade, 1 Rep. in Ch. 48, 49 457
v. Walker, 107 Ill. 540, 47 Am. Rep. 467 853
Deck v. Works, 18 Hun, 266 620
Decorah v. Dunstan, 38 Iowa, 96 736
Dedham v. Natick, 16 Mass. 140 680
Deem v. Milliken, 6 Ohio C. Ct. Rep. 357 148
De Hass v. Roberts, 59 Fed. Rep. 853 104
Delaware & H. Canal Co. v. Carroll, 89 Pa. 374 809
Delie v. Chicago & N. W. R. Co. 51 Wis. 400 291
Demaree v. Scates (1893) 50 Kan. 275, 20 L. R. A. 97 705
Deming v. Carrington, 12 Conn. 5, 30 Am. Dec. 591 586
Denver v. Knowles, 17 Colo. 204, 17 L. R. A. 135 611
Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146 291
Denver, T. & G. R. Co. v. De Graff, 2 Colo. App. 42 476
De Peyster v. Clarkson, 2 Wend. 78 661
Derby v. Modesto, 104 Cal. 515 524
Derringer v. Plate, 29 Cal. 292, 87 Am. Dec. 170 207
Derry v. Peek, 14 App. Cas. 337 364
Detroit v. Detroit City R. Co. 76 Mich. 421 199
v. Rush, 82 Mich. 532, 10 L. R. A. 171 334, 669
Devoy v. Boyer, 3 Johns. 247 706
De Walt v. Bartley, 146 Pa. 529, 15 L. R. A. 771 669
Dewar's Estate, *Re*, 10 Mont. 426 654, 655
Dewey v. Detroit, G. H. & M. R. Co. 97 Mich. 329, 22 L. R. A. 292 325
Dewing v. Sears, 78 U. S. 11 Wall. 379, 20 L. ed. 189 600
Dickey v. Polk County, 58 Iowa, 289 286
Dickinson v. Philadelphia, 14 W. N. C. 307 408
Dillaway v. Butler, 135 Mass. 479 44
Dillingham v. Snow, 5 Mass. 547, 558, 559 530
Dixon v. Pluns, 98 Cal. 385, 20 L. R. A. 698 724
Doane v. Badger, 12 Mass. 65 505
Docker v. Somes, 2 Myl. & K. 663 660, 661
Dodson v. Hays, 29 W. Va. 577 455
Dodsworth v. Hercules Iron Works, 66 Fed. Rep. 483 195
Doe v. Roe, 82 Me. 503, 8 L. R. A. 833 151
v. Roe, 13 Fla. 602 68
Doggett v. Walter, 15 Fla. 337 509
Doll v. Crume, 41 Neb. 655 853
v. State, 45 Ohio St. 445 193
Donahoe v. Richards, 38 Me. 376, 61 Am. Dec. 256 253
Donaldson v. Milwaukee & St. P. R. Co. 21 Minn. 293 697
Donnaher v. State, 3 Smedes & M. 649 771, 772
Donnally v. Ryan, 41 Pa. 306 699
Dorsey v. Whipps, 8 Gill, 462 60
Dougherty v. Henarie, 47 Cal. 9 731
Dow v. Whitney, 147 Mass. 1 37, 38
Dowling v. New York C. & H. R. R. Co. 90 N. Y. 670 761
v. State, 5 Smedes & M. 664 838
Downer v. Miller, 15 Wis. 612 26
Downs v. High Point, 115 N. C. 182 701
Doyle v. Lord, 64 N. Y. 432, 21 Am. Rep. 629 590, 591
Drovers' Nat. Bank v. Anglo-American Pkg. & P. Co. 117 Ill. 100, 57 Am. Rep. 855 797
Drury v. Drury, 1 Rep. in Ch. 48, 49 457
DuBois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co. 149 Pa. 1 490, 491
Ducie v. Ford, 138 U. S. 587, 34 L. ed. 1091 652
Duclos v. Cunningham, 102 N. Y. 678 223
Dudley v. Kennedy, 63 Me. 465 701, 702
Duffield v. Williamsport School Dist. 162 Pa. 476, 25 L. R. A. 152 254
Duffies v. Duffies, 76 Wis. 374, 8 L. R. A. 420 151
Duggan v. Colorado Mortg. & Invest. Co. 11 Colo. 113 145
Dunbar v. Augusta, 90 Ga. 390 804
Duncan v. Missouri, 152 U. S. 377, 38 L. ed. 485 838
v. Richardson, 34 Ala. 117 746
Dunkin v. Vandenbergh, 1 Paige, 624, 2 L. ed. 776 706
Dunlieth & D. Bridge Co. v. Dubuque County, 55 Iowa, 558 392, 393
Dunn v. Stone, 1 Taylor Repos. 241 701, 702
Dupuy v. Gibson, 36 Ill. 197 805
Durfee v. Grinnell, 69 Ill. 371 805
Durkee v. Janesville, 28 Wis. 464, 9 Am. Rep. 500 390
Dwinelle v. New York Cent. & H. R. R. Co. 120 N. Y. 122, 8 L. R. A. 224 407
Dyckman v. Sevatson, 39 Minn. 138 806
Dyer v. Sanford, 9 Met. 395, 408, 43 Am. Dec. 399 504
Dyson v. New York & N. R. R. Co. 57 Conn. 921 802, 873, 874

E.

Early v. Friend, 16 Gratt. 21, 78 Am. Dec. 662, 665 454, 455
Easterling v. State, 35 Miss. 210 281
Eastman v. Meredith, 36 N. H. 284, 72 Am. Dec. 302 868
East St. Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795 870
East Tennessee, V. & G. R. Co. v. Feathers, 10 Lea, 103, 105 699
Eaton v. Boston & L. R. Co. 11 Allen, 500, 87 Am. Dec. 730 299
v. Manitowoc County Suprs. 44 Wis. 489 864
Ebersole v. Rankin, 102 Mo. 488 45
Economy Bldg. Asso. v. Hungerbuehler, 98 Pa. 258 127
Edwards v. Darby, 25 U. S. 12 Wheat. 206, 6 L. ed. 608 510
v. Denver & R. G. R. Co. 13 Colo. 59 144
Egerton v. Brownlow, 4 H. L. Cas. 195 100
Eggeman v. Eggeman, 37 Mich. 436 36
Ehrenfeldt's Appeal, 101 Pa. 186 421
Ehrgott v. New York, 96 N. Y. 264, 48 Am. Rep. 622 301
Elkins v. McKean, 79 Pa. 493 256
Elliott v. Barnes, 31 Kan. 170 251
Elliott v. Fair Haven & W. R. Co. 32 Conn. 579, 582 373
v. Van Buren, 33 Mich. 51, 20 Am. Rep. 668 291
Elmer v. Locke, 135 Mass. 575 108
Elrod v. Keller, 89 Ind. 382 461
Elwood v. New York C. & H. R. R. Co. 4 Hun, 808 699
Emdin v. Darley, 1 Bos. & P. N. R. 22 705
Emert v. Missouri, 156 U. S. 296, 309, 39 L. ed. 430 534, 536-538
Emmel v. Hayes, 102 Mo. 186, 11 L. R. A. 328 49
Empire Mills v. Alston Grocery Co. (Tex.) 12 L. R. A. 366 145
Enfield v. Jordan, 119 U. S. 680, 30 L. ed. 528 521
Englar v. Offutt, 70 Md. 78 606
English v. Smock, 34 Ind. 116, 7 Am. Rep. 215 765
Episcopal City Mission v. Appleton, 117 Mass. 326 173
Epps v. Epps, 17 Ill. App. 196 868
Equitable L. Ins. Co. v. Hazlewood, 75 Tex. 347, 7 L. R. A. 217 707
Erickson v. Milwaukee, L. S. & W. R. Co. 63 Mich. 231, 98 Mich. 414 323-325
Ervine's Appeal, 16 Pa. 265, 55 Am. Dec. 499 809
Eschrich's Estate, *Re*, 85 Cal. 98 660, 661
Espin v. Pemberton, 3 DeG. & J. 547 50
European Bank, *Re*, L. R. 5 Ch. 358 44
Evans v. Atlantic & P. R. Co. 62 Mo. 49, 57, 58 699
v. Dravo, 24 Pa. 62, 62 Am. Dec. 359 295, 296
v. Edmonds, 13 C. B. 777 353
v. Warren, 122 Mass. 308 805
Evansville v. State, 118 Ind. 426, 4 L. R. A. 93 115
Evansville & T. H. R. Co. v. Irwin, 84 Ind. 457 538
Everham v. Oriental Sav. & L. Asso. 47 Pa. 352 184
Evitt v. Price, 1 Sim. 483 214
Exchange Bank of Columbus v. Hines, 3 Ohio St. 1 520
Express Cases, 117 U. S. 1, 29 L. ed. 791 358

F.

Fabens v. Mercantile Bank, 23 Pick. 332, 34 Am. Dec. 59 797
Fairfax Forrest Min. & Mfg. Co. v. Chambers, 75 Md. 604 276
Fannin v. Anderson, 7 Q. B. 811 275
Farmers' Loan & T. Co. v. Grape Creek Coal Co. 50 Fed. Rep. 481, 16 L. R. A. 608 272
Farnsworth v. Pawtucket, 13 R. I. 82, 88 529
Farrell v. Waterbury Horse R. Co. 60 Conn. 239, 255 300, 302
Farwell v. Boston & W. R. Corp. 4 Met. 49, 38 Am. Dec. 339 141
v. St. Paul Trust Co. 45 Minn. 495 614
Ferchen v. Arndt, 26 Or. 121, *ante*, 664 667, 668
Fernstler v. Seibert, 114 Pa. 196 481
Ferrill v. Brewis, 25 Gratt. 765, 768 582
Fidelity Ins. Trust & Safe-Deposit Co. v. Roanoke Iron Co. 68 Fed. Rep. 623 272
Fiefield v. Marinette County, 62 Wis. 532, 541 580
Finch v. Riverside & A. R. Co. 87 Cal. 597 464
Finley v. Simpson, 22 N. J. L. 311, 53 Am. Dec. 253 504
Finn v. Haynes, 37 Mich. 63 333
Finn v. Western R. Corp. 112 Mass. 524, 538, 534, 17 Am. Rep. 128 530, 532

First Nat. Bank v. Brenneisen, 97 Mo. 148..... 686
v. Sprague, 34 Neb. 318, 15 L. R. A. 498.... 797
First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co. 49 Minn. 327, 6 L. R. A. 676 268, 269
Joliet v. Adam, 126 Ill. 488 83
Sturgis v. Peck, 8 Kan. 660..... 104
Fish v. Glover, 154 Ill. 86..... 806
Fisher v. St. Louis, 44 Mo. 482..... 408
Fitch v. Johnson, 104 Ill. 111..... 508
Fitchburg R. Co. v. Gage, 12 Gray, 399..... 428
v. Grand Junction Railroad & Depot Co. 4 Allen, 198..... 171
Fithian v. Corwin, 17 Ohio St. 118..... 320
Fitzgerald v. Connecticut River Paper Co. 155 Mass. 155..... 360
Fleckner v. Bank of United States, 21 U. S. 8 Wheat. 338, 339, 5 L. ed. 631.....765, 766, 827
Flesh v. Lindsay, 115 Mo. 1..... 45, 48
Fletcher v. Peck, 10 U. S. 6 Cranch, 87, 3 L. ed. 162 99
v. Phelps, 28 Vt. 257..... 540
Flike v. Boston & A. R. Co. 53 N. Y. 549, 13 Am. Rep. 545..... 109, 325
Flint & P. M. R. Co. v. Willey, 47 Mich. 88..... 699
Floyer v. Edwards, 1 Cowp. 112..... 764
Folger v. Columbian Ins. Co. 99 Mass. 267, 96 Am. Dec. 747..... 168
Foot v. Card, 58 Conn. 1, 6 L. R. A. 829.....151, 152
Forbes v. Smith, 11 Exch. 161..... 275
Ford v. Tirrell, 9 Gray, 401, 69 Am. Dec. 297.... 222
Forest v. Tinkham, 29 Ill. 141..... 805
Fosdick v. Schall, 99 U. S. 235, 25 L. ed. 339..... 272
Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168 96
v. Mullanphy Planing Mill Co. 92 Mo. 87 834
v. Park Comrs. 133 Mass. 321..... 857
Fougeray v. Cord, 50 N. J. Eq. 185..... 102
Fourth School Dist. v. Wood, 13 Mass. 198..... 863
Fox v. Allensville C. S. & V. Turnp. Co. 46 Ind. 36 65
v. Hall, 74 Mo. 315, 41 Am. Rep. 316.....37, 45
v. Spring Lake Iron Co. 89 Mich. 397..... 325
Francis v. Evans, 69 Wis. 115..... 666
Franklin v. Winona & St. P. R. Co. 37 Minn. 409 108
Frederick v. Marquette, H. & O. R. Co. 37 Mich. 342, 26 Am. Rep. 531..... 175
Freeman v. Atlanta, 66 Ga. 617..... 511
v. Birch, 1 Nev. & M. 420.....580, 581
v. Moffit, 119 Mo. 280..... 51
Frelinghuysen v. Nugent, 36 Fed. Rep. 238..... 665
Frenkel v. Hudson, 82 Ala. 158, 60 Am. Rep. 736 44
Frey v. Clifford, 44 Cal. 336..... 37
v. Kirk, 4 Gill & J. 521, 23 Am. Dec. 581 275, 277
Frink v. Lawrence, 20 Conn. 120, 50 Am. Dec. 274..... 370
Frisbie v. United States, 157 U. S. 160, 39 L. ed. 657..... 260
Frische v. Kramer, 16 Ohio, 126, 139, 47 Am. Dec. 368..... 442
Fritts v. New York & N. E. R. Co. 62 Conn. 503 300
Fritz v. Hobson, L. R. 14 Ch. Div. 542..... 571
Frohock v. Pattee, 38 Me. 103..... 818
Frorer v. People, 141 Ill. 171, 16 L. R. A. 492.... 82
Frost v. St. Paul Bkg. & Invest. Co. 57 Minn. 325 781
v. Shaw, 3 Ohio St. 270..... 867
v. Winston, 32 Mo. 489..... 660
Fry v. Payne, 82 Va. 759..... 459
Fuller v. Jackson, 92 Mich. 197.....290, 291
v. Missroon, 35 S. C. 314, 331.....774, 776
v. People, 92 Ill. 182..... 62
Furman v. Haskin, 2 Cal. 369..... 617
v. Van Sise, 68 N. Y. 435, 15 Am. Rep. 441 680

G.

Gaar v. Hurd, 92 Ill. 315..... 805
Gallagher v. New York & N. E. R. Co. 57 Conn. 446, 5 L. R. A. 737..... 302
Gardner v. Collins, 27 U. S. 2 Pet. 58, 7 L. ed. 347 557
3 Mason, 398..... 554
Garland, Petitioner, *Ex parte*, 71 U. S. 4 Wall. 390, 18 L. ed. 374..... 837
Garrahy v. Kansas City, St. J. & C. B. R. Co. 25 Fed. Rep. 258..... 142
Garrigan v. Knight, 47 Iowa, 527..... 286
Garrigus v. Parke County Comrs. 39 Ind. 73.... 561
Garside v. East St. Louis, 43 Ill. 47..... 99
Gates v. Boston & N. Y. Air Line R. Co. 53 Conn. 333, 341, 343..... 370
Gavit v. Chambers, 3 Ohio, 496..... 54
Gayle v. Johnston, 80 Ala. 395..... 454
Gayler v. Wilder, 51 U. S. 10 How. 494, 13 L. ed. 511..... 790
Geiser Mfg. Co. v. Jones, 90 Ga. 807..... 620
George v. Wamsley, 64 Iowa, 175..... 697
Georgia v. Atlantic & G. R. Co. 3 Woods, C. C. 434..... 199
Georgia & B. R. Co. v. Dougherty, 86 Ga. 744... 176
Georgia Railroad v. Olds, 77 Ga. 678..... 176
Georgia Southern R. Co. v. Reeves, 64 Ga. 492. 504
German Nat Bank v. Burns, 12 Colo. 539..... 797
German Reformed Church v. Com. 3 Pa. 282 481
Gerrish v. Union Wharf Proprs. 26 Me. 384, 46 Am. Dec. 568..... 540
Gest v. Packwood, 34 Fed. Rep. 868..... 35
Gibbons v. Ogden, 22 U. S. 9 Wheat. 1, 6 L. ed. 23 535
Gibson v. State, 68 Miss. 241..... 261, 262
Gilbert v. People, 1 Denio, 41, 43 Am. Dec. 646. 154
Giles v. Grover, 9 Bing. 128..... 246
Gill v. Read, 5 R. I. 343, 73 Am. Dec. 73..... 781
Gilliam v. South & North Ala. R. Co. 70 Ala. 268 729
Gillingham v. Ohio River R. Co. 35 W. Va. 588, 14 L. R. A. 798..... 467
Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675..... 709
Glenn v. Farmers' Bank, 70 N. C. 191..... 827
Globe Mill Co. v. Minneapolis Elevator Co. 44 Minn. 153..... 218, 221
Godcharles v. Wigeman, 113 Pa. 431.....82, 259, 809
Goddard v. Donaha, 42 Kan. 754..... 35
v. East Texas F. Ins. Co. 67 Tex. 71..... 707
v. Grand Trunk R. Co. of Canada, 57 Me. 202, 2 Am. Rep. 39..... 531
Godillot v. Harris, 81 N. Y. 203..... 206
Goetz v. Voelinger, 99 Mass. 504..... 277
Golden Canal Co. v. Bright, 8 Colo. 144..... 144
Goll v. Manhattan R. Co. 25 Jones & S. 74..... 725
Good v. Martin, 95 U. S. 90, 24 L. ed. 341..... 614
Goodell v. Buck, 67 Me. 514..... 666
Goodman v. Jewett, 24 Conn. 589..... 374
Goodnow v. Stryker, 61 Iowa, 201..... 286
Goodrich Transp. Co. v. Gagnon, 36 Fed. Rep. 128..... 472
Goodwin v. Roberts (1875) L. R. 10 Exch. 337.. 103
Gorris v. Scott, L. R. 9 Exch. 125..... 699
Gould v. Carr, 33 Fla. 523, 24 L. R. A. 130..... 68
Gowen v. Harley, 6 C. C. A. 190, 56 Fed. Rep. 973, 980..... 697
Graf v. Chicago & N. W. R. Co. 94 Mich. 579.... 289
Graff v. Middleton, 43 Cal. 341..... 37
Graffty v. Bushville, 107 Ind. 502, 57 Am. Rep. 128..... 533-535
Graham v. Graham, 6 T. B. Mon. 562, 17 Am. Dec. 166..... 458
v. Greenville, 67 Tex. 62..... 448
v. Pierce, 19 Gratt. 28, 100 Am. Dec. 608.. 460
Grand Rapids v. Burlingame, 93 Mich. 472..... 475
Grand Trunk R. Co. of Canada v. Cummings, 106 U. S. 700, 27 L. ed. 266..... 108
Grant v. Maddox, 15 Mees. & W. 737..... 222
Graves v. Weeks, 19 Vt. 181..... 277
Gray v. Durland, 50 Barb. 100..... 680
v. State, 72 Ind. 578..... 118, 119
Greasly v. Codling, 2 Bing. 263..... 701, 702
Great North of England, C. & H. Junction R. Co. v. Clarence R. Co. 1 Colly. Ch. Rep. 507..... 214
Greatrex v. Greatrex, 1 De G. & S. 692..... 214
Greeley v. St. Paul, M. & M. R. Co. 33 Minn. 137 699
Green v. Burrows, 47 Mich. 70..... 620
Greenebaum v. Wheeler, 90 Ill. 296..... 805
Gregg v. Sanford, 24 Ill. 17, 76 Am. Dec. 719.... 805
Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740.... 598
Griffin v. Griffin, 20 S. C. 486..... 776
Grimsley v. Hankins, 46 Fed. Rep. 400..... 724
Griswold v. Illinois C. R. Co. (Iowa) 24 L. R. A. 647..... 754
Grover v. Huckins, 26 Mich. 476..... 475
Guelich v. National State Bank, 56 Iowa, 434, 41 Am. Rep. 110..... 797
Gulf, C. & S. F. R. Co. v. Washington, 49 Fed. Rep. 347, 4 U. S. App. 121..... 760
Gut v. Minnesota, 76 U. S. 9 Wall. 35-38, 19 L. ed. 573, 574.....838, 839

H.

Hackley v. Mack, 60 Mich. 501..... 199
Hadley v. Baxendale, 9 Exch. 341..... 742
v. Freedman's Sav. & T. Co. 2 Tenn. Ch. 122 168
Hagan v. Hendry, 18 Md. 191..... 60
Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569..... 857
Haggerty v. Flint & P. M. R. Co. 59 Mich. 366, 60 Am. Rep. 301..... 96

Hahn's Appeal (Pa.) 5 Cent. Rep. 137 268
Haines v. Campbell, 74 Md. 158 60
Hall v. Burlingame, 88 Mich. 498, 440 475
v. Callahan, 66 Mo. 316 45, 48
v. Ody, 2 Bos. & P. 28 705
Hallett's Estate, Re, L. R. 13 Ch. Div. 696 696
Halsey v. People, 84 Ill. 89 490
v. Rapid Transit Street R. Co. 47 N. J. Eq. 388 490-492
Hamel v. Brooklyn & N. Y. Ferry Co. 1 Silv. Sup. Ct. 584 467
Hamilton v. Armstrong, 120 Mo. 597 53
v. Doolittle, 37 Ill. 473 87
Hamilton County Comrs. v. Mighels, 7 Ohio St. 109 420, 863
Hammond v. Corbett, 50 N. H. 501, 9 Am. Rep. 288 660
Hancock v. Day, McMull. Eq. 69, 36 Am. Dec. 293 460
v. Rand, 94 N. Y. 1, 46 Am. Rep. 112 97
Handley v. Stutz, 139 U. S. 417, 35 L. ed. 227 268
Hanford v. St. Paul & D. R. Co. 43 Minn. 104, 7 L. R. A. 722 55
Hanlon v. Missouri Pac. R. Co. 104 Mo. 388 289
Hannan v. Osborn, 4 Paige, 343, 3 L. ed. 468 460
Hanness v. Bonnell, 23 N. J. L. 159 807
Hannon v. St. Louis County, 62 Mo. 313 709
Hanover R. Co. v. Coyle, 55 Pa. 396 256
Hansley v. Jamesville & W. R. Co. 115 N. C. 609 702
Harding v. Waters, 6 Lea, 324 614
Harkrader v. Leiby, 4 Ohio St. 602 320
Harrigan v. Connecticut River Lumber Co. 129 Mass. 580, 37 Am. Rep. 387 472
Harrington v. Victoria Graving Dock Co. L. R. 3 Q. B. Div. 549 192, 194
Harris v. Lester, 80 Ill. 307 786
v. Runnels, 53 U. S. 12 How. 79, 84, 13 L. ed. 901, 903 217, 218, 225
Harrison v. Detroit, L. & N. R. Co. 79 Mich. 409, 7 L. R. A. 623 323, 325, 326
v. Smith, 88 Mo. 210, 58 Am. Rep. 571 666
Hart v. Flynn, 8 Dana, 191 600
v. Leete, 104 Mo. 338 383
Hartford County Comrs. v. Hamilton, 60 Md. 340, 45 Am. Rep. 739 680
Hartford F. Ins. Co. v. Raymond, 70 Mich. 499 .. 475
Hartley v. Crawford, 12 Neb. 471 277
Harvey v. Thomas, 10 Watts, 66, 36 Am. Dec. 141 809
Hassard-Short v. Hardison, 114 N. C. 437 702
Hatch v. Dana, 101 U. S. 205, 25 L. ed. 885 266
Hatfield v. Huntington City Bldg. Loan & Sav. Asso. 132 Ind. 149 183
Hatt v. Evening News Asso. 94 Mich. 119 290
Haverstick v. Sipe, 88 Pa. 368 500
Hay v. Ayling, 16 Q. B. 423 827
Hayden v. Allyn, 56 Conn. 289 301
Haynes v. Nowlin, 129 Ind. 581, 14 L. R. A. 787 .. 152
Hayward v. Eliot Nat. Bank, 96 U. S. 611, 24 L. ed. 855 448
v. National Ins. Co. 52 Mo. 181, 14 Am. Rep. 400 43, 47
Haywood v. Brunswick Permanent Ben. Bldg. Soc. L. R. 8 Q. B. Div. 403 508
v. Miller, 3 Hill, 90 577
Haslett v. Sinclair, 76 Ind. 489 508
Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811 620, 621
Hedderich v. State, 101 Ind. 564, 51 Am. Rep. 768 120
Heflin v. Rock Mills Mfg. & L. Co. 58 Ala. 613. 746
Heineman v. Schloss, 63 Mich. 158 368
Heiser v. Loomis, 47 Mich. 18 291
Heller v. Atchison, T. & S. F. R. Co. 28 Kan. 625 570
v. Stremmel, 52 Mo. 309 863
Henderson v. Hunter, 59 Pa. 335 481
Hennington v. State, 90 Ga. 396, 4 Inters. Com. Rep. 413 473
Henry v. Chester, 15 Vt. 460, 467 530
v. Sneed, 99 Mo. 407 45, 48
v. Southern P. R. Co. 50 Cal. 176 727
Hepburn v. Griswold, 75 U. S. 8 Wall. 603, 19 L. ed. 513 597, 598
Hersh v. Northern Cent. R. Co. 74 Pa. 181 428
Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367, 38 Am. Rep. 518 167
Hicks v. Citizens' R. Co. 124 Mo. 115, 25 L. R. A. 508 290
v. Person, 19 Ohio, 426 759
Higgins v. Moore, 34 N. Y. 417, 424, 425 219, 222
Hill v. Rich Hill Coal Min. Co. 119 Mo. 19 833
v. Scott, 38 Mo. App. 370 495
Hills v. Chicago, 60 Ill. 86 802
Hinton v. Locke, 5 Hill, 437 223
Hitchcock v. Galveston, 96 U. S. 341, 24 L. ed. 659 402, 403
v. Griffin & S. Co. 99 Mich. 451 65
Hoar v. Merritt, 62 Mich. 386 323
v. Wood, 3 Met. 193 154
Hodgkins v. Bond, 1 N. H. 264 615
Hogan v. Hensley, 22 Ark. 418 768
Holden v. Minnesota, 137 U. S. 483, 34 L. ed. 734 838
Holder v. Soulby, 8 C. B. N. S. 263 16
Hollida v. Hunt, 7 Ill. 109, 22 Am. Rep. 66 790
Holliger v. Bates, 43 Ohio St. 497 442
Holman v. Johnson, 1 Cowp. 343 194
Holmes v. Gardner, 50 Ohio St. 167, 20 L. R. A. 329 320
v. Gilman, 138 N. Y. 369, 20 L. R. A. 566 ... 666
v. Holmes, 133 Ind. 386 152
Holt v. Green, 73 Pa. 198, 13 Am. Rep. 737 225
v. State, 2 Tex. 363 368
Hood v. Hood, 110 Mass. 463 781
Hoover v. Pennsylvania R. Co. 156 Pa. 280, 22 L. R. A. 263 423
Hope v. Blair, 105 Mo. 90 45
Hopt v. Utah, 110 U. S. 574, 589, 28 L. ed. 262, 268 837, 839
Hord v. Taubman, 79 Mo. 101 45, 48
Horter v. Philadelphia, 13 W. N. C. 40 403
Hoskins v. Mechanics' Bldg. & Loan Asso. 84 N. C. 838 124
Houston v. McCluney, 8 W. Va. 135 491
Hovey v. Riley, 119 Ind. 336 118
Howard v. Parks, 1 Tex. Civ. App. 608 608
Howard County Comrs. v. Legg, 110 Ind. 481 .. 110
Howe Mach. Co. v. Gage, 100 U. S. 676, 25 L. ed. 754 581
Howey v. Goings, 18 Ill. 95, 54 Am. Dec. 427 460
Howser v. Cumberland & P. R. Co. 80 Md. 146, 27 L. R. A. 154 724
Hoyt v. Jeffers, 30 Mich. 181 476
v. Pawtucket Inst. for Savings, 110 Ill. 390 765
Huff v. Austin, 46 Ohio St. 386 725
Hufford v. Grand Rapids & I. R. Co. 58 Mich. 118 175, 176
Hughes v. Chatham Overseers, 5 Mann. & G. 54 577
v. Heiser, 1 Binn. 465, 2 Am. Dec. 459, 462 701
Huiskamp v. Moline Wagon Co. 121 U. S. 310, 30 L. ed. 971 687
Hull v. Sacramento Valley R. Co. 14 Cal. 387, 73 Am. Dec. 656 727
Hundley v. Farris, 103 Mo. 78, 12 L. R. A. 254 . 686
Hungerford v. O'Brien, 37 Minn. 306 614
Hunn v. Michigan Cent. R. Co. 78 Mich. 513, 7 L. R. A. 500 323-326
Hunter's Appeal (Pa.) 22 W. N. C. 361 606
Huntington v. Cheesbro, 57 Ind. 74 533, 534
Husband v. Aldrich, 135 Mass. 317 460
Huse v. Glover, 119 U. S. 543, 30 L. ed. 487 472
Hussey v. Ryan, 64 Md. 426 291
v. Sibley, 66 Me. 192, 22 Am. Rep. 557 403
Hyde v. McCabe, 100 Mo. 412 154
v. Planters' Bank, 17 La. Ann. 560, 36 Am. Dec. 621 797
Hysinger v. Baltzell, 2 Gill & J. 158 275, 277

I.

Iler v. Colson, 8 Neb. 531 511
Imperial Land Co. of Marseilles, Re, L. R. 11 Eq. 478 103
Improvement of Nassau Street, Re, 11 Johns. 77 198
Indianapolis, B. & W. R. Co. v. Fountain County Comrs. 39 Ind. 215 561
v. Hartley, 67 Ill. 439, 16 Am. Rep. 624 489
Information v. Jager, 29 S. C. 444, 445 218
v. Oliver, 21 S. C. 325 218
Ingraham v. Hutchinson, 2 Conn. 598 588
Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710 44
Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 286 207
Iowa v. Illinois, 147 U. S. 1, 37 L. ed. 55 302
Iowa Homestead Co. v. Des Moines Nav. & R. Co. 84 U. S. 17 Wall. 166, 21 L. ed. 623 .. 286
Iowa Railroad Land Co. v. Soper, 39 Iowa, 112 735
Irvin v. Irvin, 142 Pa. 271 294
Irvine v. Flint & P. M. R. Co. 89 Mich. 416 325
Isaacs v. Decker, 41 Ind. 410 511
Iselin v. Griffith, 62 Iowa, 668 223

J.

Jackson, Ex parte, 1 Ves. Jr. 131 698
Jackson v. Chicago & N. W. R. Co. 31 Iowa, 176, 7 Am. Rep. 120 47

Jackson v. Hardin, 83 Mo. 175 46
r. Newman, 59 Miss. 335, 42 Am. Rep. 367 726
Jacobs, *Re*, 98 N. Y. 98, 50 Am. Rep. 636 ..82, 84-86, 259
Jaffray v. Anderson, 66 Iowa, 719 282
v. Krauss, 79 Hun, 449 621
Jahns v. Nolting, 29 Cal. 507 817-819
Jakeway v. Barrett, 38 Vt. 316 540
James r. Jenkins, 34 Md. 1, 6 Am. Rep. 300 590
Jeffords v. Crump, 12 Phila. 500 97
Jenal r. Green Island Draining Co. 12 Neb. 163. 856
Jenkins v. Fowler, 24 Pa. 308 296
Johnson v. Ballard, 44 Ind. 270 706
v. Ballou, 28 Mich. 379 510
v. Chambers, 12 Ind. 102 616
v. Chicago & P. Elevator Co. 119 U. S. 388, 399, 400, 30 L. ed. 447, 451 472
v. Hudson, 11 East, 180 226
v. Hulings, 106 Pa. 498, 49 Am. Rep. 131 225
v. McKee, 27 Mich. 471 290-292
v. Meeler, 1 Wis. 426 827
v. People, 83 Ill. 431 87
r. Reynolds, 3 Kan. 251, 267 95, 97
r. Way, 27 Ohio St. 374 320
Johnston v. Shortridge, 98 Mo. 227 44
Jones r. Bamford, 21 Iowa, 217 86
v. Com. 86 Va. 661 838
v. Kearney, 1 Dru. & W. 134 50
v. Lusk, 2 Met. (Ky.) 356 687
r. Scott, 10 Kan. 33 807
Jordon r. Cheney, 74 Me. 359 320
Joy v. St. Louis, 138 U. S. 1, 34, 34 L. ed. 843, 853 508
Judson r. Bessemer, 87 Ala. 240, 4 L. R. A. 742. 520
June v. Purcell, 36 Ohio St. 396 54

K.

Kahley, *Re*, 2 Biss. 353 687
Kallahan v. Osborne, 37 Conn. 490 374
Kane r. New York Elev. R. Co. 125 N. Y. 165, 11 L. R. A. 640 91
Kansas City & O. R. Co. v. Frey, 30 Neb. 790 856
Kearney v. London, B. & S. C. R. Co. L. R. 5 Q. B. 411 494, 724, 726
Keats v. Hugo, 115 Mass. 204, 15 Am. Rep. 80 ..589-591
Keedle v. Flack, 27 Neb. 836 853
Kellogg v. Larkin, 3 Pinney, 125, 56 Am. Dec. 164 753
v. Robinson, 6 Vt. 276, 27 Am. Dec. 550 ... 504
Kelly v. Hendrie, 26 Mich. 255 299
Kempe v. Bader, 86 Tenn. 189 277
Kennebec & P. R. Co. v. Kendall, 31 Me. 470 ... 431
Kennedy v. Green, 3 Myl. & K. 699 44
v. National Union Bank, 23 Hun, 494 687
v. New York C. & H. R. R. Co. 35 Hun, 186 690
v. Owen, 136 Mass. 199 504
Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351 858
Keppell v. Bailey, 2 Myl. & K. 517 427
Kern v. Von Phul, 7 Minn. 490 (Gil. 341), 82 Am. Dec. 105 614
Kernohan v. Durham, 48 Ohio St. 1, 12 L. R. A. 41 320
Kerr v. Trego, 47 Pa. 292 481
Kerrains v. People, 60 N. Y. 221 577, 578
Kester v. Lyon, 40 W. Va.— 461
Keyser v. Chicago & G. T. R. Co. 66 Mich. 400.. 291
Kiersted v. State, 1 Gill & J. 231 510
Kilborn v. Field, 78 Pa. 194 296
Kimberly v. Henderson, 29 Md. 512 223
Kimmel v. Dickson (S. Dak.) 25 L. R. A. 809 251
King r. American Transp. Co. 1 Flipp. 1 472
v. Cheshnut, 1 Barn. & Ald. 473 577
v. Emden, 9 East, 437 786
v. Watson, 3 Price, 6 247
v. Wight, 155 Mass. 444 506
Kinneen v. Wells, 144 Mass. 497, 59 Am. Dec. 105 669
Kirby v. Schoonmaker, 3 Barb. Ch. 46, 49 Am. Dec. 160 687
Kirst v. Milwaukee, L. S. & W. R. Co. 46 Wis. 489 724
Kitchen v. Loudenback, 48 Ohio St. 177 320
Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662 125
Knapp r. Sioux City & P. R. Co. 71 Iowa, 41 108
Knatchbull v. Hallett, L. R. 13 Ch. Div. 696 251
Kneass' Appeal, 31 Pa. 87 809
Kneeland r. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379 272
v. Lawrence, 140 U. S. 209, 35 L. ed. 402 104
v. Milwaukee, 15 Wis. 455 120
Knoblauch v. Fogiesong, 38 Minn. 352 614
Knowles r. Yates, 31 Cal. 82 677

Knox County Comrs. v. Aspinwall, 62 U. S. 21 How. 539, 16 L. ed. 208 521, 522
Knoxville v. Lewis, 12 Lea, 180 421
Kraxberger v. Rolter, 91 Mo. 404, 60 Am. Rep. 262 46
Kring v. Missouri, 107 U. S. 221, 228, 27 L. ed. 506, 508 837, 838
Krueger v. Le Blanc, 62 Mich. 70 290
Kruse v. Wilson, 79 Ill. 238 786
Kuback, *Ex parte*, 85 Cal. 274, 9 L. R. A. 492 84
Kuhn v. Freund, 37 Mich. 545 290, 292
Kurtz v. People, 33 Mich. 283 474

L.

Lafayette, M. & B. R. Co. v. Geiger, 34 Ind. 185 120
Lafond v. Ruddock, 13 C. B. 813 275, 276
Lahr v. Metropolitan Elev. R. Co. 104 N. Y. 268 90, 92
Lake Erie & W. R. Co. v. Fix, 88 Ind. 381, 45 Am. Rep. 464 176
Lake Shore & M. S. R. Co. v. Bodemer, 139 Ill. 596 494
v. Stupak, 123 Ind. 222, 223 108
Lake Superior Land Co. v. Emerson, 33 Minn. 406 55
Lake View v. Rose Hill Cemetery Co. 70 Ill. 191, 22 Am. Rep. 71 84, 86
Lampkin v. Louisville & N. R. Co. (Ala.) 17 So. Rep. 448 729
Lampman v. Milks, 21 N. Y. 505, 513 590
Landis's Appeal, 102 Pa. 497 481
Landrum v. Trowbridge, 2 Met. (Ky.) 281 816
Lane v. Baughman, 17 Ohio St. 542, 93 Am. Dec. 653 442
v. Morton, 81 N. C. 33 261
v. Newdigate, 10 Ves. Jr. 192 214
Lang, *Ex parte*, 85 U. S. 18 Wall. 163, 21 L. ed. 872 261
Lanman v. McGregor, 94 Ind. 301 538
Larned v. Andrews, 106 Mass. 436, 8 Am. Rep. 346 218
Larson v. Aultman & T. Co. 86 Wis. 281 277
Laurel Run Bldg. Asso. v. Sperring, 106 Pa. 334 184
Lawrence v. Howard, 1 Utah, 142 97
v. Ralston, 3 Bibb, 104 314
v. Stonington Bank, 6 Conn. 521 797
Lay v. Parsons, 104 Cal. 661 676
Leach's Petition, *Re*, 134 Ind. 665, 21 L. R. A. 701 85
Leavitt v. La Force, 71 Mo. 353 48, 51
Leep v. St. Louis, I. M. & S. R. Co. 56 Ark. 407, 23 L. R. A. 264 82, 83
Lees v. United States, 150 U. S. 476, 37 L. ed. 1150 821, 824
"Legal Tender Cases" (Knox v. Lee and Parker v. Davis) 79 U. S. 12 Wall. 457, 20 L. ed. 287 598
Lehigh Valley Coal Co. v. Jones, 86 Pa. 432 809
Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36 535
Leloup v. Port of Mobile, 127 U. S. 640, 645, 32 L. ed. 311 313, 2 Inters. Com. Rep. 134 ... 535
Lembeck v. Nye, 47 Ohio St. 336, 8 L. R. A. 578. 55
Le Neve v. Le Neve, 2 White & T. Lead. Eq. Cas. 127 28
Lenix v. Missouri P. R. Co. 76 Mo. 86 697
Lennon v. Rawitzer, 57 Conn. 583, 587 300
Le Roy v. Crowninshield, 2 Mason, 157 276
Lester v. East, 49 Ind. 588 538
Le Veux v. Berkeley, 5 Q. B. 836 275
Levy v. Cox, 22 Fla. 546 68
Lewisville Natural Gas Co. v. State, 135 Ind. 49, 21 L. R. A. 784 400
Life Asso. of America v. Boogher, 3 Mo. App. 178 69
Ligare v. Chicago, 139 Ill. 46 489
Lighthall Mfg. Co., *Re*, 47 Hun, 258 850
Lime City Bldg. Sav. & Loan Asso. v. Wagner, 122 Ind. 78 183
Lincoln Bldg. & Sav. Asso. v. Graham, 7 Neb. 173 136
Lindsay Irrigation Co. v. Mehrtens, 97 Cal. 676 857
Lisenbee v. Holt, 1 Sneed, 42, 51 167
Lister v. Log Cabin Bldg. Asso. 38 Md. 115 183
v. Stubbs, L. R. 45 Ch. Div. 1 194
Little v. Chadwick, 151 Mass. 109, 7 L. R. A. 570 250, 666
Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763 858
Liverpool & G. W. Steam Co. (Limited) v. Phenix Ins. Co. 129 U. S. 438, 32 L. ed. 791 755

Lloyd v. Lynch, 28 Pa. 419, 70 Am. Dec. 137.... 742
v. Preston, 146 U. S. 630, 36 L. ed. 1111.... 268
v. Williams, 2 W. Bl. 792.... 764
Logan County Suprs. v. Lincoln, 81 Ill. 156.... 806
Long v. Clapp, 15 Neb. 417.... 742
Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623.... 725
Louisville v. Hyatt, 5 B. Mon. 200.... 408
v. Louisville University Trustees, 15 B. Mon. 642.... 801
Louisville & N. R. Co. v. Reese, 85 Ala. 497.... 726
v. Whitman, 79 Ala. 325.... 729
Louisville & P. R. Co. v. Louisville City R. Co. 2 Duv. 175.... 209
Louisville, N. A. & C. R. Co. v. Berkey, 136 Ind. 181.... 108
Louvalle v. Menard, 41 Am. Dec. 161, and *note* 460
Love v. Miller, 53 Ind. 294, 21 Am. Rep. 192.... 219, 224
Low v. Connecticut & P. R. R. Co. 45 N. H. 370.... 65
v. Rees Printing Co. 41 Neb. 127, 24 L. R. A. 702.... 84
Luce v. Carley, 24 Wend. 451, 35 Am. Dec. 637.... 54
Ludlow v. Cincinnati Southern Railway's Trustees, 78 Ky. 357.... 198
Lux v. Haggin, 69 Cal. 304.... 857
Luxton v. North River Bridge Co. 153 U. S. 525, 38 L. ed. 808.... 74
Lybarger v. State, 2 Wash. 552.... 837, 838
Lyman v. Hale, 11 Conn. 177, 27 Am. Dec. 728.... 585
Lynch v. Henry, 25 W. Va. 423, 424.... 461
v. Murphy, 119 Mo. 163.... 206
Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143.... 329
Lynn v. Turner, Cowp. 86.... 505
Lyons v. Martin, 8 Ad. & El. 512.... 96
Lyttle v. Chicago & W. M. R. Co. 84 Mich. 289.... 325, 326

M.

McAnally v. O'Neal, 56 Ala. 299.... 616
McAuley's Appeal, 77 Pa. 397.... 431
McAunich v. Mississippi & M. R. Co. 20 Iowa, 338.... 735
McCandless v. Richmond & D. R. Co. 38 S. C. 108, 18 L. R. A. 440.... 473, 476
McCann v. Randall, 147 Mass. 81.... 277
McCauley v. Rogers, 104 Ill. 578.... 805
McClelland v. Bishop, 42 Ohio St. 113.... 104
McClenaghan v. Brock, 5 Rich. L. 17.... 730
McClure v. La Plata County Comrs. 19 Colo. 122.... 250
McClung v. Kingsland, 42 U. S. 1 How. 206, 11 L. ed. 103.... 789
McConnel v. Reed, 5 Ill. 117, 38 Am. Dec. 124.... 37
McConnell v. Kitchens, 20 S. C. 430, 436, 439, 47 Am. Rep. 845.... 218, 224, 225
McCoy v. Southern P. Co. 94 Cal. 568.... 756
McCulloch v. Maryland, 17 U. S. 4 Wheat. 426, 4 L. ed. 606.... 793
McDermaid v. Russell, 41 Ill. 489.... 785
McDole v. Purdy, 23 Iowa, 272.... 271
McDonald v. Smith, 57 Vt. 502.... 706
McDowell v. Stewart, 83 Ill. 538.... 805
McElroy v. Nashua & L. R. Corp. 4 Cush. 400, 50 Am. Dec. 794.... 299
McGavock v. Woodlief, 61 U. S. 20 How. 221, 15 L. ed. 884.... 223
McGee v. Consolidated Street R. Co. 102 Mich. 107, 26 L. R. A. 300.... 289
McGill v. Ware, 5 Ill. 21, 29.... 785
McGinnis v. Watson, 41 Pa. 9.... 481
McGoon v. Shirk, 54 Ill. 408, 5 Am. Rep. 122.... 596, 597, 599
McGrath v. Hamilton Sav. & Loan Asso. 44 Pa. 353.... 184
v. New York C. & H. R. R. Co. 59 N. Y. 469, 17 Am. Rep. 359.... 697
McIntyre v. Parks, 3 Met. 207.... 713
McKenzie v. McLeod, 10 Bing. 385.... 730
McLaughlin v. Citizens' Bldg. Loan & Sav. Asso. 62 Ind. 264.... 183
v. Cowley, 127 Mass. 316.... 154
v. Wheeler, 1 S. Dak. 497.... 223
McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287.... 251, 666
McNair v. People, 89 Ill. 441.... 62
McQuaid v. Portland & V. R. Co. 18 Or. 237.... 90
McVey v. Brendel, 144 Pa. 235, 13 L. R. A. 377.... 205
Madera Irrigation Dist. Bonds, *Re*, 92 Cal. 309, 14 L. R. A. 755.... 857
Maher v. Chicago, 38 Ill. 272.... 403
v. Swift, 14 Nev. 324.... 781
Maine v. Cumston, 98 Mass. 317.... 504
Maine Bank v. Butts, 9 Mass. 49.... 764
Majors v. Cowell, 51 Cal. 478.... 441
Mallory v. West Shore Hudson River R. Co. 3 Jones & S. 174.... 104
Malonny v. Mahar, 1 Mich. 26.... 510
Mandlebaum v. Gregovich, 17 Nev. 97, 45 Am. Rep. 433.... 218, 225
Mankato v. Fowler, 32 Minn. 364.... 736
Manning v. Wells, 9 Humph. 748, 51 Am. Dec. 688.... 97
Marion v. State, 20 Neb. 236, 57 Am. Rep. 825.... 838
Marmet v. State, 45 Ohio St. 63.... 611
Marsh v. Martindale, 3 Bos. & P. 154, 156.... 764, 769
Marshalltown v. Blum, 58 Iowa, 184.... 736
Martin v. Drinan, 128 Mass. 516.... 504
v. Hazzard Powder Co. 2 Colo. 596.... 616
v. Jones, 72 Mo. 23.... 48
v. New York & N. E. R. Co. 62 Conn. 331.... 476
Maryland Ice Co. v. Arctic Ice Machine Mfg. Co. 79 Md. 103.... 266
Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co. 121 Mass. 124.... 373
Massey v. Fisher, 62 Fed. Rep. 958.... 251
Mathewson v. Hawkins, Index QQ. 15.... 529
Mathis v. State, 31 Fla. 311.... 838
Matthewson v. Perry, 37 Conn. 435, 9 Am. Rep. 339.... 680
Mauger v. Dick, 55 How. Pr. 132.... 69
Maupin v. Evans, 47 Mo. 304.... 48
Maurice v. Worden, 52 Md. 291.... 275, 277
Maxon v. Lane, 102 Ind. 364.... 504
Maxwell v. Bay City Bridge Co. 46 Mich. 278.... 383
v. Hannibal & St. J. R. Co. 85 Mo. 95.... 46
May v. Borel, 12 Cal. 91.... 33
Mayall v. Boston & M. Railroad, 19 N. H. 122, 49 Am. Dec. 149.... 551
Maynard v. Moore, 76 N. C. 158.... 504
Mechanics' & F. Bldg. & L. Asso. v. Dorsey, 15 S. C. 462.... 131
Mechanics' Bank v. Schaumburg, 88 Mo. 228.... 48
Medley, *Ex parte*, 134 U. S. 171, 33 L. ed. 840.... 837, 838
Meier v. Blume, 80 Mo. 184.... 47
v. Thieman, 90 Mo. 433.... 49
Memphis & L. R. R. Co. v. Berry, 112 U. S. 609, 28 L. ed. 837.... 197
v. Dow, 120 U. S. 287, 30 L. ed. 695.... 269
Mercer County v. Hackett (1863) 68 U. S. 1 Wall. 83, 17 L. ed. 548.... 108
Merchants' Nat. Bank v. Goodman, 109 Pa. 422, 58 Am. Rep. 728.... 797
of Kansas City v. Lovitt, 114 Mo. 519.... 44
Savannah v. Guilmartin, 88 Ga. 797, 17 L. R. A. 322.... 96
Meriwether v. Garrett, 102 U. S. 472, 26 L. ed. 197 771
Merrifield v. Longmire, 66 Cal. 180.... 660, 661
Merriman v. Moore, 90 Pa. 78.... 853
Mersey Docks & Harbor Board Trustees v. Gibbs, 11 H. L. Cas. 687.... 709
Mesker v. Koch, 76 Ind. 68.... 510
Mesmer v. Jenkins, 61 Cal. 151.... 818
Metropolitan R. Co. v. Highland Street R. Co. 118 Mass. 290.... 373
Metzgar v. Chicago, M. & St. P. R. Co. 76 Iowa, 387.... 476
Meyer v. Krohn, 114 Ill. 574.... 784
Michigan Cent. R. Co. v. Campau, 35 Mich. 466.... 289
Middlefield v. Church Mills Knitting Co. 160 Mass. 267.... 505, 506
Middlesex County Board of Chosen Freeholders v. State Bank at New Brunswick, 30 N. J. Eq. 311.... 249
Milford v. Milford Water Co. 124 Pa. 610, 3 L. R. A. 122.... 194
Miller v. Ammon, 145 U. S. 421, 36 L. ed. 759.... 225
v. Anderson, 1 S. Dak. 539, 11 L. R. A. 317 284
v. English, 21 N. J. L. 317.... 111
v. Miller, 97 Mich. 151.... 327
v. Milwaukee, 14 Wis. 700.... 403
v. Wild Cat Gravel Road Co. 57 Ind. 244.... 65
Miller's Appeal, 10 W. N. C. 168.... 606
Millett v. People, 117 Ill. 294, 57 Am. Rep. 869.... 82, 259, 390
Millon v. Salisbury, 18 Johns. 211.... 95
Miner v. Olin, 159 Mass. 487.... 669, 670
Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 29, 32 L. ed. 586.... 99
Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185.... 575
Minor v. Happersett, 88 U. S. 21 Wall. 162, 22 L. ed. 627.... 84
Mirande, *Ex parte*, 73 Cal. 365.... 611
Misch v. Russell, 136 Ill. 22, 12 L. R. A. 125.... 383
Missouri, K. & T. R. Co. v. Long, 27 Kan. 684.... 699
Missouri P. R. Co. v. Moseley, 6 C. C. A. 641, 645, 57 Fed. Rep. 921.... 697, 698
v. Pierce, 33 Kan. 61, 64.... 699

Mitchel v. Reynolds, 1 Smith, Lead. Cas. 8th ed. 417 342
Mitchell v. Lyman, 77 Ill. 525 765
Mix v. Nettleton, 29 Ill. 245 600
Mobile v. Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325 540
Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238 472
Mobley v. Cureton, 6 S. C. N. S. 69 217
Monroe v. Douglass, 5 N. Y. 447 616
Montclair Twp. v. New York & G. L. R. Co. 45 N. J. Eq. 436 171
Montgomery v. McGee, 7 Humph. 234 169
v. Pickering, 116 Mass. 227 861
Moor v. Folsom, 14 Minn. 340 (Gil. 260) 100 Am. Dec. 227 614-616
Moore v. Hunter, 6 Ill. 317 735
v. Mandlebaum, 8 Mich. 435 122
v. Thorp, 16 R. I. 655, 7 L. R. A. 781 461
v. Walla Walla, 60 Fed. Rep. 961 520
v. Williamson, 10 Rich. Eq. 328, 73 Am. Dec. 98 461
Mordecai v. Jacobi, 12 Rich. L. 547, 548 219, 221
Moresi v. Swift, 15 Nev. 215 731
Morgan v. Kendall, 124 Ind. 460, 9 L. R. A. 445. 291
v. Mason, 20 Ohio, 402, 55 Am. Dec. 464 55
Morgan's L. & T. R. & S. S. Co. v. Louisville Board of Health, 116 U. S. 455, 30 L. ed. 297 472
Morrison v. Marquardt, 24 Iowa, 35, 64, 93 Am. Dec. 444 589-591
Morrow v. Rainey, 58 Ill. 357 596
v. Weed, 4 Iowa, 77, 66 Am. Dec. 122 448
Morton v. Detroit, B. C. & A. R. Co. 81 Mich. 423 325
Moseby v. Williamson, 5 Heisk. 278 168
Mosely v. Norman, 74 Ala. 422 706
Moses v. Pittsburgh, Ft. W. & C. R. Co. 21 Ill. 533 492
Moulton v. Scarborough, 71 Me. 267, 36 Am. Rep. 308 709
Mount Pleasant v. Clutch, 6 Iowa, 548 735
Mowbry v. Mowbry, 64 Ill. 383 680
Mower v. Leicester, 9 Mass. 247, 6 Am. Dec. 63. 863
Mudsill Min. Co., Limited v. Watrous, 9 C. C. A. 415, 61 Fed. Rep. 163 195
Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205 ..84, 575
Muleairns v. Janesville, 67 Wis. 24 724
Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530 494, 725
v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379 590
Muller v. Buyck, 13 Mont. 354 652
Mullikin v. Bloomington, 72 Ind. 161 448
Mumford v. Brown, 6 Cow. 475, 16 Am. Dec. 440 460
Munhall v. Pennsylvania R. Co. 92 Pa. 150 428
Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77 401
Munro v. Collins, 95 Mo. 33 652
Munson v. Ensor, 94 Mo. 504 45
Murdock v. Boston & A. R. Co. 137 Mass. 293, 50 Am. Rep. 307 176
Murray v. Ballou, 1 Johns. Ch. 566, 1 L. ed. 247. 440
Mutual L. Ins. Co. of New York v. Armstrong, 117 U. S. 591, 29 L. ed. 997 149
Myers v. Gemmel, 10 Barb. 537 590
v. Hewitt, 16 Ohio, 449 442
v. Stafford, 114 N. C. 234 261
Mynning v. Detroit, L. & N. R. Co. 59 Mich. 257 698
Myrick v. Hasey, 27 Me. 9, 46 Am. Dec. 583 619

N.

Nagle v. Allegheny Valley R. Co. 88 Pa. 35, 30, 32 Am. Rep. 413 761
Nashville v. Towns, 5 Sneed, 186 419
Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 33 L. ed. 352, 2 Inters. Com. Rep. 238 473
Natchez, J. & C. R. Co. v. Cook, 63 Miss. 38 680
National Exch. Bank v. Hartford, P. & F. R. Co. 8 R. I. 375, 5 Am. Rep. 582 104
National L. Ins. Co. of United States v. Minch, 53 N. Y. 145 44
Neal v. Wilcox, 49 N. C. 146, 67 Am. Dec. 266 ... 97
Needles v. Howard, 1 E. D. Smith, 54 96
Negley v. Farrow, 60 Md. 175, 45 Am. Rep. 715.. 60
Nelson v. Clay, 7 J. J. Marsh. 138, 23 Am. Dec. 387 460
v. Dunn, 15 Ala. 501 267
Nesbitt v. Chisholm, 16 Nev. 40 731
Newell v. National Bank, 12 Bush, 57 769
New England Loan & T. Co. v. Young, 81 Iowa, 732, 10 L. R. A. 478 282-286
Newman v. Sylvester, 42 Ind. 108 404
Newton v. Atchison, 31 Kan. 151, 47 Am. Rep. 486 611
v. Cooke, 10 Ark. 169 616
New York v. Miln, 36 U. S. 11 Pet. 102, 9 L. ed. 648, 12 Curt. Dec. 357 472
New York & H. R. Co. v. Morrisania Trustees, 7 Hun, 653 199
New York & N. R. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269 372
v. Waterbury, 60 Conn. 1 373
New York & N. R. R. Co.'s Appeal from Railroad Comrs. 62 Conn. 527, 540 372, 374
New York & N. H. R. Co. v. Ketchum, 27 Conn. 170 65
New York Firemen Ins. Co. v. Ely, 2 Cow. 678, 708 764, 769
New York, L. E. & W. R. Co. v. Winter, 143 U. S. 60, 36 L. ed. 71 176
New York L. Ins. Co. v. Statham, 93 U. S. 24, 23 L. ed. 789 125
New York, N. H. & H. R. Co. v. New Britain, 49 Conn. 40 198
Nichols & S. Co. v. Dedrick (Minn.) 63 N. W. Rep. 1110 614, 615
Niemeyer v. Wright, 75 Va. 239, 40 Am. Rep. 720 225
Nitro-Glycerine Case, 82 U. S. 15 Wall. 524, 21 L. ed. 206 717
Nolan v. New York, N. H. & H. R. Co. 53 Conn. 461 302
Nolon v. Chicago & A. R. Co. 23 Mo. App. 355.. 756
Nonotuck Silk Co. v. Flanders, 67 Wis. 237 250, 251, 666
Norcross v. Griffiths, 65 Wis. 499, 56 Am. Rep. 643 54
Norfleet v. Cromwell, 64 N. C. 1 508
Norris v. Langley, 19 N. H. 423 337
v. State, 25 Ohio St. 217, 18 Am. Rep. 291.. 866
North American Bldg. Asso. v. Sutton, 85 Pa. 463, 78 Am. Dec. 349 124, 127
Northampton's Petition, *Re*, 158 Mass. 299, 301. 171
North Chicago Street R. Co. v. Cotton, 140 Ill. 486 495
Northern Transp. Co. of Ohio v. Chicago, 99 U. S. 635, 25 L. ed. 336 90
Norton v. Peck, 3 Wis. 714 864
v. Pettibone, 7 Conn. 323, 18 Am. Dec. 116. 566
Norwich v. Story, 25 Conn. 47 374

O.

Oates v. First Nat. Bank, 100 U. S. 239, 249, 250, 25 L. ed. 580, 584, 585 337
O'Bannon v. Roberts, 2 Dana, 54 458
O'Donnell v. Providence & W. R. Co. 6 R. I. 211, 216 699
v. Sweeney, 5 Ala. 468, 39 Am. Dec. 336 224
O'Hara v. Stack, 90 Pa. 477 481
Ohio & M. R. Co. v. Collarn, 73 Ind. 263, 38 Am. Rep. 134 109
v. Hecht, 115 Ind. 443 201
v. Tindall, 13 Ind. 366, 74 Am. Dec. 259 680
v. Trowbridge, 128 Ind. 391 350
Oil Creek & A. R. R. Co. v. Keighron, 74 Pa. 320 360
Olcott v. Tioga R. Co. 20 N. Y. 210, 75 Am. Dec. 393 277
Oliver v. Piatt, 44 U. S. 3 How. 333, 11 L. ed. 623 38
v. Worcester, 102 Mass. 489, 3 Am. Rep. 485 709
O'Neil v. East Windsor, 63 Conn. 154 300
Osborne v. Missouri Pac. R. Co. 147 U. S. 248, 37 L. ed. 155 91
Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 274, 26 L. ed. 545 198
Osterberg v. Union Trust Co. of New York, 98 U. S. 424, 25 L. ed. 964 511
Oury v. Goodwin (Ariz.) 26 Pac. Rep. 376 867
Overby v. Fayetteville Bldg. & L. Asso. 81 N. C. 56 124
Owens v. Owens, 100 N. C. 242 142

P.

Pacific Junction v. Dyer, 64 Iowa, 38 735, 736
Page v. Cole, 120 Mass. 37 221
Paine v. Drew, 44 N. H. 314 275-277
Palmer v. Way, 6 Colo. 108 611
v. Wetmore, 2 Sandf. 316 590
Palmeri v. Manhattan R. Co. 133 N. Y. 261, 16 L. R. A. 136 467
Panama & S. P. Teleg. Co. v. India Rubber Gutta Percha & Teleg. Works Co. L. R. 10 Ch. 526 122
Pancoast v. Addison, 1 Harr. & J. 350, 2 Am. Dec. 520 275
Parish v. Whitney, 3 Gray, 516 504
Parker v. Catholic Bishop of Chicago, 146 Ill. 158 492, 570
v. Cousins, 2 Gratt. 373, 44 Am. Dec. 388.. 764
v. Foote, 19 Wend. 315 590

Parker v. Nightingale, 6 Allen, 341, 83 Am. Dec. 652 ... 504
v. United States Bldg. Land & Loan Asso. 19 W. Va. 769 ... 184
Parkersburg & O. R. Transp. Co. v. Parkersburg, 107 U. S. 691, 700-707, 27 L. ed. 584, 588-590 ... 472
Partridge v. Davis, 20 Vt. 499 ... 620
Parvin v. Wimberg, 130 Ind. 561, 15 L. R. A. 775 ... 676, 732
Patapsco Ins. Co. v. Coulter, 28 U. S. 3 Pet. 222, 7 L. ed. 659 ... 755
Paton v. Coit, 5 Mich. 505, 73 Am. Dec. 68 ... 827
Patrick v. Marshall, 2 Bibb, 41, 4 Am. Dec. 670 ... 460
Patterson v. Com. 11 Bush, 311, 21 Am. Rep. 220 ... 791, 792
v. Kentucky, 97 U. S. 501, 24 L. ed. 1115 ... 789
Pattison v. Albany Bldg. & Loan Asso. 63 Ga. 373 ... 184
Paulsen v. Dallett, 2 Daly, 40 ... 219
Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90 ... 251, 666
Peake v. New Orleans, 139 U. S. 342, 35 L. ed. 181 ... 403
Pearse v. Pettis, 47 Barb. 276 ... 861
Peckham v. Gilman, 7 Minn. 446 (Gil. 355) ... 614
Peele, *Ex parte*, 6 Ves. Jr. 601 ... 692
Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565 ... 783, 784
Pennsylvania R. Co. v. Braddock Electric R. Co. 152 Pa. 116 ... 378
v. Lyons, 129 Pa. 118 ... 256
Penny v. Little, 4 Ill. 304 ... 245
People v. Albany & V. R. Co. 24 N. Y. 261, 82 Am. Dec. 295 ... 171
v. Annis, 45 Barb. 304 ... 578
v. Barker, 141 N. Y. 118, 23 L. R. A. 95 ... 396-397
v. Boston & A. R. Co. 70 N. Y. 569 ... 171
v. Bristol & R. Turnp. Road, 23 Wend. 247 ... 749
v. Campbell, 59 Cal. 243, 43 Am. Rep. 257 ... 838
v. Chacon, 102 N. Y. 669 ... 43
v. Coleman, 126 N. Y. 433, 12 L. R. A. 762 ... 76
v. Dayton, 55 N. Y. 367 ... 510
v. Detroit Board of Education, 18 Mich. 400 ... 253
v. Felix, 45 Cal. 163 ... 261
v. Fisher, 50 Hun, 552 ... 206
v. Gillson, 109 N. Y. 389 ... 84-86, 259
v. Girardin, 1 Mich. 90 ... 62
v. Goddard, 3 Colo. 432 ... 144
v. Hillsdale & C. Turnp. Road, 23 Wend. 254, 258 ... 749, 750
v. Hurlbut, 24 Mich. 44, 57, 9 Am. Rep. 103 ... 475
v. Jenkins, 1 Hill, 469 ... 472
v. Kerr, 27 N. Y. 188 ... 771
v. Louisville & N. R. Co. 120 Ill. 48 ... 171
v. Lowe, 117 N. Y. 175 ... 184
v. McAdams, 82 Ill. 356 ... 801
v. McCreery, 34 Cal. 434, 458 ... 530
v. Mahaney, 13 Mich. 481, 495 ... 475
v. Morgan, 90 Ill. 558 ... 87
v. New York, L. E. & W. R. Co. 104 N. Y. 58, 58 Am. Rep. 484 ... 171
v. Onondaga County Canvassers, 129 N. Y. 395, 14 L. R. A. 624 ... 676
v. Otis, 90 N. Y. 48 ... 258
v. Pyper, 6 Utah, 160 ... 655
v. Rome, W. & O. R. Co. 103 N. Y. 95 ... 171
v. Scott, 9 Colo. 422 ... 144
v. Seale, 52 Cal. 71 ... 677
v. Seelye, 146 Ill. 189 ... 599
v. State Ins. Co. 19 Mich. 392, 398 ... 475
v. Tremain, 29 Barb. 96 ... 422
v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243 ... 111
v. Wands, 23 Mich. 385, 389 ... 475
v. Wappinger's Falls, 144 N. Y. 616 ... 669
People's Bank v. Howes (Minn.) 61 N. W. Rep. 457 ... 615
People's Sav. Bank v. Tripp, 13 R. I. 621 ... 510
Peoria & P. U. R. Co. v. Peoria & F. R. Co. 105 Ill. 110 ... 490
Peoria, D. & E. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619 ... 390
Pepper v. Peck, 17 R. I. 55 ... 687
Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637 ... 250
Perry v. Com. 3 Gratt. 632 ... 838
Peschel v. Chicago, M. & St. P. R. Co. 62 Wis. 349 ... 824
Peters v. Bain, 133 U. S. 670, 33 L. ed. 686 ... 666
v. Cartier, 80 Mich. 124 ... 35
v. Peters, 42 Iowa, 182 ... 152
Peterson v. Chicago & N. W. R. Co. 67 Mich. 102 ... 826
Phelps v. McNeely, 66 Mo. 555, 27 Am. Rep. 378 ... 667
Philadelphia v. Ridge Ave. Pass. R. Co. 102 Pa. 190 ... 367
Philadelphia, W. & B. R. Co. v. Rice, 64 Md. 63 ... 176
Phillips v. Quick, 63 Ill. 445 ... 803
Phœnix Ins. Co. v. Erie & W. Transp. Co. 117 U. S. 312, 29 L. ed. 873 ... 755
Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405 ... 786
v. Selleck, 18 Conn. 321, 330 ... 588, 589
Piggot v. Eastern Counties R. Co. 3 C. B. 229 ... 726
Pike v. Chicago & A. R. Co. 39 Fed. Rep. 754 ... 699
v. Colvin, 67 Ill. 227 ... 805
v. Monroe, 36 Me. 309, 58 Am. Dec. 751 ... 540
Pilgreen v. State, 71 Ala. 368 ... 581
Pindar v. Kings County F. Ins. Co. 36 N. Y. 648, 93 Am. Dec. 544 ... 707
Pittsburgh, Ft. W. & C. R. Co. v. Reich, 101 Ill. 157 ... 489
Platt v. Forty-Second Street & G. Street Ferry R. Co. 2 Hun, 124 ... 800
Platte Water Co. v. Northern Colorado Irrigation Co. 12 Colo. 525 ... 856
Plimpton v. Bigelow, 93 N. Y. 592 ... 431
Pocantico Water Works Co. v. Bird, 130 N. Y. 249 ... 857
Porter v. Rockford, R. I. & St. L. R. Co. 76 Ill. 561 ... 199
v. Sabin, 149 U. S. 479, 37 L. ed. 818 ... 160
Posey v. Scoville, 10 Fed. Rep. 140 ... 724
Potter v. State, 42 Ark. 29 ... 838
Powell v. Missouri P. R. Co. 76 Mo. 80 ... 697
Power v. Hathaway, 43 Barb. 214 ... 277
Powers v. Mulvey, 51 Conn. 432 ... 300
v. Shepard, 48 N. Y. 545 ... 371
Pratt, *Re*, 19 Colo. 138 ... 144
Pratt v. Hudson River R. Co. 21 N. Y. 308 ... 436
Preston v. Browder, 14 U. S. 1 Wheat. 120, 4 L. ed. 51 ... 210
Pretzinger v. Pretzinger, 45 Ohio St. 452, 458 ... 679
Privett v. Bickford, 26 Kan. 52, 40 Am. Rep. 301 ... 705
Proprietors of Bridges v. Hoboken Land & Imp. Co. 68 U. S. 1 Wall. 116, 17 L. ed. 571 ... 210
Prosser v. Luqueer, 4 Hill, 420, 40 Am. Dec. 288 ... 620
Providence Tool Co. v. Norris, 69 U. S. 2 Wall. 45, 17 L. ed. 868 ... 193
Prudential Assur. Co. v. Knott, L. R. 10 Ch. App. 142 ... 69
Pullman Palace Car Co. v. Lowe, 6 L. R. A. 809, and *note*, 28 Neb. 239 ... 97
v. Missouri Pac. R. Co. 115 U. S. 587, 29 L. ed. 499 ... 858
Purple v. Farrington, 119 Ind. 164, 4 L. R. A. 535 ... 687

Q.

Quin v. Lloyd, 41 N. Y. 349 ... 43
Quincy Min. Co. v. Kitts, 42 Mich. 34 ... 323

R.

Rae v. Hulbert, 17 Ill. 572 ... 600
Railroad Comrs. v. Portland & O. Cent. R. Co. 63 Me. 277, 18 Am. Rep. 208 ... 171
Ramsbottom v. Phelps, 18 Conn. 285 ... 586
Ramsey v. People, 142 Ill. 380, 17 L. R. A. 853 ... 82
Randall v. National Bldg. Loan & Protective Union of Minneapolis, 42 Neb. 809 ... 133
Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269 ... 616
Raphael v. Boehm, 11 Ves. Jr. 92 ... 660, 661
Rauch v. Lloyd, 31 Pa. 358, 72 Am. Dec. 747 ... 761
Rawson v. Uxbridge School Dist. No. 5, 7 Allen, 125, 83 Am. Dec. 670 ... 172
Reed v. Northfield, 13 Pick. 94, 23 Am. Dec. 662 ... 818
Reichwald v. Commercial Hotel Co. 106 Ill. 439 ... 65
Reid v. Bank of Mobile, 70 Ala. 199 ... 104
Reinback v. Crabtree, 77 Ill. 182 ... 598
Reining v. New York, L. & W. R. Co. 128 N. Y. 157, 14 L. R. A. 133 ... 91
Renick v. Ludington, 16 W. Va. 378 ... 706
Rennyson's Appeal, 94 Pa. 147, 153 ... 590
Revenue Law, *Re*, 14 Fla. 287 ... 87
Rex v. Loxdale, 1 Burr. 445 ... 509
Rey v. Simpson, 1 Minn. 380 (Gil. 282), 63 U. S. 22 How. 341, 16 L. ed. 260 ... 613
Reyburn v. Mitchell, 106 Mo. 365 ... 687
Reynolds v. Adden, 136 U. S. 348, 34 L. ed. 360 ... 167
v. Boston Rubber Co. 160 Mass. 240 ... 501
v. Stockton, 43 N. J. Eq. 211 ... 599

Rhines v. Phelps, 8 Ill. 455 ... 805
Rhodes, *Ex parte*, 15 Ves. Jr. 541 ... 705
Rhodes v. Georgia R. & Bkg. Co. 84 Ga. 320 ... 761
Rice v. Coolidge, 121 Mass. 393, 23 Am. Rep. 279 ... 154
v. Walker, 44 Iowa, 458 ... 422
Richards v. Wapello County, 48 Iowa, 510 ... 286
v. Warring, 1 Keyes, 576 ... 614
Richardson v. Green, 133 U. S. 30, 33 L. ed. 516 ... 268
v. Tobey, 121 Mass. 457, 23 Am. Rep. 283 ... 508
Richmond v. Dubuque & S. C. R. Co. 26 Iowa, 191 ... 753
Richter v. Harper, 95 Mich. 221 ... 289
Ricker v. American Loan & T. Co. 140 Mass. 346 ... 858
Riddle v. Proprietor of Locks & Canals, 7 Mass. 169, 5 Am. Dec. 35 ... 868
Riggs v. Palmer, 115 N. Y. 506, 5 L.R. A. 340 ... 149
Riker v. Sprague Mfg. Co. 14 R. I. 402, 51 Am. Rep. 413 ... 104
Riley v. Vaughan, 116 Mo. 176 ... 833
Rinard v. Nordyke, 76 Ind. 130 ... 511
Ritchie v. People, 155 Ill. 98, 29 L. R. A. 79 ... 259
Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694 ... 537, 538
Roberts v. Yarboro, 41 Tex. 450 ... 858
Robertson v. American Homestead Asso. 69 Am. Dec. 145, 150, 163, *note* ... 124, 135, 184
v. Burrell, 40 Ind. 328 ... 566
Robeson v. Pittenger, 2 N. J. Eq. 57, 32 Am. Dec. 412 ... 590
Robinson, *Ex parte*, 12 Nev. 263, 28 Am. Rep. 794 ... 611
v. Bartlett, 11 Minn. 410 (Gil. 302) ... 614
v. Lair, 31 Iowa, 9 ... 620
v. Pett (note) 2 Lead. Cas. Eq. 550, 570, 600 ... 102
v. Schenck, 102 Ind. 307 ... 120
v. State, 84 Ind. 452 ... 838
Robison v. Miner, 68 Mich. 549 ... 475
Rockford, R. I. & St. L. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587 ... 65
Rodrian v. New York, N. H. & H. R. Co. 126 N. Y. 526 ... 698
Rogers v. Goodwin, 2 Mass. 475 ... 116
v. Hargo, 92 Tenn. 35 ... 133
v. Leyden, 127 Ind. 52, 53 ... 108
Rohback v. Pacific R. Co. 43 Mo. 187 ... 699
Rose v. Miles, 4 Maule & S. 101 ... 701, 702
v. Stephens & C. Transp. Co. 11 Fed. Rep. 458 ... 722, 724
Roshi's Appeal, 69 Pa. 462, 8 Am. Rep. 275 ... 481
Ross v. Boston & W. R. Co. 6 Allen, 87 ... 476
v. Walker, 139 Pa. 42 ... 810
Roux v. Blodgett & Davis Lumber Co. 85 Mich. 519, 13 L. R. A. 728 ... 325
Rowland v. Old Dominion Bldg. & Loan Asso. 115 N. C. 325 ... 137
Roxbury v. Boston & P. R. Corp. 6 Cush. 424 ... 171
Ruffners v. Lewis, 7 Leigh, 720, 743, 30 Am. Dec. 513 ... 460
Ruggles v. Keeler, 3 Johns. 264, 3 Am. Dec. 482 ... 277
Rushville v. Adams, 107 Ind. 475, 57 Am. Rep. 124 ... 760
v. Rushville Natural Gas Co. 132 Ind. 575, 15 L. R. A. 321 ... 400
Russell v. McDowell, 83 Cal. 70 ... 677
Rust v. Rust, 17 W. Va. 901 ... 455
Rutherglen v. Wolf, 1 Hughes, C. C. 78 ... 441
Rutledge v. Crawford, 91 Cal. 526, 13 L. R. A. 761 ... 676
Ryan v. Bagaley, 50 Mich. 179, 45 Am. Rep. 35 ... 322-325

S.

St. Clair County v. Lovingston, 90 U. S. 23 Wall. 46, 23 L. ed. 59 ... 54, 55
St. Joseph v. Levin (Mo.) 31 S. W. Rep. 101 ... 260
St. Louis v. Bell Teleph. Co. 96 Mo. 623, 2 L. R. A. 278 ... 400
v. Green, 7 Mo. App. 468 ... 611
v. Sternberg, 69 Mo. 289 ... 612
v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 149 U. S. 465, 37 L. ed. 810 ... 770
St. Louis & S. F. R. Co. v. Payne, 29 Kan. 166 ... 699
v. Williams, 53 Ark. 58 ... 72
Sample v. Hale, 34 Neb. 220 ... 853
San Antonio & A. P. R. Co. v. Wilson (Tex.) 19 S. W. Rep. 910 ... 390
Sanders v. Jacob, 20 Mo. App. 98 ... 526
v. Utt, 16 Mo. App. 322 ... 526
San Diego v. San Diego & L. A. R. Co. 44 Cal. 106 ... 464
San Diego Water Co. v. San Diego Flume Co. 100 Cal. 43 ... 842
Sands v. Manistee River Imp. Co. 123 U. S. 288, 31 L. ed. 149 ... 472
Sangamon County Suprs. v. Springfield, 68 Ill. 66 ... 438
San José v. San José & S. C. R. Co. 53 Cal. 475 ... 611
San Luis Land, C. & I. Co. v. Kenilworth Canal Co. 3 Colo. App. 244 ... 838
Sather v. Chicago, M. & St. P. R. Co. 40 Minn. 91 ... 699
Sauer v. Nevadaville, 14 Colo. 54 ... 260
Savage v. Mason, 3 Cush. 500 ... 503
Savannah v. Jesup, 106 U. S. 563, 27 L. ed. 276 ... 511
Sawyer v. Alton, 4 Ill. 129 ... 611
Saxton v. St. Joseph, 60 Mo. 153 ... 408
Scanlan v. Childs, 33 Wis. 663 ... 510
Schaeffer v. Fithian, 17 Ind. 463 ... 697
Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507 ... 660, 661
Schlichter v. Keiter, 156 Pa. 119, 22 L. R. A. 161 ... 481
Schmidlapp v. Currie, 55 Miss. 597, 30 Am. Rep. 530 ... 690
Schmidt v. Pfeil, 24 Wis. 454 ... 291
Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 19 L. ed. 224 ... 697
Schultz v. Chicago & N. W. R. Co. 67 Wis. 616, 58 Am. Rep. 881 ... 140
Schwarz v. Stein, 29 Md. 112 ... 271
Schwoerer v. Boylston Market Asso. 99 Mass. 285, 297, 298 ... 504
Scofield v. Council Bluffs, 68 Iowa, 695 ... 403
Scott v. London & St. K. Docks Co. 3 Hurlst. & C. 595 ... 495, 734
Scudder v. Trenton Delaware Falls Co. 1 N. J. Eq. 694, 23 Am. Dec. 756 ... 867
Seaborn v. Henry, 30 Ark. 469 ... 616
Seaman v. Smith, 24 Ill. 521 ... 540
Seaver v. Adams, 66 N. H. 142 ... 152
Seay v. Bank of Rome, 66 Ga. 615 ... 248
Seeley v. Bishop, 19 Conn. 128 ... 586
v. Fisher, 11 Sim. 581 ... 60
Segar's Sons v. Thomas Bros. 107 Mo. 635 ... 687
Sego v. Stoddard, 136 Ind. 297, 22 L. R. A. 468 ... 699
Sell v. Rietz & Bros. Lumber Co. 70 Mich. 479 ... 325
Sellers v Phœnix Iron Co. 13 Fed. Rep. 20 ... 102
Sergeant v. Ingersoll, 7 Pa. 340, 15 Pa. 343 ... 50
Sexton v. Anderson (1888) 95 Mo. 373, 380 ... 668, 697, 696
Shadock v. Alpine Pl. Road Co. 79 Mich. 7 ... 290, 292
Shakespear v. Smith, 77 Cal. 638 ... 464
Shamp v. Meyer, 20 Neb. 223 ... 858
Shapley v. Bellows, 4 N. H. 347 ... 706
Sharp v. Cropsey, 11 Barb. 224 ... 680
Sharpe v. Hartman, 26 Or. 131 ... 687, 698
Shaw v. Boston & A. R. Co. 159 Mass. 397 ... 570
v. Hoffman, 21 Mich. 151 ... 290
Sheboygan Lumber Co. v. Delta Transp. Co. 100 Mich. 16 ... 471-478, 475
Sheffield v. Lovering, 12 Mass. 490 ... 557
Shelbyville R. Co. v. Louisville, C. & L. R. Co. 88 Ky. 541 ... 859
Shellenberger v. Ransom, 41 Neb. 631, 25 L. R. A. 564, 31 Neb. 61, 10 L. R. A. 810 ... 149
Shelley's Case, 1 Coke, 106 ... 437
Shelton v. Mobile, 30 Ala. 540, 68 Am. Dec. 148 ... 612
Shepard v. New Haven & Northampton Co. 45 Conn. 54 ... 300
Sherlock v. Alling, 44 Ind. 189 ... 110
93 U. S. 99, 23 L. ed. 819 ... 472
Sherrill v. Hopkins, 1 Cow. 103 ... 616
Sherwood v. Barlow, 19 Conn. 476 ... 587
v. Milford State Bank, 94 Mich. 78 ... 666
Shields v. Thomas, 71 Miss. 260 ... 666
Shippey v. Eastwood, 9 Ala. 290 ... 225
Shoecraft v. Bailey, 25 Iowa, 553 ... 97
Shoemaker v. Harrisburg, 122 Pa. 285 ... 402
Shumway v. Walworth & N. Mfg. Co. 98 Mich. 411 ... 323-325
Sice v. Cunningham, 1 Cow. 397 ... 617
Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 121, 124 ... 692, 693, 695
Sigerson v. Mathews, 61 U. S. 20 How. 496, 15 L. ed. 989 ... 311
Silver v. Barnes, 6 Bing. N. C. 180 ... 132
Simmons v. Jenkins, 76 Ill. 479 ... 805
Simpson v. Lamb, 40 Eng. L. & Eq. 59 ... 705
Singer Mfg. Co. v. Domestic Sewing-Mach. Co. 49 Ga. 17, 15 Am. Rep. 674 ... 69
Sipe v. Murphy, 49 Ohio St. 536, 17 L. R. A. 184 ... 736
Skinner v. Henderson, 26 Fla. 121, 8 L. R. A. 55 ... 419, 420
Slater v. Oriental Mills, 18 R.I. 352 ... 250, 266, 267
Slaughter-House Cases, 83 U. S. 16 Wall. 36, 21 L. ed. 394 ... 84, 413
Slavens v. John R. Cook Drug Co. (Mo.) 30 S. W. Rep. 1025 ... 833
Slaymaker v. Phillips (Wyo.) 40 Pac. Rep. 971 ... 660
Sleght v. Kane, 1 Johns. Cas. 76 ... 277
Slide & Spur Gold Mines v. Seymour, 158 U. S. 509, 38 L. ed. 802 ... 271

Sloan v. Biemiller, 34 Ohio St. 492 540
v. Edwards, 61 Md. 96 291
v. Sloan, 25 Fla. 53 68
Sloane v. Shiffer, 156 Pa. 59-65 861
Smith v. Agricultural Ins. Co. 118 N. Y. 526 706
v. Alabama, 124 U. S. 465, 475, 31 L. ed. 508, 511, 1 Inters. Com. Rep. 804 472, 473
v. Boston, 7 Cush. 254 570
v. Combs, 49 N. J. Eq. 420 666
v. Gatewood, 3 S. C. N. S. 333 511
v. Martin, 17 Conn. 400 596
v. Mawhood, 14 Mees. & W. 452 226
v. Minneapolis & St. L. R. Co. 26 Minn. 419 697
v. Moore, 90 Ind. 294 705
v. Parsons, 55 Minn. 520 769
v. Pinch, 80 Mich. 332 333
v. Read, 52 How. Pr. 14, 6 Daly, 33 95, 97
v. Salomon, 7 Daly, 216 861
v. Sorby, L. R. 3 Q. B. Div. 552 192
v. Stevens, 133 Ill. 183 785
v. Townsend, 148 U. S. 490, 37 L. ed. 533 210
v. Wilson, 3 Barn. & Ad. 728 222
Snider v. St. Paul, 51 Minn. 466, 18 L. R. A. 151 709
Snyder v. Fulton, 34 Md. 128, 6 Am. Rep. 314 60
Sohier v. Trinity Church, 109 Mass. 1, 19 172
Solomon v. Cartersville Comrs. 41 Ga. 157 510
v. Lawson, 8 Q. B. 828 60
Son v. People, 12 Wend. 344 262
Sondheim v. Gilbert, 117 Ind. 71, 5 L. R. A. 432 827
South & North Ala. R. Co. v. Morris, 65 Ala. 193 390
Southern Bldg. & Loan Asso. v. Anniston Loan & T. Co. 101 Ala. 582 137
Southern Exp. Co. v. McVeigh, 20 Gratt. 264, 284 582
South Omaha v. Taxpayers' League, 42 Neb. 671 856
Sparkman v. Gove, 44 N. J. L. 252 504
Spaulding v. Chicago & N. W. R. Co. 30 Wis. 110, 121, 11 Am. Rep. 550 476, 726
Spear v. Braintree, 24 Vt. 414, 418 590
v. Cummings, 23 Pick. 224, 34 Am. Dec. 53 253
Speck v. Riggin, 40 Mo. 405 48
Spicer v. Bonker, 45 Mich. 630 65
Springfield Fire & Marine Ins. Co. v. Hull, 25 L. R. A. 37, 52 Ohio St. — 861
Spring Valley Water Works v. San Francisco City & County, 82 Cal. 286, 6 L. R. A. 756 843
Stacy v. Dane County Bank, 12 Wis. 629 797
Stafford County School Dist. No. 25 v. State, 29 Kan. 57 448
Stamford v. Stamford Horse R. Co. 56 Conn. 381, 395, 1 L. R. A. 375 370
Stanton v. New York & E. R. Co. 59 Conn. 272 65
State v. Acuff, 6 Mo. 55 858
v. Addy, 43 N. J. L. 113, 39 Am. Rep. 547 261
v. Baltimore & O. R. Co. 24 Md. 84, 87 Am. Dec. 600 680
v. Bank of Maryland, 6 Gill & J. 228, 26 Am. Dec. 561 247
v. Beasley, 5 Mo. 91 858
v. Berdetta, 73 Ind. 185, 38 Am Rep. 117 92
v. Berlinsheimer, 62 Mo. App. 168 207
v. Black, 54 N. J. L. 446, 16 L. R. A. 769 609
v. Brin, 30 Minn. 522 211
v. Brown, 27 Vt. 619 62
v. Burton, 113 N. C. 650, 662 261, 262
v. Buttles, 3 Ohio St. 309, 322, 323 194
v. Capital City Water Co. (Ala.) 14 So. Rep. 652 749
v. Carter, 33 La. Ann. 1214 838
v. Clarke, 3 Nev. 570 705
v. Columbia, 6 S. C. N. S. 1 218
v. Cooley (Minn.) 60 N. W. Rep. 338 781
v. Covington, 29 Ohio St. 102 117
v. Curtis, 20 N. C. 222 577
v. Denny, 118 Ind. 382, 49, 4 L. R. A. 79, 65 115, 117
v. Dillon, 32 Fla. 545, 22 L. R. A. 124 669
v. Fire Creek Coal & Coke Co. 33 W. Va. 188, 6 L. R. A. 359 390
v. Gibbs, 56 Mo. 133 207
v. Goodwill, 33 W. Va. 179, 6 L. R. A. 621 82, 258, 259
v. Gorby, 122 Ind. 17 115
v. Goss, 59 Vt. 286, 59 Am. Rep. 706 717
v. Green, 36 Fla. — 421
v. Griffin, 43 Tex. 538 62
v. Guernsey, 48 N. Y. 106 460
v. Gut, 13 Minn. 341 (Gil. 315) 838
v. Hagen, 6 Ind. App. 167 207
v. Harris, 3 Ark. 570, 36 Am. Dec. 460 111
v. Hartford & N. H. R. Co. 29 Conn. 538 171
v. Hayne, 4 S. C. N. S. 403 218
v. Herod, 29 Iowa, 123 735, 736
State v. Herrmann, 75 Mo. 340, 353 208, 288
v. Hocker, 35 Fla. 19 420
v. Hope, 100 Mo. 347, 8 L. R. A. 606 48, 49
v. Hornbacker, 42 N. J. L. 535 134
v. Hyde, 121 Ind. 20 115
129 Ind. 296, 13 L. R. A. 79 118
v. Iowa Cent. R. Co. 83 Iowa, 720 171
v. Jacksonville Street R. Co. 29 Fla. 590 421
v. Jersey City, 52 N. J. L. 65 91
v. Kansas Cent. R. Co. 47 Kan. 497 445
v. Kennon, 7 Ohio St. 546 117
v. Leffingwell, 54 Mo. 458 863
v. Leland, 83 Mo. 260 46
v. Loomis, 115 Mo. 307, 21 L. R. A. 789 82, 83, 259, 300
v. McFetridge, 84 Wis. 478, 20 L. R. A. 223 250
v. McMillan, 108 Mo. 153 669
v. McMillen, 23 Neb. 385 705
v. Manning, 14 Tex. 402 838
v. Marion County Comrs. 27 Fla. 438 422
v. Miller, 6 Baxt. 513 261
v. Mississippi River Bridge Co. 109 Mo. 253 72
v. Montgomery County Comrs. 26 Ind. 522 421
v. Mooney, 74 N. C. 99, 21 Am. Rep. 487 261
v. Moore, 42 N. J. L. 206 838
v. Murray, 28 Wis. 96, 9 Am. Rep. 489 705
v. Newark, 27 N. J. L. 185 198
v. New Orleans, 34 La. Ann. 469 422
v. Palmes, 23 Fla. 620 421
v. Parsons, 115 N. C. 730 261, 262
v. Peelle, 121 Ind. 495 115
v. Pennington, 5 Lea, 506 62
v. Platt, 24 N. J. L. 106, 120, 121 530
v. Putnam County Comrs. 23 Fla. 632 419
v. Ray, 50 Iowa, 520 261
v. Roe, 26 N. J. L. 215 746
v. Ryan, 13 Minn. 370 (Gil. 343) 838
v. Sibley, 25 Minn. 387 711
v. Smith, 31 Iowa, 493 736
44 Ohio St. 348 117
17 R. I. 371 62
v. Sorenson, 84 Wis. 27 838
v. Stoll, 84 U. S. 17 Wall. 425, 436, 21 L. ed. 654, 655 372
v. Swope, 7 Ind. 91 561
v. Tolle, 71 Mo. 645 208, 289
v. Topeka, 31 Kan. 452 261
v. Varnarsdale, 42 N. J. L. 536 422
v. Warner, 4 Wash. 773, 17 L. R. A. 263 447
v. Warren, 92 N. C. 825 261
v. Watson, 95 Mo. 411 261
v. Webb, 97 Ala. 111 746
v. Welch, 65 Vt. 50 838
State Center v. Barenstein, 66 Iowa, 249 736
State Treasurer v. Auditor General, 46 Mich. 224 197
Steele v. Sioux Valley Bank, 79 Iowa, 339, 7 L. R. A. 524 35
v. Southwick, 9 Johns. 214 60
Steinweg v. Erie Railway, 43 N. Y. 126, 3 Am. Rep. 673 476
Stephens v. Cady, 55 U. S. 14 How. 528, 14 L. ed. 528 789
v. Southern P. Co. (Cal.) 29 L. R. A. 751 755, 756
Stephenson v. Hall, 14 Barb. 222 253
Stetson v. Chicago & R. R. Co. 75 Ill. 74 492
Stevens v Gladding, 58 U. S. 17 How. 447, 15 L. ed. 155 789
v. Woodward, 50 L. J. C. P. 231 706
v. Wyatt, 16 B. Mon. 542 704
Stewart v. Brooklyn & C. R. Co. 90 N. Y. 588, 43 Am. Rep. 185 467
v. Johnson, 30 Ohio St. 24 442
Stier v. Harms, 154 Ill. 476 806
Stitt v. Casterline, 89 Mich. 239 333
Stock's Case, 2 Leach, 1015 577
Stockle v. Silsbee, 41 Mich. 615 448
Stockton v. Powell, 29 Fla. 1, 15 L. R. A. 42 419, 420
Stokes v. State, 46 Ga. 412, 12 Am. Rep. 588 510
Stoller v. Coates, 88 Mo. 514 666
Stone v. Yeovil, L. R. 1 C. P. Div. 701 858
Stoner v. Weiser, 24 Iowa, 434 192
Storer v. Freeman, 6 Mass. 436, 4 Am. Dec. 155 540
Story v. New York Elev. R. Co. 90 N. Y. 122, 170, 43 Am. Rep. 146 90-92
Stover v. Jack, 60 Pa. 339, 100 Am. Dec. 566 540
Stratton v. Hussey, 62 Me. 288 706
Straus v. Ross, 25 Ind. 300 538
Street v. Augusta Ins. & Bkg. Co. 12 Rich. L. 13, 75 Am. Dec. 714 780
Strithorst v. Graeme, 2 W. Bl. 723 275
Strohen v. Franklin Sav. Fund & Loan Asso. 115 Pa. 273 183, 184
Stroeser v. Fort Wayne, 100 Ind. 443 443
Strup v. Edens, 22 Wis. 492 495
Suffolk Bank v. Worcester Bank, 5 Pick. 106 818

Sumner v. McKee, 89 Ill. 127 807
Susquehanna Canal Co. v. Bonham, 9 Watts & S. 27, 42 Am. Dec. 315 212
Sutherland v. Ingalls, 63 Mich. 620 96
Sutphen v. Therkelson, 38 N. J. Eq. 318 591
Sutter v. First Reformed Dutch Church Trustees, 42 Pa. 508 481
Swan v. Scott, 11 Serg. & R. 155 296
Swann v. Swann, 21 Fed. Rep. 299 753
Swartswalter's Account, 4 Watts, 77 102
Swartz v. Leist, 13 Ohio St. 419 320
Sycamore Marsh Harvester Mfg. Co. v. Sturm, 13 Neb. 210 742

T.

Taft v. Mills, 5 R. I. 393 431
Taggart v. Newport Street R. Co. 16 R. I. 669, 7 L. R. A. 205 490, 491
Taussig v. Hart, 58 N. Y. 425 122
Tayloe v. Merchants' F. Ins. Co. of Baltimore, 50 U. S. 9 How. 390, 13 L. ed. 187 713
Taylor v. Badoux, 92 Tenn. 249 166, 167
v. Bleakley (Kan.) 28 L. R. A. 683 669, 676
v. Popham, 15 Ves. Jr. 79 705
v. State, 31 Ala. 383 746
Tennessee Coal & R. Co. v. Reddy, 85 Tenn. 400 110
Tenney v. Prince, 4 Pick. 385, 16 Am. Dec. 347 614
Terre Haute v. Beach, 96 Ind. 143 448
Texas & P. R. Co. v. Rosedale Street R. Co. 64 Tex. 80, 53 Am. Rep. 739 490
Thiel College v. Mercer County, 101 Pa. 580 606
Thill v. Pohlman, 76 Iowa, 639 151
Third Nat. Bank v. Vicksburg Bank, 61 Miss. 112, 48 Am. Rep. 78 797
Tholen v. Duffy, 7 Kan. 408 708
Thomas v. Hannibal & St. J. R. Co. 82 Mo. 538 756
v. Western U. Teleg. Co. 100 Mass. 156 724
Thompson v. Corrie, 57 Md. 200 271
v. Gillison, 28 S. C. 542 122
Thompson's Appeal, 22 Pa. 16 666
Thurber v. Harlem Bridge, M. & F. R. Co. 60 N. Y. 326 761
Thurman v. State, 54 Ark. 120 261
Thurston v. Thurston (Minn.) 59 N. W. Rep. 1017 731
Tiffany v. Stewart, 60 Iowa, 207 706
Tillett v. Lynchburg & D. R. Co. 115 N. C. 666 702
Tindal v. Brown, 1 T. R. 167 617
Toledo, P. & W. R. Co. v. Pindar, 53 Ill. 447, 5 Am. Rep. 57 476
Toledo Tie & Lumber Co. v. Thomas, 38 W. Va. 566 714
Tompkins v. Saltmarsh, 14 Serg. & R. 275 256
Towle v. American Bldg. Loan & Invest. Soc. 61 Fed. Rep. 446 133
Towns v. Mead, 16 C. B. 123 275
Townsend v. New York Cent. & H. R. R. Co. 56 N. Y. 295, 15 Am. Rep. 419 176
Township 36, Range 2 East, Board of Education v. Boyd, 58 Mo. 276 422
Tracy v. Smith, 2 Lev. 178 552
Trebilcock v. Wilson, 79 U. S. 12 Wall. 687, 20 L. ed. 460 598
Trentman v. Swartzell, 85 Ind. 443 667
Trenton Bkg. Co. v. Woodruff, 2 N. J. Eq. 117 36
Trumble v. Trumble, 37 Neb. 340 856
Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co. 11 Leigh, 76, 36 Am. Dec. 374 779
Tuesley v. Robinson, 108 Mass. 558, 4 Am. Rep. 575 807
Tuigg v. Treacy, 104 Pa. 493 481
Tulk v. Moxhay, 2 Phil. Ch. 774 427
Turley v. Taylor, 3 Lea, 173 169
Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497 590
Tuscaloosa Scientific & Art Asso. v. State, 58 Ala. 54 746
Tuttle v. Bartholomew, 12 Met. 452 620
Twomley v. Central Park, N. & E. R. Co. 69 N. Y. 158, 25 Am. Rep. 162 108
Twyne's Case, 3 Coke, 80 427
Tyler, Petitioner, *Ex parte*, 149 U. S. 164, 37 L. ed. 689 511
Tyson v. Booth, 100 Mass. 258 291
v. Weber, 81 Ala. 470 806

U.

Ulen v. Kittredge, 7 Mass. 233 614, 615
Umatilla Irrigation Co. v. Barnhart, 22 Or. 389 857
Underhill v. Van Cortlandt, 2 Johns. Ch. 355, 1 L. ed. 407 267
Unger v. Forty-Second Street & G. Street Ferry R. Co. 51 N. Y. 497 495
Union Ins. Co. v. Hoge, 62 U. S. 21 How. 35, 16 L. ed. 61 510
Union Nat. Bank v. Goetz, 138 Ill. 127 666
Union Pac. R. Co. v. De Rusk, 12 Colo. 294, 3 L. R. A. 350 473
v. Hall, 91 U. S. 343, 23 L. ed. 428 171
United States v. Appleton, 1 Sumn. 492-502 590
v. Arredondo, 31 U. S. 6 Pet. 691, 8 L. ed. 547 448
v. Bennett, 16 Blatchf. 338 62
v. Dickson, 40 U. S. 15 Pet. 165, 10 L. ed. 698 393
v. Gilmore, 75 U. S. 8. Wall. 330, 19 L. ed. 396 510
v. Hall, 2 Wash. C. C. 366, 10 U. S. 6 Cranch, 171, 3 L. ed. 189 337
v. James, 60 Fed. Rep. 257, 26 L. R. A. 418 824, 825
v. Lytle, 5 McLean, 9 510
v. Morris, 39 U. S. 14 Pet. 464, 10 L. ed. 543 99
v. Stern, 5 Blatchf. 512 393
v. Union Pac. R. Co. 91 U. S. 72, 23 L. ed. 224 210
United States Rolling Stock Co. v. Atlantic & G. W. R. Co. 34 Ohio St. 450-460, 32 Am. Rep. 380 122
Universal Church v. Columbia Twp. Section 29, Trustees, 6 Ohio, 446, 27 Am. Dec. 267 439
University of Alabama Trustees v. Moody, 63 Ala. 389 530
Upham v. Prince, 12 Mass. 14 619
Utica Ins. Co. v. Bloodgood, 4 Wend. 652 765

V.

Vahlberg v. Keaton, 51 Ark. 539, 541, 4 L. R. A. 462 763, 764, 768, 769
Vallett v. Parker, 6 Wend. 615 827
Vanatta v. Delaware & B. B. R Co. 33 N. J. L. 282 746
Van Baalen v. People, 40 Mich. 258 736
Vance v. Throckmorton, 5 Bush, 41, 96 Am. Dec. 327 97
Vanderkemp v. Shelton, 11 Paige, 28, 5 L. ed. 45 443
Van Deventer v. Long Island City, 139 N. Y. 133, 138 530
Vandine, Petitioner, 6 Pick. 187, 17 Am. Dec. 351 612
Van Doran v. Marden, 48 Iowa, 188 151
Van Dusen v. Letellier, 78 Mich. 492 325
Van Hoesen v. Van Alstyne, 3 Wend. 75 617
Van Hook v. Selma, 70 Ala. 361, 45 Am. Rep. 85 736
Van Husan v. Heames, 96 Mich. 504 475
Vanzant v. Arnold, 31 Ga. 210 620
v. Waddel, 2 Yerg. 260 390
Vassar v. Camp, 11 N. Y. 441 436
Vaughn v. Schmalsle, 10 Mont. 186, 10 L. R. A. 411 659
v. Tracy, 22 Mo. 415, 417, 25 Mo. 318, 69 Am. Dec. 471 48, 51
Venables v. Baring Bros. & Co. (1892) 3 Ch. 527 103, 104
Vinton v. Baldwin, 88 Ind. 102, 104, 45 Am. Rep. 447, 448 219, 294
Volkmar v. Manhattan R. Co. 134 N. Y. 418 725, 726
Voss v. Union School Dist. No. 11, 18 Kan. 467 443
Vote Marks, *Re*, 17 R. I. 812 676, 733

W.

Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605 110
Waddell v. Simoson, 112 Pa. 567 809, 810
Waggoner-Gates Mill Co. v. Ziegler-Zaiss Commission Co. (Mo.) 31 S. W. Rep. 28 838
Waite's Case, 99 N. Y. 443 168
Walcott v. People, 17 Mich. 68 611
Wales v. Muscatine, 4 Iowa, 304 858
Walker v. Ohio Board of Public Works, 16 Ohio, 543 54
v. Osgood, 93 Am. Dec. 177, *note* 219
v. Schreiber, 47 Iowa, 529 96
Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407 221
v. Walker, 99 Am. Dec. 296 661
Wallwork v. Derby, 40 Ill. 527 785
Wally v. Kennedy, 2 Yerg. 554, 24 Am. Dec. 511 390
Walston v. Com. 16 B. Mon. 16, 40 838
Wangerien v. Aspell, 47 Ohio St. 250, 261 186
Ward v. Ward, 21 W. Va. 262 461, 463
Ware v. Hayward Rubber Co. 3 Allen, 84, 85, 219, 223
Warren v. Farmer, 100 Ind. 593 687
v. Warren, 89 Mich. 123, 14 L. R. A. 545 133
Washington & G. R. Co. v. Gladmon, 82 U. S. 15 Wall. 408, 21 L. ed. 116 760

Waters v. Merchants' Louisville Ins. Co. 36 U. S. 11 Pet. 213, 9 L. ed. 691 755
Watkins v. Workingmen's Bldg. & Loan Asso. 97 Pa. 514 187
Watson v. Peters, 26 Mich. 508 54, 55
v. San Francisco & H. B. R. Co. 50 Cal. 523 599
Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.. 789
Weber v. Fickey, 47 Md. 196, 52 Md. 500 268
Webster v. Cobb. 17 Ill. 459 614
v. Reid. 52 U. S. 11 How. 437, 13 L. ed. 761.. 784
Weeks v. Millwaukee, 10 Wis. 186, 264 198, 529
v. Napier, 33 Ala. 568 746
Weener v. Brayton, 152 Mass. 101, 8 L. R. A. 640 205
Welch v. Ware, 32 Mich. 77 291
Wells v. Martin, 1 Ohio St. 386 759
Welton v. Dickson, 33 Neb. 767, 23 L. R. A. 496 856
v. Missouri, 91 U. S. 275, 278, 23 L. ed. 347, 348 535, 537
Westbrook v. Miller, 56 Mich. 148 509, 510
Western U. Teleg. Co. v. Tyler, 90 Va. 297, 4 Inters. Com. Rep. 451 473
Westlake v. Westlake, 34 Ohio St. 621, 32 Am. Rep. 397 151, 152
Westmoreland v. Bragg, 2 Hill, L. pt. 2, p. 414. 225
Wetmore v. Scovell, 3 Edw. Ch. 523, 6 L. ed. 748 69
v. State, 55 Ala. 198 510
Whitaker v. Morrison, 1 Fla. 29, 44 Am. Dec. 627 617
White, *Re*, 33 Neb. 813 856
White v. Bradley, 66 Me. 254 591
v. Miller, 52 Minn. 367 104
v. Nicholls, 44 U. S. 3 How. 266, 11 L. ed. 591 154
v. Snell, 5 Pick. 425 403
v. Vermont & M. R. Co. 62 U. S. 21 How. 575, 16 L. ed. 221 104
v. White, 1 Md. Ch. 57 275, 277
Whiteman v. Fayette Fuel Gas Co. 139 Pa. 492. 214
Whitmarsh v. Conway F. Ins. Co. 16 Gray, 359, 77 Am. Dec. 414 707
Whitney v. Allen, 62 Ill. 472 154
v. State, 6 Lea, 247 261
v. Union R. Co. 11 Gray, 359, 71 Am. Dec. 715 504
v. Wheeler Cotton Mills, 151 Mass. 396, 7 L. R. A. 618 503
v. Wyman, 101 U. S. 392, 25 L. ed. 1050.... 65
Whittaker v. Delaware & H. Canal Co. 126 N. Y. 544 108
Whittam v. Zahorik (Iowa) 59 N. W. Rep. 57 670, 676, 781, 782
Whittenton Mills v. Upton, 10 Gray, 582..... 502
Wickersham v. Crittenden, 92 Cal. 29..... 464
Wiggins v. Keizer, 6 Ind. 252..... 561
Wilcox v. People, 90 Ill. 186..... 87
v. Todd, 64 Mo. 388, 390..... 45, 48
v. Wood, 9 Wend. 346..... 222
Wild v. Erath, 27 La. Ann. 171..... 689
Wilder v. Chicago & W. M. R. Co. 70 Mich. 382. 389
Wildey v. Crane, 69 Mich. 17..... 337
Wilkins v. State, 118 Ind. 514, 516..... 120
Wilkinson v. Detroit Steel & Spring Works, 78 Mich. 405..... 290
Will County Suprs. v. People, 110 Ill. 511..... 421
Willenborg v. Murphy, 36 Ill. 344..... 785
William Branfoot, The, 48 Fed. Rep. 914..... 495
William Deering & Co. v. Washburn, 141 Ill. 158..... 805
Williams, *Ex parte*, 26 Fla. 310..... 261
Williams v. City Electric Street R. Co. 41 Fed. Rep. 556..... 509
v. Waldo, 4 Ill. 264..... 630
v. Western U. Teleg. Co. 93 N. Y. 162..... 77
v. Williams, 68 Wis. 58, 53 Am. Rep. 253... 781
Willingham v. Hardin, 75 Mo. 429..... 37, 45
Willitts v. Waite, 25 N. Y. 586..... 168
Wilson v. Chilcott, 12 Colo. 600..... 611
v. Heflin, 81 Ind. 35..... 441
v. Kings County Elev. R. Co. 114 N. Y. 488 65
v. Wheeler, 55 Vt. 446, 453, 454..... 530
Winebrenner v. Colder, 43 Pa. 244..... 481
Winnipiseogee Lake Cotton & Woolen Mfg. Co. v. Gilford, 64 N. H. 337, 348..... 58
Winslow v. Fletcher, 53 Conn. 394, 55 Am. Rep. 122..... 481
Wiser v. Chesley, 53 Mo. 547..... 95
Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333..... 504
Wodock v. Robinson, 148 Pa. 503..... 296
Wolford a. Morgenthal, 91 Pa. 80..... 809
Wood v. Detroit City Street R. Co. 52 Mich. 402, 50 Am. Rep. 259..... 289
v. Guarantee Trust & Safe Deposit Co. 128 U. S. 421, 32 L. ed. 478..... 272
Woodruff v. Catlin, 54 Conn. 277, 295..... 372
v. Saul, 70 Ga. 271..... 616
Woods v. Armstrong, 54 Ala. 150..... 225
Woodworth v. Raymond, 51 Conn. 70..... 598
Woolfolk v. Graniteville Mfg. Co. 22 S. C. 332.. 776
Worcester v. Norwich & W. R. Co. 109 Mass. 103 171
Worthen v. Griffith, 59 Ark. 562..... 834
Wright, *Re*, 3 Wyo. 478, 13 L. R. A. 748.....837, 838
Wright v. Forrestal, 65 Wis. 341..... 510
Wurts v. Hoagland, 114 U. S. 606, 29 L. ed. 229.. 857
Wynehamer v. People, 13 N. Y. 378..... 259

Y.

Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984..... 54
Yeoman v. Lasley, 40 Ohio St. 190..... 192
Yesler v. Seattle, 1 Wash. 308..... 518, 520
Young v. Branstord, 12 Lea, 282..... 725
v. Clapp, 147 Ill. 176, 193..... 784
v. Hughes, 32 N. J. Eq. 872..... 122

STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

England.

Statutes.

9 Hen. III. stat. 1, § 18. Process against king's debtor..... 246
25 Edw. III. chap. 19. Process against king's debtor..... 246
33 Hen. VIII. chap. 39. Process against king's debtor..... 246
37 Hen. VIII. chap. 9. Usury 245
13 Eliz. chap. 8. Usury..... 244
43 Eliz. chap. 6, § 2. For avoiding trifling suits 244
21 Jac. I. chap. 16. Limitation of actions..... 274
3 & 4 Anne. Account between joint tenants.. 458
4 Anne, chap. 16, § 19. Limitation of actions.. 274
9 Anne, chap. 14, § 1. Gaming securities..... 829
12 Anne. Usury..... 764
5 & 6 Wm. IV. chap. 41, § 1. Gaming securities 829

United States.

Constitution.

Art. 1, § 8, cl. 3. Commerce..... 328
cl. 7. Postoffices and post-roads ... 328
cl. 8. Writings and inventions..... 788
§ 10. *Ex post facto* law..... 536
Amend. 4. Criminal procedure..... 820
5. Self-crimination..... 820
Due process of law..... 258
14, § 1. Due process of law, etc.....
.....84, 98, 258, 412, 782

Ordinances.

1787, July 13. Northwest territory..... 546

Statutes.

1792. Legal tender..... 598
1862, Feb. 25. Legal tender..... 596
July 11. Legal tender..... 596
1874. Fraud on revenue laws..... 820

Alabama.

Code, 1852.

§ 2160. Commencement of action..... 745

Revised Code.

§ 2558. Commencement of action..... 745

Code, 1876.

§ 2224. Commencement of action..... 745

Code, 1886.

§ 1556. Powers of building associations..... 125
2651. Commencement of action..... 745
2652. Issuance of summons..... 745
3167. Dissolution of corporation..... 744

Arkansas.

Constitution.

Art. 19, § 13. Usury..... 709

Statutes.

1575, Feb. 9. Interest in advance..... 768
1887, No. 84. Foreign insurance companies.... 713

Mansfield's Digest.

§ 3832. Tax on foreign corporation..... 713
3833. Duty of foreign insurance company.. 713
3834. Duty of foreign insurance company.. 713

Sandels & Hill's Digest.

§§ 4137-39. Foreign insurance companies..... 713

California.

Constitution.

Art. 1, § 11. Uniform laws..... 823
§ 13. Self-crimination..... 823
§ 19. Security from searches and seizures..... 823
4, § 25. Special law..... 823

Statutes.

1869, p. 399. Indebtedness for waterworks.... 514
1891, p. 94. Indebtedness for waterworks.... 514
p. 473. Misdemeanor to start fire..... 755
1893, p. 61. Indebtedness for waterworks..... 514

Civil Code.

§ 308. Scope of by-laws..... 850
312. Proxies at corporate elections..... 848
354. Power of corporation officers..... 843
629. Duty to furnish gas..... 464
3288. Interest as damages..... 756

Code of Civil Procedure.

§ 1112. Mandatory and directory provisions of statute..... 677
1138. Agreed case..... 514
1458. Embezzlement of decedent's assets.... 817
1459. Discovery of property of decedent.... 814
1460. Refusal to disclose property 815

Political Code.

§ 1160. Time for polls to be open..... 677
1162. Ballot boxes not to be removed from polling places..... 677
1197. Manner of voting..... 676
1205. Preparation of ballot..... 676
1207. Replacing spoiled ballots..... 676
1208. Assistance in marking ballot..... 677
1211. Marking ballots..... 675
1215. Effect of distinguishing marks..... 675

Colorado.

Constitution.

Art. 10, § 3. Uniform taxation..... 610

Statutes.

1887, p. 406. Filing certificate of incorporation 143

Connecticut.

Public Statutes.

1882, p. 215. Crossing of railroads..... 374
1889, chap. 29. Taking effect of act..... 371
chap. 168. Crossing of railroads..... 371
1893, June 1, p. 307. Street railway in city..... 371
p. 308. Control over tracks in street..... 372
June 14, chap. 208, p. 361. Crossing of railroads..... 371
June 30. Taking effect of act..... 371

Special Statutes.

Vol. 5, pp. 306, 492. Judicial notice..... 300
1893, June 23, p. 846. State Street Horse Railway Company..... 372
June 28. East End Railway Company... 370
p. 877, § 19. Consolidation of street railway companies..... 370

General Statutes.

§ 386. Permission to construct railway crossings..... 371
§§ 392, 393. Notice of application for right to construct crossing..... 371
1087. Judicial notice..... 300
1304. Partition..... 586
1307. Sale for partition..... 586
2137. Vaccination of school children..... 253
2197. Vaccination of school children..... 253
2970. Prescription..... 587

Practice Act.

PP. 57-59. Forms for action against carriers.. 299

Dakota.

Compiled Statutes, 1887.

§ 1261. Public highways..... 608
1262. Road properly laid out..... 608
1264. Care of roads..... 608
1266. Repair of roads..... 608
1271. Road tax..... 608
1272. Assessment of tax..... 608
1277. Road overseers..... 608
3014. Signs at railroad crossings..... 608
3016. Signals at crossings..... 608
3017. Private railroad crossing..... 608

Florida.

Constitution.

Art. 9, § 5. Purposes of taxation..... 419

Statutes.

1869, chap. 1713. Taxation of railroads..... 509
1891, chap. 4014, § 17. Road taxes..... 416
1893, chap. 4115, § 48. Return of railroad for taxation..... 508
§ 49. Procedure on default of payment..... 509

Revised Statutes.

§ 584. Drawing money from treasury..... 422
585. What warrant must specify..... 422
586. Keeping county funds..... 422

Georgia.

Code.

§ 1493. Assignment by bank for creditors..... 248
2226. Destruction of property for public good..... 304

Illinois.

Constitution, 1870.

Art. 2, § 1. Objects of government..... 82
§ 2. Due process of law..... 82, 733
4, § 13. Act not to embrace more than one subject..... 86
§ 16. Appropriations..... 86
5, § 24. Office..... 87
8, § 3. Appropriation of public funds to sectarian institutions..... 803

Statutes.

1867. Length of working day..... 84
Feb. 16. Washingtonian Home..... 799
1872, March 22. No person debarred from employment because of sex..... 85
1873, May 1. Taxation of bridges..... 71
1874. Married woman's act..... 85
1879, May 23. Industrial school for girls..... 803
1893, June 17, p. 99. Regulation of manufactures..... 81

Revised Statutes, 1893.

Chap. 22, ¶ 12, § 12. Notice in chancery cases.. 733
¶ 20, § 20. Effect of answer without oath..... 735
24, art. 5, §§ 9, 24, 25. Chicago charter; regulation of streets..... 490
68, §§ 1, 6, 7. Married woman's act..... 85
110, ¶ 87, § 26. Review of judgment..... 733
120, § 1 (2 Starr & C. Stat. p. 2124). Taxation of bridges 71

Starr & Curtis' Annotated Statutes.

Vol. 1, p. 973, § 10. Dramshop act; lien of judgment..... 573
p. 1056. No person debarred from employment because of sex..... 85
2, p. 1630. Chattel mortgages..... 805
p. 1799, ¶ 27. Reviver of judgment.... 733

Indiana.

Constitution, 1816.

Art. 4, § 8. Filing offices..... 116

Constitution.

Art. 1, § 23. Privileges and immunities..... 533
3, § 1. Departments of government..... 114
4, § 30. Member of assembly ineligible to other office 115

Art. 5, § 1. Executive powers ... 114
§ 15. Duty to see that laws are enforced 118
§ 18. Vacancy in office during vacation 115
15, § 1. Choosing officers ... 114

Statutes.

1817, Jan. 2. Descents ... 546
1831, Jan. 29. Descents ... 546
1838, Feb. 17, § 2. Descent to half blood ... 546
1846, p. 35. Prison warden ... 117
1875, March 2. General incorporation law ... 74
1881, Apr. 8. General incorporation law ... 74
1885, p. 81. Loan association assessments ... 182
1887, p. 80. Monument commissioners ... 119
March 7. Regulations for safe distribution of gas ... 400
1891, p. 89. Jurisdiction of appellate court ... 582
1895, March 7. Prison directors ... 114
p. 135. Regents of monument ... 119

Laws, 1818.

P. 188. Descents ... 546

Revised Laws, 1824.

P. 154. Descents ... 546

Revised Statutes, 1831.

P. 207. Descents ... 550
208, § 2. Descents ... 546
512. Management of state's prison ... 116

Revised Statutes, 1838.

P. 236, § 2. Descent to half blood ... 547
572. Management of state's prison ... 116

Revised Statutes, 1843.

P. 20. No distinction between whole and half blood ... 546
100. Officers to be chosen by legislature ... 116
436, § 114. Inheritance by half blood ... 547

Revised Statutes, 1881.

§ 2470. Descent to brothers and sisters ... 548
2472. Inheritance by half blood ... 547
3006. Winding up of loan association ... 180
8106, subd. 23. Regulation of peddling ... 583
3408. Management of loan association business ... 182
3410. Lien on loan association stock ... 183
3412. Security for loans ... 183
3413. Payment of loans ... 183
3419. Loan association assessments ... 182
4420. State board of education ... 119
4577. University visiting board ... 119
4727. Canvass of election returns ... 119
5643. Board to examine treasury ... 119
6163. Auditors of female reformatory ... 119

Revised Statutes, 1894.

1336. Jurisdiction of appellate court ... 580
2625. Descent to brothers and sisters ... 548
2627. Inheritance by half blood ... 547
2933. Bank examiner ... 119
3193. Board of charities ... 119
3429. Winding up of loan association ... 180
3541. Regulation of peddling ... 583
4445. Management of loan association business ... 182
4455. Loan association assessments ... 183
4458. Loan association assessments ... 182
4461. Loan association assessments ... 183
5849. State board of education ... 119
5858. Schoolbook commissioners ... 119
6076. University visiting board ... 119
6176. Trustees of Purdue university ... 119
6213. Board of election commissioners ... 119
6282. Canvass of election returns ... 119
6711. State board of health ... 119
7594. Commissioners of public printing ... 119
7670. Board to examine treasury ... 119
8256. Auditors of female reformatory ... 119
§§ 7783, 7789. Council for purchase of supplies 119
§ 8535. Board of tax commissioners ... 119

Elliott's Supplement.

P. 841. Management of loan association business ... 182

Iowa.

Statutes.

16th Gen. Assem. chap. 100. Giving lien priority over existing liens ... 288
23d Gen. Assem. chap. 34. Preservation of fish 391

Code.

§ 462. Licensing transient merchants ... 735
463. License tax ... 736
865. Lien of taxes ... 281
870. Refund of tax ... 286
1558. Giving lien priority over existing liens 283
2202. Liability of wife for civil injuries ... 151
2204. Liability of husband for wife's torts ... 151
2205. Joint liability of husband and wife ... 151
2211. Wife's wages ... 151
2212. Exemption of property of husband and wife for other's debts ... 151
2218. Wife's contracts ... 151
2562. Suits by and against married woman ... 151
2610. Presentation of claim for refund of tax 286
2883. Judgment liens ... 283
4717. Lien in bastardy proceedings ... 283

McClain's Digest.

§ 621. Licensing transient merchants ... 735

Kansas.

Constitution.

Art. 6, § 7. State university ... 383
12, § 1. Special act conferring corporate powers ... 383

Statutes.

1861, Jan. 29. Lawrence university ... 383
1889, chap. 258, § 6. Board of regents ... 384
1895, chap. 226. Payment for breakage in state university ... 386

Code.

§ 658. Quo warranto ... 381

General Statutes, 1889.

§ 958. Authority to enact ordinance for good government ... 400
984. Lighting streets ... 400
991. Authority to enact ordinance for welfare ... 400
¶ 1328, § 5. Requiring proper operation of railroad ... 445
§ 1401. Powers of gas and water companies ... 400

Kentucky.

Constitution.

§ 172. Taxation ... 77
174. Manner of taxation ... 77

General Statutes.

§ 1581, subs. 8. New election ... 705
4020. Taxation of corporations ... 77
4077. Franchise tax ... 77
4078. Valuation of franchise ... 77
4079. Taxation of capital stock of corporation ... 76

Maine.

Statutes.

1889, chap. 261. Arrest by car conductor ... 581
chap. 292, § 2. Short lobsters ... 716
102, § 24. Marking ballots ... 732

Revised Statutes.

Chap. 46, § 6. What by-laws may provide for 431
48, §§ 16-19. Organization of corporations ... 431
51, § 73. Arrest by car conductor ... 581

Maryland.

Constitution, 1867.

Art. 1, § 15. Poll taxes ... 407

Statutes.

1702, chap. 1. Established church ... 409
1704, chap. 21. Road work ... 410
1715. Limitation of actions ... 277
1765. Limitation of actions ... 277
1795, chap. 37. Road work ... 411
1818, chap. 216. Limitation of actions ... 274

Code.

Art. 16, § 161. Effect of improvident joinder of subject-matter upon jurisdiction to give relief ... 269
57, § 5. Limitation statute does not run in favor of absent defendant ... 274

Code of Public Local Laws.

Art. 10, §§ 268-70. Road work 407

Massachusetts.

Declaration of Rights.

Art. 9. Freedom of elections 669

Constitution.

Art. 4, § 1. Power to enact laws 86
Amend. 2. Town meetings 670

Statutes.

1854, chap. 124. Transfer of charter of New Bedford & Fairhaven Ferry 170
1882, chap. 80. Franchises of Fairhaven Branch Railroad 171
1890, chap. 70. Obscene literature 62
1893, chap. 417. Official ballots 668
1894, chap. 392. Old Colony Railroad Ferry 171

Revised Statutes.

Chap. 4, § 12. Elections in Boston 670
15, § 34. Election of town officers 670
130, § 10. Obscene literature 63

Public Statutes.

Chap. 27, § 80. Election of town officers 670
217, § 2. Prosecution for fine 178

Michigan.

Constitution.

Art. 4, § 20. Acts to embrace single object 474
7, § 6. Purity of elections 333

Public Laws.

1846, p. 170. Michigan Southern Railroad charter 197
1855, p. 300. Consolidation of railroads 197
1861, No. 153. Fire screens on steam vessels ... 469
1867, No. 313. Definition of penalty 475
1891, No. 190. Printing ballots 332
1893, No. 206. Taxation 474
1895, March 14. Printing ballots 333

Local Laws.

1896, title 6, § 10. Grand Rapids charter; warrant for collection of taxes 199

Howell's Statutes.

§§ 2083, 2084. Fire screens on steam vessels 469
§ 3360. Railroad tax 198

Minnesota.

Constitution.

Art. 9, § 3. Taxation 778

Statutes.

1860, chap. 17. Agricultural societies 710
1867, chap. 29. Agricultural societies 710
58. Recording of railroad mortgages 214
1868, chap. 19. Appropriation to agricultural societies 710
56, §§ 1-3. Railroad mortgages 213
1870, chap. 29. Minnesota State Agricultural Society 710
1883, chap. 60, § 1. Execution sale subject to mortgage lien 215
142. State Agricultural Society 710
1885, chap. 174. Conveyance of land by Ramsey County 711
1887, chap. 18. Liability for injuries by fellow servant 209
181. State Agricultural Society 711
1891, chap. 168. Appropriation to State Agricultural Society 711

Public Statutes, 1849-1858.

Chap. 17, §§ 334-338. Agricultural societies 710

General Statutes, 1866.

Chap. 121, § 4. Effect of repeal of agricultural societies' act 710
122. Agricultural societies 710

General Statutes, 1878.

Chap. 34, §§ 71-73. Railroad mortgages 213
66, title 11. Injunction 214
76. Remedy for enforcing railroad mortgage 213

General Statutes, 1894.

§ 1512. Tax exemptions 777
2794. Corporations 777

Mississippi.

Statutes.

1874, April 9. Telegraph charter 771
1886, p. 98. Right to construct telegraph line. 770

Code, 1892.

§§ 3980-5. Taxation of telegraph companies .. 771

Missouri.

Constitution.

Art. 2, § 4. Natural rights 258
§ 30. Due process of law 258
4, § 53. Exclusive privileges 208, 258

Statutes.

1893, p. 200. Trade-marks 208

Revised Statutes, 1859.

§ 2419. Notice by record 50
5136. Agent's contract for sale of land 44

Montana.

Compiled Statutes.

§ 1237. Interest 660

Probate Practice Act.

§§ 254-70. Executor's account 637

Nebraska.

Constitution.

Art. 1, § 21. Compensation for property taken 856
2, § 11. Subject of statutes 856

Statutes.

1889, March 27, art. 1, § 3. Irrigation law 856

Consolidated Statutes.

§ 2084. Irrigation law 856

Compiled Statutes, 1889.

Chap. 16, § 145. Building associations 135
§§ 158, 159. Corporations 856

Nevada.

Statutes.

1891. Australian ballot law 781

New Hampshire.

Statutes.

1891, chap. 217. Time does not run in favor of absent defendant 276

General Laws.

Chap. 1, § 20. Definition of "lands" 58
53, § 2. Taxation of real estate 58
54, § 11. Taxation of real estate 58

New York.

Statutes.

1855, chap. 97. Tax on capital 394
1864, chap. 277. Powers of township trustees. 199
1880, chap. 269. Certiorari to review tax 394

North Carolina.

Code.

§ 1211. Payment of costs 261

North Dakota.

Political Code.

Art. 2, chap. 12. Public highways 698

Ohio.

Constitution.

Art. 1, § 1. Property rights 389
§ 16. Open courts 389

Statutes.

Vol. 89, p. 59, § 6563a. Costs in actions for wages 388

Revised Statutes.

§§ 3108–10. Father entitled to services of minor children 660
§ 3113. Liability of father for support of children 660
3171. Negotiable paper 320
3172. Indorsee of note may maintain suit 320
3281. Railroad appropriation of land 443
3282. Power over railroad land 443
3299. Lien on railroad property 443
3398. Lien of judgment for labor 443
4748. Penalty for obstructing highway 760
5022. Actions concerning land in another county 441
5055. When action is pending 441
5056. Judgment against land in another county 441
5375. Judgment lien 443
5661. Assignment by corporation after petition for dissolution 166
5866. Lien on railroad property 443
6449. Lien on railroad property 443
6969. Public officer's interest in contract 198
6990. Permitting car to obstruct highway 760
§§ 8516–35. Enforcing and preserving judgment lien 443

Oregon.

Statutes.

1887, p. 252. Bridge over Willamette river 90

Hill's Code.

Vol. 1, § 501. Alteration of municipal boundaries 447

Pennsylvania.

Constitution.

Art. 1, § 17. Obligation of contracts 809
§ 18. Attaint of treason 148
19. Corruption of blood 148
17, § 1. Carriers to carry each other's traffic 428
3. Rights of transportation 428
4. Consolidation of railroads 428

Statutes.

1815. Suit for divorce 296
1860, § 75. Penalty for murder 148
1861, Apr. 23. Consolidation of railroads 428
1887, May 24. Assessments for street improvements 402
1889, May 7. Sidewalk act 366
1891, p. 176. To protect miners 809

Rhode Island.

Constitution.

Art. 1, § 2. Distribution of public burdens 529

Statutes.

1889, chap. 781. Ballots 676
1892, May 21, chap. 1088. Tax exemption 528

Revised Laws, 1822.

P. 222. Descents 555

Public Statutes.

Chap. 42, § 6. Notice of tax 527
§ 7. Account for taxation 527
8. Tax list 527
18. Assessment roll 527
142, §§ 6, 7. Negotiable paper 104

Judiciary Act.

Chap. 33, § 20. Attachment of corporate shares 431

South Carolina.

Statutes.

1870. Occupation tax 226

Statutes at Large.

Vol. 17, p. 562. Occupation tax 224
p. 1053. Record of mortgages 776

Revised Statutes, 1873.

Chap. 22, p. 180. Affidavit sufficient to entitle mortgage to record 776
22, p. 186. Papers entitled to record 776
Chap. 82, p. 422. Record of real estate mortgage 776
120, pp. 548–9. Recording chattel mortgage 776

South Dakota.

Constitution.

Art. 5, § 23. Police magistrates 864
6, § 18. Compensation for property taken 863
17, § 18. Compensation for property taken 863

Statutes.

1891, chap. 94. Compensation for property taken 863

Compiled Statutes.

§ 778. Townships 864
§§ 1022–1188. Incorporation of towns 864
§ 1302. Assessing damages 862
1324. Appeal to court for assessment of damages 862
1612. Lien of personal property tax 284

Tennessee.

Statutes.

1823. Disposal of public land 771

Milliken & Vertrees' Code.

§ 3665. Set-off of judgments 705
5040. Satisfaction of foreign judgment 166

Utah.

Compiled Statutes, 1888.

§ 2087. Driving cattle upon highway 98

Vermont.

Statutes.

1886, No. 98. Regulations against contagious diseases 575
1892, No. 82. Regulations against contagious diseases 575

Virginia.

Statutes.

1874, March 24. Usury 828

Code.

§ 2318. Usury 828

Washington.

Constitution.

Art. 6, § 1. Electors 672
§ 6. Mode of election 672

Statutes.

1881, Nov. 29. Port Townsend charter 447
1890, March 27. Alteration of municipal boundaries 447

General Statutes.

§ 382. Endorsement of official ballots 672
384. Endorsement by inspectors 672
389. Disposition of unendorsed ballot 673
391. Unendorsed ballot void 672

West Virginia.

Code.

Chap. 100, § 14. Account between joint tenants 454
129, § 7. Exceptions to commissioner's report 461

Wisconsin.

Statutes.

1867, chap. 112, § 1. Municipal corporations 864

Wyoming.

Constitution.

Art. 3, § 40. Extinguishment of debt by legislature 249

Statutes.

1890, chap. 17. Change of venue 835
chap. 51. Voluntary assignments 242
1890–91, chap. 35. Adopting territorial laws 249
1895, chap. 84. Change of venue 835

Revised Statutes.

§ 498. Adopting common law 244
1623. Delivery of books of deceased official 250
3441. Change of venue 835

LAWYERS' REPORTS,

ANNOTATED.

SOUTH DAKOTA SUPREME COURT.

J. E. PARKER, *Appt.*,
v.
William J. RANDOLPH *et al.*, I. Remsen LANE, *Respt.*

(19 S. Dak. 131.)

***1. Respondent became the purchaser of notes and mortgages through defendant Emery, under general instructions to reinvest** certain money then in Emery's hands. There was a prior mortgage on the same premises, given by defendant Randolph to Emery, which Emery sold to appellant, and discharged before record of assignment. He subsequently procured a quitclaim deed of the mortgaged premises, and by quitclaim deed conveyed the same to respondent, who, in consideration therefor, surrendered the mortgages. *Held*, in an action by appellant to foreclose his mortgage, that respondent's quitclaim deed did not make him a bona fide holder of the title to the mortgaged premises.

2. The transfer of a note secured by a mortgage carries with it the mortgage also, and when the original mortgagee and payee sells such note without assigning the mortgage to the purchaser of the same, and then takes subsequent mortgages upon the same property, and fraudulently discharges the prior mortgage, he can gain no advantage thereby, either for himself or for one for whom he is acting as agent, in any of the transactions directly involving the property mortgaged.

(*Corson, P. J., dissents from proposition 1.*)

(July 18, 1894.)

*Headnotes by FULLER, *J.*

APPEAL by plaintiff from a judgment of the Circuit Court for Spink County in favor of defendant Lane in a proceeding to foreclose a mortgage upon property in which Lane was alleged to have some interest. *Reversed.*

The facts are stated in the opinion.

Messrs. **R. B. Hassell** and **John J. Myers** for appellant.

Mr. **Horace Comfort** for respondent.

Fuller, *J.*, delivered the opinion of the court:

This was an action to foreclose a mortgage on the premises in controversy, executed by the defendant William J. Randolph and his wife to C. F. Emery on the 27th day of December, 1884, to secure their promissory note of $1,200, of even date therewith. The complaint is in the usual form, and alleges on information and belief that the defendants George A. Poe, C. F. Emery, and I. Remsen Lane have or claim to have an interest in the premises, which interest is alleged to be subsequent to plaintiff's mortgage, and subject thereto. Upon the complaint and answer of defendant Lane the cause was tried to the court without a jury. Judgment for defendant, and plaintiff appeals.

Briefly stated, the facts are as follows, and undisputed: At the time the mortgage described in the complaint was executed, the mortgagor, William J. Randolph, was the owner of the premises. This mortgage was dated December 27, 1884, and recorded December 31, 1884, and on the 4th day of February, 1885, Emery sold the same, together with the note for $1,200, secured thereby, to the plaintiff. The note was in-

NOTE.—*The effect of a quitclaim deed in an otherwise perfect record title.*

This subject presents the question of the conflict between the old equity rule that one who takes a quitclaim deed is not a bona fide purchaser, and the rule established by the recording acts that an unrecorded deed is without effect against a subsequent purchaser without notice.

While there is some conflict in the decisions there is not so much as would appear from a cursory examination of them. Many of the cases in which the question of bona fide purchaser is discussed have no reference whatever to the rights of purchasers under the recording acts, while others contain mere *dicta* upon that question having been ruled by other principles entirely.

A disposal of the irrelevant cases first will leave the others in better condition to determine the location of the weight of authority.

Quitclaim purchasers not protected against latent equities.

There is a class of cases in which a purchase by quitclaim has been held not bona fide so as to be entitled to protection, in which the question was solely as to protection in equity against outstanding or latent equities. These cases are frequently cited as authority in cases arising under the recording acts. But they are now quite generally distinguished from such cases.

In considering the question of good faith under the betterment act, the court in Griswold v. Bragg, 19 Blatchf. 94, said it is true that in a class of cases in equity no person deriving title merely by a quitclaim deed is considered a bona fide purchaser.

The purchaser does not take free from the right of a judgment creditor of the grantor to have the record amended so as to show jurisdiction over

See also 32 L. R. A. 370.

dorsed as follows: "Pay to the order of J. E. Parker. C. F. Emery." On October 15, 1887, the defendant Randolph and his wife transferred the premises by quitclaim deed to the defendant George A. Poe, which deed was recorded May 19, 1888. Before recording his deed, and on the 1st day of May, 1888, the defendant Poe mortgaged the premises to the defendant Emery, the consideration mentioned in the mortgage being $1,000; and on the following day Poe gave Emery another mortgage on the same premises, and the consideration mentioned therein was $800. The $1,000 mortgage was recorded May 19, 1888, and the $800 mortgage on July 25th of that year. Without the knowledge or consent of the plaintiff, and on the 22d day of June, 1888, the defendant Emery executed a discharge of the mortgage securing the $1,200 note, which he had previously sold to plaintiff, and on the 17th day of July following caused the same to be recorded, and said mortgage was thereby satisfied of record. The plaintiff, J. E. Parker testified upon the trial that he bought the note and mortgage described in the complaint and offered in evidence from the defendant Emery, and paid him $1,200 therefor, and that said note and mortgage are still in his hands, unpaid and unsatisfied, and owned by him; that he had no knowledge of the execution of the discharge of the mortgage, and had never authorized Emery or any one else to make and execute or record a satisfaction of the mortgage. The defendant Lane testified that he bought the $1,000 and $800 mortgages from the defendant Emery some time during the year 1888, and that afterwards, and on the 29th day of January, 1889, said Emery, to satisfy said Poe's mortgages, amounting to $1,800, conveyed the premises to him by quitclaim deed; and that he had no notice of plaintiff's mortgage; and that the title to said land, so far as he could see from an abstract, appeared clear, and was vested in the defendant Poe at the time he gave the $1,000 and $800 mortgages to the defendant Emery. "*Q.* You purchased the mortgages in July, 1888, and took a deed in January, 1889? *A.* Yes. *Q.* Did you, at the time the deed was given, make any payment in addition to the previous advances on the mortgages? *A.* None whatever. *Q.* How did the deed come into your possession? *A.* It was sent to me by Mr. Emery. *Q.* Had it been recorded before you received it? *A.* Yes. *Q.* What was the consideration you paid for the mortgages? *A.* In the month in which these mortgages were purchased I had a loan of $2,500 paid off, and under general instructions to Mr. Emery the amount so paid off was reinvested. *Q.* Ther this was a part of the $2,500? *A.* Yes." It is conceded that no part of the amount for which plaintiff seeks to foreclose the mortgage has ever been paid, and that he never authorized the defendant Emery to discharge the mortgage securing the same. If plaintiff took an assignment of the mortgage from Randolph to Emery at the time he purchased the same, together with the note in suit, such assignment was never recorded. The interest of Randolph was conveyed to Poe by quitclaim deed, subject to plaintiff's mortgage; and at the time Poe executed mortgages amounting to $1,800 in favor of the defendant C. F. Emery, plaintiff's mortgage for $1,200 was of record, and the lien thereof was paramount to such subsequent mortgages. It appears from the evidence that the defendant Emery was the agent of the defendant Lane in the month of July, 1888, with full authority, under general instructions, to collect and reinvest his principal's money; and that during said month he became the owner of the above-described mortgages, amounting to $1,800, through his said agent, C. F. Emery, although the same were not assigned to him until late in the month of November following. It also appears that after said Emery purchased the $1,000 and $800 mortgages from the defendant Poe, and before the $800 mortgage had been recorded, and in the month of July, 1888, and

the grantor and make the judgment a lien on the land. Allison v. Thomas, 72 Cal. 562.

A purchaser by quitclaim from the grantees in a sheriff's deed is not protected from the defense that the sheriff's sale was not founded on a valid judgment. Leland v. Isenbeck, 1 Idaho, 469.

The recording act does not apply to equities arising out of a breach of a trust relation, and as to such equities a purchaser by quitclaim deed is not a bona fide purchaser entitled to protection in equity. Eoff v. Irvine, 108 Mo. 378.

A quitclaim deed is not good against an adverse possession. Ridgeway v. Holliday, 59 Mo. 444.

A holder of a quitclaim deed is not entitled to protection against outstanding or latent equities. Hastings v. Nissen, 31 Fed. Rep. 597; Gest v. Packwood, 34 Fed. Rep. 368; McClung v. Steen, 32 Fed. Rep. 373; Wood v. Holly Mfg. Co. 100 Ala. 326; Smith v. Perry, 56 Ala. 269; Derrick v. Brown, 66 Ala. 162; McMillan v. Rushing, 80 Ala. 402; O'Neal v. Seixas, 85 Ala. 80; Bragg v. Paulk, 42 Me. 502; Stoffel v. Schrœder, 62 Mo. 147; Stivers v. Horne, 62 Mo. 473; Mann v. Best, 62 Mo. 491; Hope v. Blair, 105 Mo. 90; Bowman v. Griffith, 35 Neb. 361; Richards v. Snyder, 11 Or. 511; Baker v. Woodward, 12 Or. 3; Woodfolk v. Blount, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736; Carter v. Wise, 39 Tex. 273; Hamman v. Keigwin, 39 Tex. 34; Harrison v. Boring, 44 Tex. 255; Martin v. Morris, 62 Wis. 423; Woodward v. Jewell, 25 Fed. Rep. 691.

A few cases seem inclined to take issue with the above, for it has been held that taking a quitclaim deed is not of itself sufficient to charge the grantee with notice that his grantor's title was procured by fraud. Mansfield v. Dyer, 131 Mass. 200.

And in Nidever v. Ayers, 33 Cal. 39, it was held that a purchaser by a quitclaim deed was entitled to protection against an unrecorded decree of distribution showing an equity against the property and incidentally that he was entitled to be protected against a resulting trust arising from the payment of the purchase money by one person and the taking of the title in the name of another person who made the quitclaim deed.

Purchaser with notice.

There are several cases in which although the court expressed an opinion upon the effect of taking a quitclaim deed the facts showed that the purchaser had actual notice of the outstanding title itself or was negligent in making inquiry after receiving notice of suspicious circumstances, of course such purchasers could not rely alone on the records.

apparently while said Emery was acting as the agent of defendant Lane, he fraudulently discharged plaintiff's mortgage for $1,200, and satisfied the same of record, and turned the Poe mortgages over to his principal, with an abstract of title to the premises, from which it appeared that the mortgagor, Poe, at the time of the execution of the mortgages, held the property under a quitclaim deed from Randolph, the original mortgagor. Emery subsequently took from Poe a quitclaim deed, and by quitclaim deed transferred the premises to the defendant Lane, in satisfaction of the mortgages for $1,800. Defendant Lane examined the abstract before he purchased the property, and observed that all prior conveyances were by quitclaim deeds, and it also appeared therefrom that his agent had taken the two mortgages, amounting to $1,800, and soon afterwards discharged plaintiff's mortgage for $1,200, and took a quitclaim deed from Poe to himself; and the record was therefore sufficient to put the defendant Lane on inquiry, as a grantee in a quitclaim deed is not a bona fide purchaser. Such deed simply conveys all the interest, if any, which the grantor has in equity at the time of its execution; and in this case defendant's mortgages were taken by his agent, subject to plaintiff's lien, which should not be defeated by the fraudulent acts of such agent.

In *Steele* v. *Sioux Valley Bank*, 79 Iowa, 339, 7 L. R. A. 524, it is said that "one who takes a mere quitclaim deed for real estate is conclusively presumed to have notice of prior equities, and takes subject thereto; and so an unrecorded bond for a deed takes precedence of a subsequent quitclaim deed, though the deed is based upon a valuable consideration, and is taken without actual notice of the bond." In *Peters* v. *Cartier*, 80 Mich. 124, the court says: "Under the cloak of quitclaim deeds, schemers and speculators close their eyes to honest and reasonable inquiries, and traffic in apparent imperfections in titles. The usual method of conveying a good title—one in which the grantor has confidence—is by warranty deed. The usual method of conveying a defective title is by quitclaim deed. The rule is wise and wholesome which holds that those who take by quitclaim deed are not bona fide purchasers, and take only the interest which their grantor had. It is therefore immaterial whether or not Cartier had notice or knowledge of complainant's title. He must be held to have purchased at his own risk, and, Douville having no title, conveyed none to him." A quitclaim deed is sufficient to put a person on inquiry. *Goddard* v. *Donaha*, 42 Kan. 754. In *Gest* v. *Packwood*, 34 Fed. Rep. 368, it is held that "one who takes a mere conveyance of another's interest in real property, or a quitclaim deed thereto, is not a purchaser for a valuable consideration, within the rule in equity which protects such a purchaser against prior conveyances or rights of which he had no notice; for by the very terms of his conveyance he has notice that he is purchasing nothing more than the interest or right his vendor then had, . . . and the assignment of a mortgage thereon for an antecedent debt does not make the vendee or assignee a purchaser for a valuable consideration, so as to protect him against a prior conveyance of, or right in or to, such property." Notice sufficient to prevent the purchase from being bona fide is said to inhere in the very form of this kind of conveyance. 2 Pom. Eq. Jur. 753.

It is conceded by counsel for respondent that the quitclaim deed alone would give the defendant no standing in court, but he contends that his title rests upon the two mortgages from Poe to Emery, of $1,000 and $800, respectively, which were assigned to him by said Emery. The defendant Lane testified that Emery had general authority to invest and reinvest at least $2,500 of his money, and that all the business transacted in purchasing these mortgages was done through said Emery, and that he took the quitclaim deed to the premises in satisfaction of these mort-

The quitclaim grantee cannot claim title if he had notice of the prior unrecorded deed. Stanley v. Schwalby, 85 Tex. 348.

One who takes a quitclaim deed cannot rely on the records if he has actual notice of outstanding titles. Logan v. Neill, 128 Pa. 457.

If the grantee in the quitclaim deed has sufficient notice to put him on inquiry he will not be entitled to the protection of the registry acts. Stetson v. Cook, 39 Mich. 753.

One who receives a quitclaim deed with notice that the land has been sold acquires no title as against a prior unrecorded deed in the hands of a bona fide purchaser in good faith. Wines v. Woods, 109 Ind. 291.

In Battershall v. Stephens, 34 Mich. 74, where a quitclaim deed was taken, the court seems to assume that it might under some circumstances be entitled to priority over prior unrecorded deeds but holds that under the circumstances of that case it was not so entitled because not taken in good faith.

In Peters v. Cartier, 80 Mich. 124, the court after deciding that the circumstances of the case were sufficient to put the intending purchaser on inquiry says the rule is wise and wholesome that those who take by quitclaim deed are not bona fide purchasers and take only the interest which their grantors have.

In Martin v. Brown, 4 Minn. 291, it is stated that when a person relies upon a mere quitclaim deed of the interest which another person may have in the property he does so at his peril and must see to it that there is an interest to convey. But in that case the evidence showed circumstances which should have given the purchaser notice of the outstanding interest.

The ruling in Martin v. Brown was followed in Everest v. Ferris, 16 Minn. 26.

The grantee in a quitclaim deed will obtain no title if he had sufficient information to put him on inquiry which would have led to the discovery of the prior unrecorded deed. Cummings v. Finnegan, 42 Minn. 524; Wolf v. Zabel, 44 Minn. 90.

In Pleasants v. Blodgett, 32 Neb. 427, the court after finding that the evidence showed notice, says the purchaser bought an interest which had previously been conveyed to another and the grantee under the quitclaim therefore took nothing.

A grantee under a mere quitclaim deed reciting a nominal consideration where no possession of the property is given under the deed acquires no right

gages; and it therefore clearly appears that the defendant Lane intended to extinguish the mortgages, and that the same thereby became merged to the extent of his interest in the premises. Plaintiff's mortgage directly affected the premises in controversy at the time Emery, as the agent of Lane, was acting in relation thereto; and the fact that it was a valid and subsisting lien, paramount to the Poe mortgages, was well known to the said agent; and the defendant Lane is charged with a knowledge of that fact, as the same was directly involved in matters within the scope of Emery's authority. At the time defendant's mortgages were executed, and for nearly three months thereafter, plaintiff's mortgage was of record, and remained so until the same was fraudulently released. Emery, who was acting for the defendant Lane, had at the time actual notice and knowledge of its existence, which in law became the notice and knowledge of his principal, the defendant Lane, who is presumed to have taken his mortgages and quitclaim deed subject to plaintiff's lien for $1,200. *Jones* v. *Bamford*, 21 Iowa, 217; *May* v. *Borel*, 12 Cal. 91; Boone, Mortg. 69. The transfer of a note secured by mortgage carries with it the mortgage also, and when the original mortgagee and payee sells such note without assigning the mortgage to the purchaser of the same, and then takes subsequent mortgages upon the same property, and fraudulently discharges the prior mortgage, he can gain no advantage thereby, either for himself or for one for whom he is acting as agent, in any of the transactions directly involving the property mortgaged. *Walker* v. *Schreiber*, 47 Iowa, 529. In *Downer* v. *Miller*, 15 Wis. 612, Paine, *J.*, speaking for the court, said: "Where a prior mortgage or judgment has by wrong or fraud been discharged of record, a subsequent mortgagee, whose rights existed at the time of such discharge, cannot claim to be injured by allowing it to be set aside and the prior mortgagee to be restored to his rights." From *Trenton Bkg. Co.* v. *Woodruff*, 2 N. J. Eq. 117, we quote without comment the following: "The cancellation of a mortgage on the record is only prima facie evidence of its discharge, and leaves it open to the party making such allegation to prove that it was made by accident, mistake, or fraud. On such proof being made, the mortgage will be established, even against subsequent mortgagees without notice." A court of equity will grant relief in cases like the present by considering a mortgage fraudulently discharged of record in full force, as the interests of justice are thereby best subserved. *Barnes* v. *Camack*, 1 Barb. 392; *Eggeman* v. *Eggeman*, 37 Mich. 436; *Banta* v. *Vreeland*, 15 N. J. Eq. 103, 82 Am. Dec. 269. All the business transacted in procuring these mortgages and the quitclaim deed was done through Emery, as the agent of the defendant Lane; and under the doctrine of principal and agent he is charged with a knowledge of the act of Emery with reference to the matters over which his authority extended, and which directly affected the premises in controversy; and, under all the circumstances of this case, the defendant Lane is not a bona fide owner of the premises discharged of plaintiff's mortgage, and *the judgment of the Trial Court is therefore reversed*, and a new trial is ordered.

Kellam, *J.*, concurring:

I think appellant is entitled to a reversal of this judgment on the ground that respondent, upon the evidence presented by the record, was not an innocent purchaser of the note and mortgage which he turned over in payment of the land, and that, under the circumstances of this case, his quitclaim deed did not make him an innocent purchaser of the mortgaged premises. As particularly noticed in *Judge* Fuller's opinion, respondent, Lane, became the purchaser of the note and mortgage through Emery, under general authority to him to reinvest his money,—that is, Emery acted for him. Emery knew all about the facts, and that the mortgage which

to take as against a prior grantee whether the deed of such grantee is recorded or not. American Mortg. Co. v. Hutchinson, 19 Or. 334.

The registration act will not protect one who for a nominal consideration takes a quitclaim deed from one who appears by the record to be the owner of the property but who states that he is not in fact such. Kearney v. Vaughan, 50 Mo. 284.

In Bradford v. Carpenter, 13 Colo. 30, it was held that the fact that a trust deed was on record, coupled with the fact that a subsequent grantee from its maker took a quitclaim deed, were sufficient to charge the grantee with notice of rights which had been acquired under a purchase at the trustee's sale, the evidence of which had not been recorded.

Where one who took a quitclaim deed to property in possession of a third person had his deed recorded before that under which the third person claimed, it was held that his title was subordinate to that of the third person which was a prior deed from the common grantor. African M. E. Church Trustees v. Hewitt, 37 Kan. 107.

In United States v. Sliney, 21 Fed. Rep. 894, a purchaser from one holding a quitclaim deed was denied the position of a bona fide holder because of the fact that a third person was in possession, inquiry of whom would have shown the true state of the title, but the judge takes occasion to state that it is authoritatively decided that a purchaser by deed of quitclaim simply is not to be considered as a bona fide purchaser without notice.

A person who takes a quitclaim of a tax title while the taxpayer is still in possession will take with notice of the taxpayer's equities. Merrett v. Poulter, 96 Mo. 237.

Other rulings.

A quitclaim deed from heirs will not affect a prior unrecorded deed from the ancestor. Rodgers v. Burchard, 34 Tex. 441, 7 Am. Rep. 283.

In Flagg v. Mann, 2 Sumn. 486, a deed of quitclaim was construed as a bargain and sale for the purpose of giving the grantee the rights of a bona fide purchaser.

In Ripley v. Seligman, 88 Mich. 177, the court held that the holder of the quitclaim deed was within the section of the statute which provided that no implied or resulting trust should be alleged or established to defeat or prejudice the title of a purchaser for a valuable consideration and without notice of the trust.

In Hockenhull v. Oliver, 80 Ga. 89, the court refuses to decide the question.

he assumed to discharge was not paid. Lane must be charged with his agent's knowledge. He was not, therefore, a bona fide owner of the note and mortgage. He turned over this note and mortgage, of which he was not a bona fide holder as against appellant, and took a quitclaim deed from Emery, who had by quitclaim become the apparent holder of the legal title. While there is an absolute conflict of authorities as to the legal effect of a quitclaim deed, I am well satisfied that under the circumstances of this case, as exhibited by the evidence before us, respondent, Lane, ought not to be held an innocent and bona fide holder either of the note and mortgage or of the title to the mortgaged premises as against appellant, Parker, whose mortgage was apparently fraudulently discharged by respondent's agent and grantor. It is well known that deeds denominated quitclaim have in practical use taken a variety of forms, in some of which it is difficult to determine whether they were intended as active, specific grants, or simply releases or discharges of some possible or contingent interest in the grantor. None of the deeds are set out in the abstract, and I assume that they were simply releases. Further facts may be developed on a retrial. For these reasons I concur in the reversal.

Corson, *P. J.*, dissenting

I am unable to concur with my associates in the reversal of the judgment in this case, placed, as I understand the opinion, mainly upon the ground that the defendant Lane acquired his title to the property through a "quitclaim deed," and therefore had constructive notice of the equities of Parker in the property. *Judge* Fuller, in the majority opinion, says: "Defendant Lane examined the abstract before he purchased the property, and observed that all prior conveyances were of quitclaim deeds, and took a quitclaim deed from Poe to himself; and the record was therefore sufficient to put defendant on inquiry, as a grantee in a quitclaim deed is not a bona fide purchaser." It seems to me that such a doctrine unnecessarily introduces into our system of conveyances a rule as to real-estate titles based upon the form of the deed that can only result in uncertainty and doubt in titles which, in my opinion, should be determined by the records alone, except in the well-recognized cases of actual notice or want of consideration. Our registry laws were established for the express purpose of enabling one by an examination of the records to ascertain the true title to property therefrom. But by the decision in this case a new element is introduced. If there is in the chain of title a quitclaim deed, then no reliance can be placed upon the records, and the party purchasing is charged with notice of all outstanding equities and conveyances not recorded. Such a doctrine is very far-reaching, and renders titles in this state very uncertain, as there are probably but few titles in which there are not more or less quitclaim conveyances.

While there are some authorities that seem to sustain the position of the opinion of the court, I am of the opinion that the better-considered and later cases are opposed to the views therein expressed. I shall not undertake to do more at this time than to call attention to a few of the cases bearing upon this question: *Dow* v. *Whitney*, 147 Mass. 1; *Chapman* v. *Sims*, 53 Miss. 154; *Willingham* v. *Hardin*, 75 Mo. 429; *Fox* v. *Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Graff* v. *Middleton*, 43 Cal. 341; *Frey* v. *Clifford*, 44 Cal. 335; *Hamilton* v. *Doolittle*, 37 Ill. 473; *Brown* v. *Banner Coal & Coal Oil Co.* 97 Ill. 214, 37 Am. Rep. 105. In the latter case the supreme court of Illinois quotes with approval from *McConnel* v. *Reed*, 5 Ill. 117, 38 Am. Dec. 124, the following: "A deed of release and quitclaim is as effectual for the purpose of transferring title to land as a deed of bargain and sale; and the prior recording of such deed will give it a preference over one previously executed, but which was subsequently recorded. In this respect, there is no distinc-

Distinction between conveyance of land and of mere interest.

A distinction should be and is made between cases where the quitclaim is intended to operate as a conveyance of the land itself and those where a mere transfer of the grantor's interest is intended. In the latter case of course a person who purchases merely another's interest in certain land will get nothing if there is not such interest. This distinction may perhaps reconcile all the cases, but it is difficult to determine from the reports of some of them whether the courts had in mind this distinction or not, and in view of the fact that the decisions of some states are uniformly one way the inference is that there was no intention to base the decisions upon this distinction. The decisions in which the distinction has been clearly draw are as follows:

One who takes a quitclaim, deed of the land itself, and not merely of the right, title, and interest of the grantor, is not within the rule that a person acquiring title by quitclaim deed is not entitled to the protection of the recording acts. Prentice v. Duluth Storage & Forwarding Co. 58 Fed. Rep. 437.

A conveyance of land will entitle the holder to the protection of the recording acts. Baylor v. Scottish-American Mortg. Co. 66 Fed. Rep. 631.

One who has in good faith purchased the absolute right to land in contradistinction to that of the title or claim of title of the grantor and by outside proof has shown that he has paid a valuable consideration therefor may claim as an innocent purchaser against adverse title or equities of which he has no notice. Richardson v. Levi, 67 Tex. 359.

If the deed purports to convey the land itself the grantee will be protected against a prior unrecorded conveyance. Dycus v. Hart, 2 Tex. Civ. App. 354.

If the deed purports to convey the land it will be protected by the registry acts. Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304.

In Miller v. Fraley, 23 Ark. 735, it is said it is no doubt the law that where a person bargains for and takes a mere quitclaim deed or deed without warranty it is a circumstance if unexplained to show that he had notice of imperfections in the vendor's title and only purchased such interest as the vendor might have in the property and that he is not entitled to protection in equity as an innocent purchaser without notice.

If it appears that the intention was not to pass the land formerly conveyed the later deed will not take preference of the prior one. Hamilton v. Doolittle, 37 Ill. 473.

tion between different forms of conveyance. As a general rule, the one first recorded must prevail over one of older execution, when made in good faith, and when it appears to have been the intention of the parties to convey again the same lands which had been previously conveyed. But where the terms of the second deed do not necessarily embrace the lands previously conveyed, and, on the contrary, are such as to show that it was not the intention of the grantor to include them, the court will give it such construction as not to embrace them," etc. The same view seems to be taken by the supreme court of Massachusetts in *Dow* v. *Whitney*, *supra*. That court says: "A deed of 'all the right, title, and interest,' or of 'all the interest,' of the grantor in a lot of land, conveys the same title as a deed of the land. It is the policy of our laws that a purchaser of land, by examining the registry of deeds, may ascertain the title of his grantor. If there is no recorded deed, he has the right to assume that the record title is the true title. The law has established the rule for the protection of creditors and purchasers that an unrecorded deed, if unknown to them, is, as to them, a mere nullity. The reasons for the rule apply with equal force in the case of a deed of the grantee's right, title, and interest as in that of a deed of the land. We are of the opinion, therefore, that the deed of Stephen Dow conveyed to his grantee a title which is good against any prior deed, if unrecorded. To hold otherwise would defeat the purpose of the registration laws, and create confusion in the titles to land." After referring to a number of prior cases, the court says: "In each of these cases the question was not as to the effect of a prior unrecorded deed of the same land, but it was whether the land previously sold was included within the description of the latter deed. In other words, it was a question of the construction of the deed relied upon. No such question can arise in the case at bar, as the description of the land intended to be conveyed is specific and exact. The same considerations apply to the deed from Alfred A. Dow to the plaintiff." These quotations I think will explain many of the cases apparently sustaining the opinion of the court. The question was not, in those cases, as to the character of the deed, but what did the grantor intend to convey by his deed? In the case of *Chapman* v. *Sims*, *supra*, the supreme court of Mississippi very fully reviews the cases seeming to hold that the grantee in a quitclaim deed is not a bona fide purchaser, and concludes as follows: "We conclude that there is no authority for the proposition that a quitclaim deed in the chain of title deprives him who claims under it of the character of a bona fide purchaser. There are *dicta* and suggestions and inferences to that effect; but we deny and repudiate the proposition as unsound, and insupportable on authority, principle, or policy." The court further says: "There is no reference to the subject of a distinction between quitclaim deeds or deeds with special covenants and those with general covenants of warranty as a protection to bona fide purchasers, or as a significant circumstance to put one on inquiry, in the full and learned discussion of bona fide purchasers by the English and American editors of Leading Cases in Equity, in connection with the case of *Basset* v. *Nosworthy*, 2 White & T. Lead. Eq. Cas. 3d Am. ed. 101, except to remark: 'But there is some difficulty in assenting to a *dictum* in *Oliver* v. *Piatt*, 44 U. S. 3 How. 333, 11 L. ed. 622, that taking a deed with a covenant of special warranty is sufficient to show a doubt of the warrantor's title,' etc. The case of *Le Neve* v. *Le Neve*, 2 White & T. Lead. Eq. Cas. 127 *et seq.*, presents an exhaustive discussion of the subject of notice, as considered by the English and American adjudications, and nowhere among them is a distinction between a quitclaim and a warranty deed adverted to as affecting a holder with notice, or putting him on inquiry. Nor is there any reason for such a

A conveyance of the right, title, and interest will convey only what the grantor has to convey. Coe v. Persons Unknown, 43 Me. 436.

A release of all right, title, and interest will not take precedence of a prior unrecorded conveyance. Nash v. Bean, 74 Me. 340.

A deed of the grantor's "now remaining" interest in the tract of land will not take precedence over a prior unrecorded deed of the tract. Eaton v. Trowbridge, 38 Mich. 454.

A conveyance of the right, title, and interest will not pass the property if it has been previously conveyed to another. Hope v. Stone, 10 Minn. 152.

One who takes a mere release of the interest of his grantor will not be protected. Tate v. Kramer, 1 Tex. Civ. App. 427.

One who takes merely a conveyance of interest is not a bona fide purchaser. Tram Lumber Co. v. Hancock, 70 Tex. 312; Lumpkin v. Adams, 74 Tex. 96.

The purchase of the chance of title will not constitute the purchaser a bona fide one. Carleton v. Lombardi, 81 Tex. 355.

While non-registered deeds are declared void by statute as to subsequent purchasers for value and without notice still the doctrine is well settled that a subsequent purchaser although for value and without actual notice who takes under a strictly quitclaim deed, that is one by which the chance of title and not the land itself is conveyed, will not be accorded the protection of the statute for the obvious reason that he contracted for the interest only that his vendor then had in land. Thorn v. Newson, 64 Tex. 161, 53 Am. Rep. 747.

Doctrine of the United States Supreme Court.

The distinction between the equity rule and that under the recording acts is well illustrated by the decisions of the Supreme Court of the United States. That court has uniformly refused to recognize the right of a purchaser by quitclaim deed to protection against latent equities, but as soon as the question of his right to protection under the recording acts was presented he was held to be entitled to such protection.

In Oliver v. Piatt, 44 U. S. 3 How. 333, 11 L. ed. 635, in which the question was whether or not certain trusts attached to lands in the hands of defendants, the court said the deeds taken were quitclaim deeds without covenants of warranty, except against persons claiming under the grantor, "in legal effect therefore the deed conveyed no more than his right, title, and interest in the property, and under such circumstances it is difficult to conceive how

distinction. A covenant of warranty does not convey title. It cannot enlarge a title conveyed by the deed in which it is inserted. It is no more than a covenant to indemnify against failure of title by eviction, actual or constructive. A quitclaim deed is as effectual to convey title as one with general warranty. . . . Such a doctrine as that a quitclaim conveyance in the chain of title affects the party who claims under it with notice of infirmities in the title would be as impolitic as it is unsupported by reason or authority." It seems to me, as stated by *Judge* Campbell in the above opinion, the wiser and safer course is to give full effect to our registration laws, except when parties have taken conveyances with actual notice of outstanding equities or prior conveyances, or have taken conveyances without consideration. Of course, when a party has actual notice, or has paid no consideration, it would be a fraud upon the party holding the equity or prior title to permit such a conveyance to prevail over the equity or prior conveyance. But where one is a purchaser in good faith for value, without actual notice, he ought not to be deprived of his property because of the form of the deed or deeds in his chain of title under which he claims.

MISSOURI SUPREME COURT (In Banc).

D. C. HICKMAN *et al.*, *Appts.*,
v.
Lucy J. GREEN *et al.*, *Respts.*

(123 Mo. 165.)

1. **The testimony of a witness** admitted without objection cannot be excluded because the other party to the transaction was dead.
2. **Notice to a special agent employed to make a certain exchange of property** without any authority to pass upon the title or matters connected with the title to the property obtained in the exchange is not imputed to the principal,—especially when the agent was acting for the other party also, and his concealment of the facts was a fraud on his principal.
3. **The principal is not chargeable with the knowledge of the agent** in relation to a fraud which he perpetrates in collusion with the other party.
4. **Possession of premises by a woman** who furnishes to her vendee as evidence of her title a quitclaim deed to herself with an abstract showing a perfect record title in her grantor, does not charge her vendee with notice of a prior unrecorded warranty deed from the same grantor to her and the heirs of her body.
5. **A quitclaim deed to a vendor who is in possession of the premises** from one who has the record title is sufficient to give his vendee the right to claim the protection of the recording laws against a prior unrecorded deed, by which such vendor was given a life estate only.
6. **A decision will not be reversed** merely because a seemingly pertinent question was excluded, if it is not shown what the party proposed to prove.

(*Sherwood, Brace, and Burgess, JJ., dissent.*)

(June 18, 1894.)

APPEAL by complainants from a judgment of the Circuit Court for Audrain County in favor of defendants in a proceeding brought to have reinstated a deed which was alleged to have been destroyed in fraud of complainant's rights. *Affirmed.*

Statement by **Gantt**, *J.*:

This is a suit in equity to restore a de-

the grantee can claim protection as a bona fide purchaser for a valuable consideration without notice against any title prior to that of the grantor which attached itself as an unextinguished trust to the land."

In May v. Le Claire, 78 U. S. 11 Wall. 232, 20 L. ed. 53, the court says the evidence "satisfies us" that the grantee had full notice of the frauds and the infirmities of the grantor's title. Whether this was so or not, having acquired his title by a quitclaim deed, he cannot be regarded as a bona fide purchaser without notice. In such cases the conveyance passes the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey.

In Alexander v. Rodriguez, 79 U. S. 12 Wall. 323, 20 L. ed. 406, the court says that a purchaser by quitclaim deed cannot have the immunities which the position of bona fide purchaser without notice gives to those entitled to its protection, as against the right of a grantor by a deed absolute to have the same declared a mortgage.

A purchaser by quitclaim deed will be bound by an estoppel which prevents his grantor from asserting his title to the premises. Dickerson v. Colgrove, 100 U. S. 578, 25 L. ed. 618.

In Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065, where one in whom the record title stood had estopped himself to set it up as against subsequent purchasers from one shown by the records to be a mortgagee, quitclaimed to the representative of an attorney who discovered the defect in the title while examining the title for a client, the court in holding that such title could not prevail over that of the client says no one taking a quitclaim deed can stand in the relation of bona fide purchaser to the property.

In Mansfield v. Excelsior Refinery Co., 135 U. S. 326, 34 L. ed. 162, the court recognizes the Illinois doctrine as declared in McConnel v. Reed, 5 Ill. 117, 38 Am. Dec. 124.

Where the title may be conveyed by a quitclaim deed and a deed of that description is accepted after payment of full value for the land the purchaser is entitled to rely upon the records so far as outstanding claims of third persons are concerned. McDonald v. Belding, 145 U. S. 492, 36 L. ed. 788.

A purchaser by quitclaim is entitled to protection under a statute providing that all instruments shall take effect from the time of recording as to "all subsequent purchasers in good faith, without notice." Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 350.

In the latter case the court said: "The doctrine expressed in many cases that the grantee in a quitclaim deed cannot be treated as a bona fide pur-

29 L. R. A.

See also 36 L. R. A. 658.

stroyed deed from J. G. Lakenan and wife to Mrs. Francis D. Hickman for her life, remainder to the natural heirs of her body, conveying to them a parcel of land in the city of Mexico, Audrain county, Mo., 90 feet front by 270 feet deep, being the north part of and taken off of the north side of lot No. 85 of Mrs. Sparks' Southern addition to said city of Mexico. It was alleged in the amended petition, and sustained by the proofs, that in 1886 Lakenan and wife, by warranty deed, conveyed said land to Mrs. Hickman and her bodily heirs, and that said deed was never recorded. In May, 1889, Mrs. Hickman and her children were in the possession of this lot occupying it as a residence. At the same time Mrs. Green, the defendant, was the owner in fee of a small farm of 40 acres near Mexico, on which she was residing with her husband and codefendant herein. Mrs. Hickman was desirous of moving to the country, and Mrs. Green preferred a residence in the city, and, thereupon, each of them employed the real-estate firm of Moore & Nelson to effect the exchange of these two properties. Their contracts with Moore & Nelson were in writing. Mrs. Hickman's contract with them was executed May 14, 1889, and Mrs. Green's on May 16th. In Mrs. Green's contract the land was placed with Moore & Nelson to exchange for Mrs. Hickman's lot. Mrs. Green asserted that she was the owner in fee of the 40 acres, and she agreed to take Mrs. Hickman's lot therefor, and give possession November 1, 1889, the agency to continue for one month from its date. Moore & Nelson were "authorized to sell and contract under seal with purchaser for said premises according to the price and term of payment above written, or any price or term which we may agree to accept, other than the above." Their commission was fixed at $50 if the exchange was effected, whether by them or another. Mrs. Hickman's contract was in all respects, except dates, exactly like Mrs. Green's. She represented that she was the owner in fee of her lot, and authorized the agents to exchange it for Mrs. Green's 40 acres, and for the same commission and upon the same stipulation, and give possession at "any time." Each owner valued her property at the time at $2,000, and there is no evidence that one was not as valuable as the other. Mrs. Hickman caused an abstract of her title to the lot to be made, and as by the abstract the title would appear in Lakenan, whose deed to her she had not recorded, and which, if recorded, would show she only had a life estate, she obtained from Lakenan and wife another deed,—a quitclaim deed and special warranty,—on May 23, 1889, conveying the title in the lot to herself without the words of limitation to her bodily heirs. Mrs. Green's title to the 40 acres has not been disputed. Mrs. Hickman, through her agents, Messrs. Moore & Nelson, gave Mrs. Green the abstract to the lot, and Lakenan's quitclaim deed, and Mrs. Green submitted the abstract and deed to M. Y. Duncan, Esq., for his opinion on the title as shown by the abstract and deed. He advised her that Mrs. Hickman could make her a good title, and accordingly Mrs. Hickman made Mrs. Green a warranty deed to the lot in town, and Mrs. Green and husband made Mrs. Hickman a warranty deed to the 40 acres, conveying a life estate to Mrs. Hickman, remainder in fee to her bodily heirs. Soon after the deeds were exchanged, Mrs. Hickman, with her children, the plaintiffs, moved out of her town house and took possession of the 40 acres, and lived on it until she died, and Mrs. Green took possession of and moved into the house in town. After the deeds were exchanged, Mrs. Hickman, her adult son, Thomas Hickman, J. G. Lakenan, and Nelson, of the firm of Moore & Nelson, met in the office of Moore & Nelson, in Mexico, and Nelson, in their presence, and at Mrs. Hickman's request, destroyed the unrecorded warranty deed from Lakenan and wife to Mrs. Hickman and her bodily heirs. The plaintiffs in this cause are D. C. Hickman, Mary L. Hickman, and Mariah Hickman,

chaser does not seem to rest upon any sound principle. It is asserted upon the assumption that the form of the instrument, that the grantor merely releases to the grantee his claim, whatever it may be, without any warranty of its value, or only passes whatever interest he may have at the time, indicates that there may be other and outstanding claims or interests which may possibly affect the title of the property, and, therefore, it is said that the grantee, in accepting a conveyance of that kind, cannot be a bona fide purchaser and entitled to protection as such; and that he is in fact thus notified by his grantor that there may be some defect in his title and he must take it at his risk. This assumption we do not think justified by the language of such deeds or the general opinion of conveyancers. There may be many reasons why the holder of property may refuse to accompany his conveyance of it with an express warranty of the soundness of its title or its freedom from the claims of others, or to execute a conveyance in such form as to imply a warranty of any kind even when the title is known to be perfect. . . . It would be unreasonable to hold that, for his inability to secure any other form of conveyance, he should be denied the position and character of a bona fide purchaser, however free, in fact, his conduct in the purchase may have been from any imputation of the want of good faith. . . . There is in this country no difference in their efficacy and operative force between conveyances in the form of release and quitclaim and those in the form of grant, bargain, and sale. . . . If in either case the grantee takes the deed with notice of an outstanding conveyance of the premises from the grantor, or of the execution by him of obligations to make such conveyance of the premises, or to create a lien thereon, he takes the property subject to the operation of such outstanding conveyance and obligation, and cannot claim protection against them as a bona fide purchaser. But in either case if the grantee takes the deed without notice of such outstanding conveyance or obligation respecting the property, or notice of facts which, if followed up, would lead to a knowledge of such outstanding conveyance or equity, he is entitled to protection as a bona fide purchaser upon showing that the consideration stipulated has been paid, and that such consideration was a fair price for the claim or interest designated. The mere fact that in either case the conveyance is unaccompanied by any warranty of title and against incumbrances or liens, does not raise a presumption of the want of bona fides on the part of the purchaser in the transaction."

adult children and heirs of Mrs. Frances Hickman, who died April 2, 1890, and prior to the institution of this suit. The defendants are Mrs. Green and her husband, Lakenan and wife, and J. T. Hickman and James L. Hickman, adult sons of Mrs. Hickman, who refused to become plaintiffs, and Mrs. Josie Hickman, the widow of a deceased son, William T. Hickman, and his two minor children, William T. and Sadie Hickman. At the request of plaintiff, the circuit court made its finding of facts, upon certain points in the case, as follows: "I find that the witness Nelson was the agent of both Mrs. Hickman and Mrs. Green at the time and before the transfer of the deeds was made between Mrs. Hickman and Mrs. Green; that he was agent only for the purpose of effecting an exchange of the lands between the parties, and was not authorized by Mrs. Green to judge of the goodness of the title she was getting from Mrs. Hickman, nor did he presume to act for her in that capacity; that Mrs. Green had in her employ an attorney, M. Y. Duncan, Esq., for the purpose of passing upon the title to the land she was getting; that Duncan, before the trade, did pass upon the title of Mrs. Hickman to the land traded Mrs. Green, and pronounced it good. I further find that Lakenan and Nelson destroyed the deed from Lakenan and wife to Mrs. Hickman [the deed that provided for a life estate in Mrs. Hickman, and remainder to her children], that this was done after the delivery of the quitclaim deed; that Nelson, before the consummation of the trade, knew, or had an opportunity of knowing, the contents of the destroyed deed. I further find Mrs. Green, before the trade, knew that Mrs. Hickman, deceased, was living on, and had possession of, the 90×270 feet lot traded Mrs. Green, and also knew that Mrs. Hickman claimed to be the owner of it, and, further, that the destroyed deed was never on record; that Mrs. Green, upon inquiry as to the title of Mrs. Hickman to the lot mentioned, had delivered to her by Mrs. Hickman [was furnished] an abstract of the title to said lot, taken from the records in the recorder's office of Audrain county, together with the quitclaim deed from Lakenan and wife to Mrs. Hickman, which showed an absolute estate in Mrs. Hickman to the said lot, which abstract and quitclaim deed Mrs. Green caused to be examined by a competent attorney, Duncan, who pronounced the title good. These are the only facts the plaintiffs desire me to find in writing, and the conclusion of law I draw from the facts as above found, together with others, is, Mrs. Green, being without notice of the existence, contents, or destruction of the first unrecorded deed from Lakenan and wife to Mrs. Hickman, and having exercised proper care and diligence in the examination of the title to said lot, is not affected by its fraudulent destruction, but takes a good title to said lot." To this finding plaintiffs duly excepted. The circuit court thereupon found the issues for defendants, and rendered judgment accordingly. A motion for new trial was made and overruled, and plaintiffs have appealed to this court. The errors assigned in this court are, briefly, that the circuit court erred in excluding the evidence of Frank R. Jesse, Esq., offered by plaintiffs, and in admitting the evidence of Mrs. Green herself, and in its finding of facts.

Mr. **John M. Barker,** for appellant:

The communications of Mrs. Green to Mr. Jesse were not privileged, because she was contemplating wrongdoing.

Mo. Stat. 1889, §§ 8648, 8660, 8661; *State* v. *McChesney*, 16 Mo. App. 259, and cases cited; *Charlton* v. *Coombes*, 33 L. J. Ch. 284, cited on page 103 of 7 Am. & Eng. Encyclop. Law.

And the court ought to have excluded her evidence because the other party was dead.

Meier v. *Thieman*, 90 Mo. 433.

Notice to her attorney, Mr. Duncan, was notice to her. Her agent Mr. Nelson, also knew it.

Livermore v. *Blood*, 40 Mo. 48; *Bank of Com-*

Where not protected.

In the following decisions the grantee has been held not to be entitled to protection:

In Runyon v. Smith, 18 Fed. Rep. 879, the rule in the United States Supreme Court in equity proceedings was applied to deprive the grantee of the benefit of the recording acts, and the judge who delivered the opinion expressed his preference for that rule, although the conveyance in the case was simply of the right, title, and interest of the grantor.

In Dodge v. Briggs, 27 Fed. Rep. 161, the court, upon the authority of Oliver v. Piatt, decides that a quitclaim grantee is not entitled to the protection of the recording acts.

Prior to 1876 a quitclaim deed gave the holder no right to rely on the recording acts in Minnesota. Dunn v. Barnum, 10 U. S. App. 86, 51 Fed. Rep. 355.

The purchaser by quitclaim deed is not protected by a statute which provides that every conveyance not recorded shall be void as against any subsequent purchaser in good faith and for valuable consideration of the same real estate or any portion thereof whose conveyance shall be first duly recorded. The court says: "It is only the purchaser of the same real estate or any portion thereof who by his priority of record cuts out the title of a prior purchaser. For when the second purchaser obtains by quitclaim deed only what his grantor had at the time when such deed was made he is not a purchaser of the same real estate which his grantor had previously conveyed away and therefore no longer has," and besides the grantee in a quitclaim deed is not a purchaser in good faith. Marshall v. Roberts, 18 Minn. 405, 10 Am. Rep. 201.

But the rule was subsequently changed there by statute. See cases cited under next subdivision of *note*.

A quitclaim grantee acquires no title as against prior unrecorded deeds. Shepherd v. Hunsacker, 1 Tex. Unreported Cas. 578.

McAdow v. Black, 6 Mont. 601, applies the doctrine of the United States Supreme Court cases in favor of an unrecorded mortgage.

In Utley v. Fee, 33 Kan. 668, it is stated that there is much reason for holding that one who procures a title by virtue of a quitclaim deed cannot be considered as an innocent or bona fide purchaser.

But the present doctrine in Kansas is otherwise.

A purchaser by quitclaim deed is not entitled to protection against unrecorded deeds. Fries v. Griffin (Fla.) 17 So. Rep. 66.

A grantee under a recorded quitclaim deed is sub-

merce v. *Hoeber*, 88 Mo. 87, 57 Am. Rep. 359:

The burden of showing that the defendant was an innocent purchaser rested upon her, and she did not show it. On the contrary, the facts and circumstances showed conclusively that she had notice, at least of sufficient facts, to put her on inquiry of Mr. Lakenan, if she had any wish to know.

Davis v. *Ownsby*, 14 Mo. 170, 55 Am. Dec. 105; *Maupin* v. *Emmons*, 47 Mo. 304; 3 Washb. Real Prop. 4th ed. 317; *Drey* v. *Doyle*, 99 Mo. 459.

This case of all cases is one where this court should intervene with its authority to correct the erroneous finding of the trial court.

See *Whitsett* v. *Ransom*, 79 Mo. 258; *Spohn* v. *Missouri Pac. R. Co.* 87 Mo. 74; *Garrett* v. *Greenwell*, 92 Mo. 120.

Mr. **George S. Grover** also for appellants.

Mr. **George Robertson**, for respondents:

The evidence of Mr. Jesse, the attorney to whom Mrs. Green carried the abstract title to the lands, was inadmissible.

Rev. Stat. 1889, § 8924; *Cross* v. *Riggins*, 50 Mo. 335.

Mrs. Green had no knowledge of the unrecorded deed from Lakenan to Mrs. Hickman and bodily heirs. She was therefore an innocent purchaser and took good title as against the whole world.

Rev. Stat. 1889, § 2420.

The deed from Lakenan to Mrs. Hickman conveys a good title to those unaffected with actual notice.

Munson v. *Ensor*, 94 Mo. 504; *Ebersole* v. *Rankin*, 102 Mo. 488.

If the authority of the agent is confined to obtaining the execution of the deed the notice of the agent is not imputable to the principal.

Devlin, Deeds, § 779; *Wyllie* v. *Pollen*, 32 L. J. Ch. 782.

If he thought by communicating this fact to Mrs. Green that the exchange would not be consummated and he withheld it from her in order that he would be able to collect the two $50 fees provided for in these contracts with Mrs. Green and Mrs. Hickman, then he committed the fraud for his own benefit and the principal, Mrs. Green, would not be affected with any notice that he had.

Devlin, Deeds, § 781.

Notice to an agent to bind the principal must be within the scope of the agent's employment and notice to him of any fact outside the scope of his agency will not affect his principal.

Trentor v. *Pothen*, 46 Minn. 298; *Roach* v. *Karr*, 18 Kan. 529, 26 Am. Rep. 788; *Smith* v. *Board of Water Comrs. of Norwich*, 38 Conn. 208; *Congar* v. *Chicago & N. W. R. Co.* 24 Wis. 157, 1 Am. Rep. 164; *Innerarity* v. *Merchants Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Dillaway* v. *Butler*, 135 Mass. 479; *Atlantic Cotton Mills* v. *Indian Orchard Mills*, 147 Mass. 268; *Allen* v. *South Boston R. Co.* 5 L. R. A. 716, 150 Mass. 200.

Mrs. Lucy J. Green was a competent witness.

Coughlin v. *Haeussler*, 50 Mo. 126; *Orr* v. *Rode*. 101 Mo. 387.

By some of the heirs conveying away their interest and all of the others retaining theirs they have not brought themselves within the rule that "he who seeks equity must do equity," and are not entitled to any relief in a court of conscience.

Kline v. *Vogel*, 90 Mo. 239; *Deichmann* v. *Deichmann*, 49 Mo. 108; 1 Pom. Eq. Jur. § 388.

Notice to the agent is not notice to the principal when the agent acts for himself, in his own interest and adversely to that of his principal.

Frenkel v. *Hudson*, 82 Ala. 158, 60 Am. Rep. 736; *Wickersham* v. *Chicago Zinc Co.* 18 Kan. 481, 26 Am. Rep. 784; *Reid* v. *Bank of Mobile*, 70 Ala. 199.

Where the agent is in collusion with a third person to defraud the principal, the latter will not be responsible for the knowlege of the agent in relation to such fraud.

ordinate to a prior unrecorded mortgage by his grantor. The grantee is no more entitled to plead the registry act against the mortgage than is the mortgagor himself. Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625.

The holder of a mere quitclaim deed cannot be regarded as a bona fide purchaser for value without notice, and "we see no reason why such purchaser should be allowed the aid of the registry statute to avoid a prior mortgage which has not been recorded, any more than the aid of the chancery court for his protection." Smith v. Branch Bank at Mobile, 21 Ala. 125.

But in Barclift v. Lillie, 321 Ala. 319, the court in holding that the holder of the quitclaim deed was not subject to a remote vendor's lien on the property because the vendor had placed himself in such a position that it was more equitable that he should lose the money than that the purchaser should, refuses to answer the question whether the fact of taking a quitclaim deed deprives a person of the character of bona fide purchaser, and states that there are authorities both ways.

Where entitled to protection.

In the following cases the grantee is held to be entitled to protection:

The holder of a quitclaim deed has a right to rely on the records. White v. McGarry, 2 Flipp. 572. In that case the court in considering the effect of the decisions of the Supreme Court of the United States said: "We are of opinion that in neither of them did the court intend to lay down the broad doctrine asserted by complainant's counsel. The question of the effect produced by the recording laws is not touched by either of the decisions. In transactions where no question of recorded titles is involved the rule to which reference has been made would apply, but in our opinion it does not apply when there are recording laws."

A quitclaim deed received in good faith and for valuable consideration which is first recorded will prevail over a deed of older execution which is subsequently recorded. Graff v. Middleton, 43 Cal. 341; Frey v. Clifford, 44 Cal. 335.

One accepting a quitclaim deed without notice of prior rights will be as fully protected as if it had contained full covenants of warranty, except where it appears from the conveyance itself that it was not the intention of the grantor to convey the land itself. Bradbury v. Davis, 5 Colo. 265.

In McConnel v. Reed, 5 Ill. 117, 38 Am. Dec. 124, the court says that the prior record of the quitclaim deed will give it preference over one previously executed but which is subsequently recorded, but it decided that in that case the terms of

United States Nat. L. Ins. Co. v. *Minch*, 53 N. Y. 144; *De Kay* v. *Hackensack Water Co.* 38 N. J. Eq. 158; *Barnes* v. *Trenton Gas Light Co.* 27 N. J. Eq. 33.

Gantt, J., delivered the opinion of the court:

1. No objection was made as to the competency of Mrs. Green when she was sworn. She was examined in her own behalf by her counsel, and cross-examined by plaintiffs' counsel at length, without a suggestion that she was incompetent to testify because of Mrs. Hickman's death. After all the evidence was closed, the plaintiffs moved the court to strike out or disregard all the evidence of Mrs. Green, because the other party to the trade was dead, which motion the court overruled. It is apparent at a glance that, if Mrs. Green was incompetent for the reason assigned, plaintiffs were as well aware of it before she testified as afterwards. They cannot then urge that they had no opportunity to interpose an objection. Having permitted her to testify without objection the subsequent motion to exclude came entirely too late. Such a practice is not tolerated in our courts. *Maxwell* v. *Hannibal & St. J. R. Co.* 85 Mo. 95; *State* v. *Hope*, 100 Mo. 347, 8 L. R. A. 608; 1 Rice, Ev. §§ 258, 259; *Quin* v. *Lloyd*, 41 N. Y. 349; *People* v. *Chacon*, 102 N. Y. 669; *Berry* v. *Hartzell*, 91 Mo. 132.

2. The important question in this case is that of notice to Mrs. Green of the execution and delivery of the warranty deed from Lakenan and wife to Mrs. Hickman for life, remainder to her bodily heirs. It is asserted by plaintiffs that she had direct actual notice, and, if not, she is bound by the knowledge which Nelson confessedly had of the existence of that deed prior to the exchange of the deeds of Mrs. Green and Mrs. Hickman. As to the direct evidence tending to show that Mrs. Green knew of the prior deed, Lakenan alone testifies. His story is that some days, perhaps a week, before the trade between Mrs. Hickman and Mrs. Green was consummated, Mr. and Mrs. Green passed him on the square in Mexico, and one of them,—he don't remember which,—asked him what kind of deed he had made Mrs. Hickman. He says: "I told them my best impression was I had deeded it to Dr. Hickman and wife and her bodily heirs." Mrs Green, in her evidence, denied that she ever met Lakenan as he stated, or talked with him, and emphatically denies that she ever heard, or knew, of the prior deed when she traded for the lot. This made a clear and distinct issue for the trior of facts. The trial judge had these two witnesses before him. He observed their manner and bearing, and he chose to believe Mrs. Green in preference to Lakenan. Upon an issue so sharp and distinct, and evidence so contradictory, we defer to the finding of the circuit court. But it is said that Mrs. Green is bound by the notice imparted to her agent, Nelson. By the terms of Mrs. Green's contract with Moore & Nelson, she simply employed them to effect an exchange with Mrs. Hickman. The agency was in no sense a general one. They were not employed to sell or convey the land to any one but Mrs. Hickman, or upon any terms except those specifically named in the instrument, or such as she might afterwards agree to. She did not employ them to examine Mrs. Hickman's title. On the contrary, she consulted Mr. Duncan, her attorney, on the title. Nor is there any evidence in the record that Moore & Nelson prepared the abstract or passed on the title. The duty of furnishing the abstract devolved upon Mrs. Hickman. It does not appear, then, that it was within the scope of the agency of Moore & Nelson to pass upon Mrs. Hickman's title, or that they did so, and it is firmly settled that notice to the agent, to bind the principal, must be within the scope of the agent's employment. *Mechanics Bank* v. *Schaumburg*, 38 Mo. 228; *Hayward* v. *National Ins. Co.* 52 Mo. 181, 14 Am. Rep. 400. By the Statute of Frauds in this state, section 5186,

the second deed did not necessarily embrace the land previously conveyed, and therefore it did not operate to the prejudice of the first purchaser, and the *dictum* in that case was recognized in Butterfield v. Smith, 11 Ill. 485.

In Harpham v. Little, 59 Ill. 509, the prior Illinois cases are explained as holding that a prior unrecorded deed containing the usual covenants of warranty will hold against a subsequent quitclaim deed to the same land and recorded, and which contains express limitations against a second grant of the same land, or which must be construed as not embracing the land previously conveyed.

A recorded unrestricted quitclaim deed takes precedence of a prior unrecorded warranty deed of the same premises by the same grantor. Brown v. Banner Coal & Coal Oil Co. 97 Ill. 214, 37 Am. Rep. 105; Stokes v. Riley (Ill.) 6 West. Rep. 784.

A recorded quitclaim deed taken by a purchaser in good faith for value will prevail over a prior unrecorded deed where the subsequent purchaser had no notice of the prior deed and could not have discovered its existence by an investigation of the public records or by the exercise of reasonable diligence, in making proper examinations and inquiries. Merrill v. Hutchinson, 45 Kan. 59.

A quitclaim deed is only a circumstance bearing on the question of the bona fides of the purchase. Knapp v. Bailey, 70 Me. 195.

Where a mortgagee of land has the legal title such title may be conveyed by a deed of release duly executed and recorded to one who has no notice of the prior unrecorded assignment of the mortgage. Welch v. Priest, 8 Allen, 165.

A deed of all the grantor's right, title, and interest in certain lands will prevail over an unrecorded prior deed of the same premises. Dow v. Whitney, 147 Mass. 1.

By statute in Minnesota the holder of a quitclaim deed is entitled to the same protection from the recording acts as the holder of other kinds of deeds. Strong v. Lynn, 38 Minn. 315.

The quitclaim grantee is entitled to protection. Sharp v. Cheatham, 88 Mo. 498, 57 Am. Rep. 433.

A purchaser for value by a quitclaim deed is as much within the protection of the registry act as one who becomes a purchaser by warranty deed. Munson v. Ensor, 94 Mo. 504. In that case the court says: "Cases of this and other courts are often cited as showing a different result, but from a careful consideration it will be seen that most of them have to do with equities which arise from transac-

"no contract for the sale of lands made by an agent shall be binding upon the principal unless such agent is authorized in writing to make such contract." This contract, then, must be the measure of the authority conferred, and by its terms it is limited to the special matter of the exchange of Mrs. Green's 40 acres for Mrs. Hickman's lot. Whatever difficulty may arise in determining, in some cases, whether the agency is general or special, we think it obvious that this was a special agency, if Mrs. Green was competent to appoint an agent for any purpose. Mechem, Agency, §§ 284, 285. In fact, so far as Moore & Nelson were concerned, it was taken for granted that Mrs. Hickman had a good title in fee, as she had represented to them when she employed them. The examination of her title was not a part of the duty imposed upon them by their contract with Mrs. Green, and any information they obtained, outside of her contract with them, is not to be imputed to her. But there are other considerations which forbid that their knowledge of this deed should be imputed to Mrs. Green. Moore & Nelson were also the agents of Mrs. Hickman. They had assumed a position antagonistic to Mrs. Green. They obtained their knowledge of this deed while serving the opposite party, and not in her employment, and it must be remembered that upon the consummation of this exchange they were to receive $100 commission, otherwise nothing. If they concealed from Mrs. Green what they and Mrs. Hickman knew, the exchange would be made; if they disclosed the existence of that deed, and the infirmity of Mrs. Hickman's title, the presumption was that Mrs. Green, as an ordinarily sensible woman, would not transfer her property, in which she had a perfect title in fee, for a mere life estate in property no more valuable. Their obligation to Mrs. Hickman might prevent their disclosing the weakness of her title, and the infirmity they had discovered in serving her and themselves, not Mrs. Green. *Johnston* v. *Shortridge*, 93 Mo. 227.

If this concealment was a fraud, it was committed in the interest of Mrs. Hickman and themselves. In the late case of *Merchants' Nat. Bank of Kansas City* v. *Lovitt*, 114 Mo. 519, it was held that, while it was a general rule that notice of a fact acquired by an agent while transacting the business of his principal is notice to his principal, and this rule was alike applicable to corporations and individuals, and that the agent was presumed to communicate said fact to his principal, the reason of the rule ceased when the agent acquired such knowledge while acting for himself, and not his principal, and in such a case the rule ought not to apply. In that case the court cited and approved the case of *Innerarity* v. *Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, in which it was said: "While the knowledge of an agent is ordinarily to be imputed to the principal, it would appear now to be well established that there is an exception to the construction or imputation of notice from the agent to the principal in case of such a contract by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the communication of the fact would necessarily prevent the consummation of a fraudulent scheme which the agent was engaged in perpetrating." See also to the same effect, *Frenkel* v. *Hudson*, 82 Ala. 158, 60 Am. Rep. 736; *Kennedy* v. *Green*, 3 Myl. & K. 699; *Cave* v. *Cave*, L. R. 15 Ch. Div. 639; *Re European Bank*, L. R. 5 Ch. 358; *Atlantic Nat. Bank* v. *Harris*, 118 Mass. 147; *Dillaway* v. *Butler*, 135 Mass. 479; *Allen* v. *South Boston R. Co.* 150 Mass. 200, 5 L. R. A. 716. When the agent is in collusion with a third-party person to defraud the principal, the latter will not be responsible for the knowledge of the agent in relation to such fraud. *National L. Ins. Co. of United States* v. *Minch*, 53 N. Y. 145. The conduct of Nelson in destroying the deed with his hands, by the direction of Mrs. Hickman, in the absence of Mrs. Green, brings this case peculiarly within the principle of

tions or a state of facts not required to be spread upon the records, or from some peculiar expression in the quitclaim deed.

A quitclaim deed takes priority over a former unrecorded deed to the same property. Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Boogher v. Neece, 75 Mo. 383; Willingham v. Hardin, 75 Mo. 429; Ebersole v. Rankin, 102 Mo. 488.

There is an exception to the rule where the equities are of such a character as the registry acts will apply to. Campbell v. Laclede Gas-Light Co. 84 Mo. 352.

A quitclaim is within the provisions of the recording acts. Wilhelm v. Wilken, 75 Hun, 552.

A bona fide purchaser without notice under a quitclaim deed is protected by the registration act. Morris v. Daniels, 35 Ohio St. 406.

A recorded quitclaim deed takes precedence. Cutler v. James, 64 Wis. 173, 54 Am. Rep. 608.

In Chapman v. Sims, 53 Miss. 163, it is said if the vendor has a good title a covenant of warranty is useless to the grantee, but if the mortgagee doubts it or does not know of it he quite naturally exacts a covenant of warranty for his indemnity and there is force in the suggestion of Mr. Rawle that requiring a covenant of warranty if any presumption arises from it is rather calculated to suggest either a doubt of the title or carelessness and indifference about it, and a looking to the covenant of warranty for indemnity against possible failure of title.

From the above cases it will be seen that aside from the courts which have followed and which may perhaps have considered themselves bound to follow the inapplicable doctrine of *Oliver* v. *Piatt*, the only court which is definitely committed to the doctrine that a quitclaim purchaser cannot rely on the records is Florida. To that must now be added South Dakota because of the decision in PARKER v. RANDOLPH, and probably also Iowa. But the condition of the law in that state is so anomalous as to require a statement of it alone.

The Iowa doctrine.

It was first held that a purchaser by quitclaim is protected by a statute that no instrument affecting real estate is of any validity against subsequent purchasers for a valuable consideration without notice unless recorded. Pettingill v. Devin, 35 Iowa, 344.

Then the court held that the holder of a quitclaim deed is not protected against outstanding equities. Watson v. Phelps, 40 Iowa, 482. And the same ruling was made in Postel v. Palmer, 71 Iowa, 157.

these cases and it would be unjust and unreasonable to impute Nelson's notice to Mrs. Green, by mere construction, under the facts of this case. So that, laying out of view altogether the fact that Mrs. Green was during all these transactions a married woman, and incapable of appointing an agent in respect to property not her separate estate, we do not think she was bound by Nelson's knowledge of the existence of Lakenan's prior deed. But it was held in *Henry* v. *Sneed*, 99 Mo. 407, in an opinion by Sherwood, *J.*, that it would be assumed, in the absence of evidence to the contrary, that the wife was seised of a legal estate in fee, and not of a separate estate; and it was held in *Wilcox* v. *Todd*, 64 Mo. 388, and subsequently followed in *Hall* v. *Callahan*, 66 Mo. 316, *Hord* v. *Taubman*, 79 Mo. 101, and *Flesh* v. *Lindsay*, 115 Mo. 1, that a "married woman could not have an agent as to real estate which was not her separate estate." If incapable of having an agent, it would seem utterly illogical to bind her by notice to one who was not permitted by the law, as announced in these decisions, to bear that relation to her. *Cook* v. *Walling*, 117 Ind. 9, 2 L. R. A. 769. Much stress is laid upon the fact that when Mrs. Hickman and Mrs. Green began to trade the title of record was in Lakenan, with Mrs. Hickman in possession. This is true, but there is absolutely no evidence that Mrs. Green knew anything whatever about this title of record. Conceding that Mrs. Hickman's possession was evidence of notice of her title, how does that affect Mrs. Green? When the negotiations advanced far enough, Mrs. Hickman asserted in writing that she was the owner in fee, and furnished the abstract of title which showed a perfect title in Lakenan, and along with it she furnished a quitclaim deed from him to herself, with a special warranty. If Mrs. Green had her suspicions aroused by the quitclaim deed, she very sensibly and naturally submitted the abstract and deed to her counsel, and desired to know if Mrs. Hickman could convey her a good title. As the title was perfect in Lakenan he advised Mrs. Green that Lakenan's quitclaim conveyed to Mrs. Hickman a perfect title, and she could convey a good title, according to the decisions of this court in *Fox* v. *Hall*, 74 Mo. 315, 41 Am. Rep. 316; *Boogher* v. *Neece*, 75 Mo. 383; *Willingham* v. *Hardin*, Id. 429; *Munson* v. *Enor*, 94 Mo. 504; *Ebersole* v. *Rankin*, 102 Mo. 488, and *Hope* v. *Blair*, 105 Mo. 90. He advised and required the Lakenan deed to be recorded and put on the abstract, and that was done, and Mrs. Hickman warranted the title to Mrs. Green. Her information, then, after examining in the usual and proper way, to wit, by requiring an abstract, and seeking the advice of competent counsel, disclosed that Mrs. Hickman was the owner in fee of the lot, and her possession was consistent with her paper title, and, having purchased it for value, she is as much within the protection of the statute for recording deeds as one who purchased from one having a warranty deed, and she acquired the title against the prior unrecorded deed of which she had no notice. *Ebersole* v. *Rankin*, *supra*. We attach no importance to the fact that Mrs. Green's deed to Mrs. Hickman conveyed a life estate to her, with remainder to her bodily heirs, as it was, no doubt, drawn in this manner at Mrs. Hickman's suggestion, as she had a right to have it conveyed in any way she preferred. When it is considered that one of these heirs, J. T. Hickman, an adult son, stood by and saw the prior deed destroyed without protest, that all the grown children moved to the Green property, and that two of them have since mortgaged their shares in it, with full knowledge of all these facts, and that not one of them gave Mrs. Green notice until after the deeds had passed and possession given, there is little to commend in this action, so far as the adults are concerned.

3. It remains only to notice the complaint that the circuit court refused to let Mr. Jesse, an attorney, answer two questions, put

In Smith v. Dunton, 42 Iowa, 48, the principle of the Watson Case was applied to a case of defective record because the name of the grantor was indexed in the wrong place.

In Besore v. Dosh, 43 Iowa, 211, the same principle was applied to a quitclaim purchaser of land held under a tax deed which was void because of absence of a valid sale.

In Springer v. Bartle, 46 Iowa, 688, the question was as to the validity of the tax title held under a quitclaim deed, the evidence showing that it was originally acquired by fraud, and the court said that it was claimed that a ruling contrary to the Watson Case was made in the Pettingill Case, but continued: "This is a grievous mistake; no such point was presented in that case. The principle decided was that under the recording act a person holding under a quitclaim deed acquired a prior right to one claiming under a bond for a deed of which he did not have notice. In that case the person executing a quitclaim deed had the legal title, but in the case at bar (the title quitclaimed) was tainted with fraud against which the quitclaim deed did not protect the plaintiff. Besides which the statute expressly provides that such purchaser as Devin in the Pettingill Case is protected against the prior unrecorded conveyance."

29 L. R. A.

Then various decisions were made as follows:

The holder of a quitclaim deed is not protected against outstanding equities. Wightman v. Spofford, 56 Iowa, 145.

In Kaiser v. Waggoner, 59 Iowa, 41, where it was sought to reach certain land which was alleged to have been transferred in fraud of a judgment, the court said the grantee is not a bona fide purchaser and under the circumstances it was incumbent on her in order to cut off the equity of the plaintiff to establish that she had paid value for the land without notice.

In Raymond v. Morrison, 59 Iowa, 371, the court after stating that it was inclined to think that there was sufficient notice to prevent the purchase from being bona fide, said that "he is not entitled to protection for the reason that he held under a quitclaim deed only," but as the question of his right was not involved, while that of his grantee was, such statement is not of controlling force.

In Laraway v. Larue, 63 Iowa, 412, the question was as to the validity of a quitclaim against one in possession of the property claiming to hold adversely to his grantor; and the court after intimating that the evidence showed that he had knowledge of the claim of the one in possession says: "A conclusive answer is" that he held under a quit-

to him by plaintiffs. He was first asked to state "what, if anything, Mrs. Green had ever said to him about the lost or destroyed deed;" and, without waiting for an answer, he was immediately asked "if she didn't come to him and ask him to destroy the deed, and supply it with another deed." Before these questions, or either of them, were answered, counsel for defendant, by permission, made inquiry, and developed that Mr. Jesse, at that time, was engaged with Mr. Duncan in defending a case in the circuit court for defendant, and afterwards in this court, reported as *Davis* v. *Green*, 102 Mo. 170, 11 L. R. A. 90, and that, if she came to him at all, she came to him as her attorney; and thereupon the court sustained the objection to the question as one of privilege. The question was not pressed. No offer was made to show that Mr. Jesse would, if permitted, testify to any material fact. It has been ruled again and again that this court will not reverse a case merely because a seemingly pertinent question is excluded, but the party must go further, and state what he proposes to prove, so that the court can judge of its materiality and relevancy, otherwise it is said the cause might be reversed, and upon retrial the matter elicited by the question may be immaterial and incompetent. *Aull Sav. Bank* v. *Aull*, 80 Mo. 199; *Jackson* v. *Hardin*, 83 Mo. 175; *State* v. *Leland*, 82 Mo. 260; *Kraxberger* v. *Roiter*, 91 Mo. 404, 60 Am. Rep. 262; *Berthold* v. *O'Hara*, 121 Mo. 88. The mere denial of this question is not sufficient ground to reverse a cause otherwise well tried.

The judgment is affirmed.

Black, *Ch. J.*, and **Barclay** and **Macfarlane,** *JJ.*, concur.

Sherwood, *J.*, dissenting:

"This is an equitable proceeding to obtain a decree restoring a destroyed deed which gave to the bodily heirs of Frances D. Hickman a remainder in fee in a certain lot in Mexico after the expiration of their mother's life estate in said lot. The petition also asked for other and further relief. In 1886, Lakenan and wife, for a consideration of $2,000, conveyed to Frances D. Hickman, for her life, with remainder to the natural heirs of her body, the lot in litigation; being a lot 90 feet by 270 feet, to wit, the north part of lot 35, Sparks addition, in the city of Mexico. This deed—a general warranty deed—was never put to record, but was retained by Mrs. Hickman, the life tenant, who thereupon with her family, took possession of the premises. About three years thereafter, to wit, in 1889, Lucy J. Green and her husband became desirous of exchanging a 40-acre tract in the county, owned by Mrs. Green, for the litigated lot, on which Mrs. Hickman and her family then lived. So they engaged the services of Moore & Nelson, real-estate agents in Mexico, to effect the exchange, and this was by the following contract: 'Contract between Principal and Agent for the Sale of Real Estate. This writing made on the 16th day of May, A. D. 1889, witnesseth that Lucy Green and J. R. Green, of the county of Audrain, in the state of Mo., have this day placed with Moore & Nelson the following described property, of which they are the owners in fee, situate in township 50, of range 9, county of Audrain, and state of Mo., to wit, all that certain farm or tract of land containing 40 acres, N. E. S. W. Sec. 12, Tp. 50, Range 9, for which the said Lucy J. Green and J. R. Green hereby agree to take in exchange lot No. 35, Sparks' addition to Mexico, Mo., belonging to Francis D. Hickman; price, $2,000. Terms of payment as above. Amount of mortgage of property? ——— How soon after sale can give possession? November 1st, 1889. The said Moore & Nelson shall have the agency of sale for the above property for one month from the date hereof; and we hereby authorize them to sell and contract under seal with purchaser for said premises according to the price and terms of payment above written, or any price or terms

claim deed from the alleged cotenants of the one in possession, and he "occupied no better position than they did."

The grantee by a mere quitclaim deed cannot be regarded as an innocent purchaser without notice of the rights of a prior purchaser from the same grantor by a deed defectively acknowledged. Fogg v. Holcomb, 64 Iowa, 627.

In Butler v. Barkley, 67 Iowa, 498, the plaintiff claimed that a deed executed to a third person was for his use and benefit and asked that the title be transferred to him. The grantor answered claiming that the deed was procured by fraud and the court said that being a quitclaim deed the plaintiff was charged with notice of all equities existing adversely to the title he derived under the deed and a decree in favor of the defendant was affirmed.

Bradley v. Cole, 67 Iowa, 653, was a suit for taxes paid and the court says defendant acquired the land by quitclaim deed and is charged with notice of plaintiff's equities and the law regards his purchase as subject thereto.

Finally the question again arose as to the rights of a quitclaim purchaser under the recording acts, and the court held that the holder of a quitclaim deed is not protected by a statute providing that unless recorded no instrument affecting real estate is of any validity as against subsequent purchasers without notice. Steele v. Sioux Valley State Bank, 7 L. R. A. 524, 79 Iowa, 339; Wickham v. Henthorn (Iowa) 59 N. W. Rep. 276.

The court said that the Pettingill Case had been in effect overruled. It would seem that in this ruling the court lost sight of the distinction between latent equities and rights under the recording act, and thus unwittingly placed itself upon the side of the question which the other courts were hastening to abandon.

Care must be used.

A person who holds real estate by virtue of a quitclaim deed only from his immediate grantor whether he is a purchaser or not, is not a bona fide purchaser with respect to outstanding and adverse equities and interests shown by the records or which are discoverable by the exercise of reasonable diligence in making proper examinations and inquiries. Johnson v. Williams, 37 Kan. 179; Goddard v. Donaha, 42 Kan. 754; Cook v. Dinsmore, 5 Ohio C. Ct. Rep. 385.

A person receiving a quitclaim deed is presumed to take with notice of all outstanding interests and claims of which he can obtain knowledge by the exercise of a reasonable degree of diligence in

which we may agree to accept other than the above; and if the said property to be sold or exchanged during the period above stated, no matter by whom, or after above period on information obtained through their agency, we agree to pay them a commission of fifty dollars on gross amount of such sale or exchange.

his
'Lucy J. Green. [Seal.] J. R. × Green.
mark

'[Seal.] Signed in presence of J. T. Nelson.' Two days later a similar contract was entered into between this firm and Mrs. Hickman. In order to effect this exchange, it became necessary to destroy the deed from Lakenan to Mrs. Hickman, and to substitute in lieu thereof a deed from Lakenan to Mrs. Hickman alone, which would convey merely a fee-simple title. So such new deed was executed by the complainant Lakenan to Mrs. Hickman alone; but this deed was but a quitclaim deed, through it recited the same consideration as the former one. On the other hand, the deed executed by Mrs. Hickman to Mrs. Green, which conveyed to her the lot in controversy, to her sole and separate use, was a general warranty deed. But, when Mrs. Green and her husband came to execute the deed for the 40-acre farm, they executed a general warranty deed to Mrs. Hickman, for life, with remainder to her bodily heirs, in similar form to her original deed from Lakenan. The parties then exchanged deeds, and moved, respectively, to the farm and lot thus mutually exchanged, after which the original deed to Mrs. Hickman by Lakenan was destroyed by Nelson, the agent of both parties, in the presence of Mrs. Hickman, Thomas Hickman, and Lakenan. Mrs. Hickman died before this proceeding was instituted. The answer of Mrs. Green was a general denial; admitted the exchange of the different pieces of property, as already stated, and that the deed of Mrs. Green to Mrs. Hickman and her heirs was as heretofore alleged; and denied what is not expressly admitted, etc. Reply filed. In addition to Mrs. Green and her husband, there are other defendants, either the children, or else grandchildren, of Mrs. Hickman, for whom a guardian *ad litem* was appointed. Lakenan was also made a defendant. The court below found for Mrs. Green, and that she was a purchaser without notice, and plaintiffs appeal. Other facts than heretofore recited will appear in the following opinion:

"The dominant issue in this cause is the question of notice to Mrs. Green. After discussing this question, others, of less importance, but yet bearing on the main issue, will be passed upon.

"1. No reason is perceived why in this case the general rule should not prevail, that notice to the agent is notice to the principal. *Meier* v. *Blume*, 80 Mo. 184; *Hayward* v. *National Ins. Co.* 52 Mo. 181; *Chouteau* v. *Allen*, 70 Mo. 290; Story, Agency, § 140; Wade, Notice, §§ 31-33; Kerr, Fraud & Mistake, 258. In this case the agency of Moore & Nelson was a general one. By the written authority and contracts entered into by and between them and Mrs. Green and Mrs. Hickman, respectively, they were empowered to make the exchange of properties, 'to sell and contract under seal with the purchaser for said premises according to the price and terms of payment above written, or any price or terms which we may agree to accept, other than the above.' If such language did not make Moore & Nelson general agents, it is hard to say what words would be sufficient. Notwithstanding Nelson's evasive manner of answering the question as to whether the original deed from Lakenan to Mrs. Hickman and her heirs was 'in his hands' before its destruction, he was forced to admit that he knew of its existence before that time, and knew that it was not destroyed till after the other deeds were delivered; and he further states that 'Mrs. Hickman requested it,' *i. e.* the destruction of the deed. This single circumstance was amply sufficient to fix Mrs. Green with notice of the unrecorded deed,

the examination of all the public records affecting the title to the property included in such deed and from inquiries which he might make of persons who, the records show, had redeemed the property from tax sales and had paid subsequent taxes thereon, or were otherwise ostensibly interested in the property. Smith v. Rudd, 48 Kan. 296.

The holder of the quitclaim deed must make a clear case of bona fide purchase before his deed will be sustained. Hoyt v. Schuyler, 19 Neb. 652.

Remote quitclaim in chain of title.

HICKMAN v. GREEN is in accord with the current of authority upon the branch of the subject. The greater number of cases as well as sound principle hold that if a grantee receives a warranty deed he will not be affected by the fact that his grantor or some more remote person in the chain of title received merely a quitclaim deed.

The rule that the holder of a quitclaim deed cannot be a bona fide holder, even if applicable elsewhere, will not be applied where the deed is a remote link in the chain of title of one who receives a regular warranty deed to the property. United States v. California & O. Land Co. 148 U. S. 31, 37 L. ed. 354.

The presence of a quitclaim deed in a chain of title will not deprive of the benefit of the recording acts one who takes by warranty deed from a grantor who in turn received a warranty deed. Sherwood v. Moelle, 1 L. R. A. 797, 36 Fed. Rep. 478.

One who takes a warranty deed is not affected by the fact that his grantor held by a quitclaim deed only. Meikel v. Borders, 129 Ind. 529.

The holder of a warranty deed is not deprived of the position of bona fide purchaser by the fact that there is a quitclaim deed in the chain of title. Winkler v. Miller, 54 Iowa, 476; Huber v. Bossart, 70 Iowa, 78; Chapman v. Sims, 53 Miss. 163.

A person who finds a complete chain of conveyances from the original grantee to his grantor upon the proper records of the county may rely thereon although there is a quitclaim deed among them provided he has no notice either actual or constructive of equities affecting the title and is a purchaser for a sufficient consideration. Snowden v. Tyler, 21 Neb. 199.

In Hume v. Franzen, 73 Iowa, 25, in which a remote quitclaim deed appeared in the chain of title, the court said the burden is upon the present claimant to prove that he is an innocent purchaser for value and upon that point there does not appear to be any evidence. And for that reason a decree was rendered against him.

and to inform her of it as fully as her agent was informed. And it does not matter that it does not appear of what kind of estate Mrs. Green was seised in the 40-acre farm. Grant that she was seised simply in fee, and therefore, under our rulings, could not have an agent who could bind her by a contract in writing with a third person (*Wilcox* v. *Todd*, 64 Mo. 390; *Hall* v. *Callahan*, 66 Mo. 316; *Hord* v. *Taubman*, 79 Mo. 101; *Henry* v. *Sneed*, 99 Mo. 407), still it does not thence follow that notice to Nelson would not be notice to her. Under a recent ruling of this court (*Flesh* v. *Lindsay*, 115 Mo. 1), a married woman is not to be regarded as a very impersonal person, after all. Mrs. Green had eyes to see, and ears to hear; and doubtless Nelson communicated to her what he knew regarding the prior deed, and he will be presumed to have done so. In the case cited, Burgess, *J.*, applied to a married woman, in the use of her property, the maxim, '*sic utere tuo*,' etc.; and I can discover no reason why another maxim, equally familiar, is not applicable here. In a word, Mrs. Green cannot be permitted to flaunt her disability in the face of a court of equity; assert she had no notice, because she could have no agent; and still, at the same time, claim and hold under the questionable services of the very person whom she employed in that fiduciary capacity. Such conduct will not be tolerated by a court of conscience. '*Qui sentit commodum sentire debet et onus.*' Broome, Legal Maxims, 8th ed. *706; Burrill, Law Dict. 369; Story, Agency, 9th ed. § 389; 1 Story, Eq. Jur. 13th ed. § 469.

"2. But there are other facts and principles of law which tend to the same conclusion: Thus, when Mrs. Green began her negotiations with Mrs. Hickman, the record of deeds of the county showed that Lakenan was the owner of the legal title to the lot. This gave Mrs. Green constructive notice that he was the real owner. 3 Washb. Real Prop. 5th ed. 835, and cases cited. And this, too, when Mrs. Hickman was then in the actual, notorious, open, exclusive, unequivocal, and visible possession of the lot, and had been thus in possession for some three years previously; and this was known to Mrs. Green, who resided on her 40-acre farm, some three miles from there. Under the authorities in this state, such a possession is evidence of actual notice, sufficient, in ordinary circumstances, to satisfy a jury that a party purchased with knowledge of a prior deed. Actual notice, under our registry acts, is not certain knowledge, but such information as men generally act upon in the transactions of life. *Vaughn* v. *Tracy*, 22 Mo. 415, 25 Mo. 318, 69 Am. Dec. 471. In *Speck* v. *Riggin*, 40 Mo. 405, the court holds that 'notice is actual when the purchaser either knows of the existence of the adverse claim, or is conscious of having the means of knowing, although he may not use them.' See also, *Maupin* v. *Emmons*, 47 Mo. 304; *Martin* v. *Jones*, 72 Mo. 28; 3 Washb. Real Prop. 336; Tiedeman, Real Prop. Enlarged ed. § 819. A recent author says upon this subject that 'if facts are brought to the knowledge of a party which would put him, as a man of common sagacity, upon inquiry, he is bound to inquire; and if he fail to do so, or to do properly, whether fraudulently, or only negligently, he will be charged with notice of what he might have learned upon reasonable examination.' Bigelow, Frauds, 386. In another work of merit, touching the point in hand, it is said: 'The reason of the rule is this: That it is the duty of a person who proposes to deal respecting the title to a particular tract of land to ascertain in advance who is in possession of it, and by what right he claims to hold it; and if he neglects this duty it is only just that he should be charged with the knowledge that he would have obtained, had he performed it.' 2 White & T. Lead. Cas. Eq. 180. See also, *Leavitt* v.

In DeVeaux v. Fosbender, 57 Mich. 579, the court divided evenly upon the question whether or not the holder of a warranty deed was entitled to rely on the record which showed a quitclaim to his remote grantor of the owner's rights, title, and interest in and to certain real estate in a certain county.

There are some courts, however, which refuse to permit the registry acts to apply in favor of any chain of title which contains a quitclaim deed.

Thus in Texas it has been said that a quitclaim deed in a chain of title is fatal. Garrett v. Christopher, 74 Tex. 453; Cain v. Woodward, Id. 549.

But on rehearing in Finch v. Trent, 3 Tex. Civ. App. 572, the court holds that since one of the deeds in the chain of title was a mere quitclaim of the interest of the grantor it would not support a title depending alone upon a bona fide purchase, and that therefore the chain of title was insufficient.

In a later Texas case, however, it was held that the mere fact that there are quitclaim deeds in the chain of title will not prevent one taking under a warranty deed from being a bona fide purchaser. Finch v. Trent, 3 Tex. Civ. App. 568.

So in Runyon v. Smith, 18 Fed. Rep. 579, the rule of Oliver v. Piatt was applied to a case where the quitclaim deed was a remote link in the chain of title although the decision was placed upon the ground that the purchaser did not pay value for the land.

The fact that the immediate grantor of the purchaser holds under a quitclaim deed is a circumstance well calculated to excite inquiry which if not prosecuted properly will affect the purchaser with notice of every fact which such inquiry prosecuted with due diligence would disclose. Aultman v. Utsey, 34 S. C. 559.

The fact that a grantee holds only under a deed of quitclaim is sufficient notice to the vendee to put him on inquiry as to the true state of the title. Baker v. Woodward, 12 Or. 3.

In American Mortg. Co. v. Hutchinson, 19 Or. 334, the court held that a series of quitclaim deeds did not constitute a chain of title upon the record of which the holder of a warranty deed from the last quitclaim grantee could rely.

In Raymond v. Morrison, 59 Iowa, 371, it was claimed that the holder of the quitclaim deed had sufficient notice to prevent his becoming a bona fide purchaser, and the court says: "We are inclined to think this is so, but it is really immaterial whether he had or not" because he is not entitled to protection for the reason that he held under a quitclaim deed only and cannot be regarded as a good-faith purchaser. But the question being as to the rights of his grantee by warranty deed the court held that if he purchased without noticed he was entitled to protection. H. P. F.

La Force, 71 Mo. 353, and cases cited. Besides all that, the very written contract or memorandum—call it what you will—which Mrs. Green signed, and gave to Moore & Nelson, for the exchange of the properties, recognized and admitted that the title to the lot was in Mrs. Hickman, though the county records showed the legal title to be in Lakenan. This, of itself, charged her with notice, and compelled her to institute the most diligent inquiry as to the true nature, scope, and extent of Mrs. Hickman's title.

"3. But this is not all. Lakenan says that some days—perhaps a week—before the quitclaim deed was executed by him to Mrs. Hickman he met Mrs. Green and her husband, and one of them asked him what kind of a deed he had made to Mrs. Hickman, whereupon he told them he had deeded the lot to Mrs. Hickman and her bodily heirs. It is true that Mrs. Green denies this conversation with herself, but does not deny but what it occurred with her husband; and then it must be borne in mind that Mrs. Green is an interested witness, while Lakenan is wholly disinterested. Nor should it be forgotten in what a singular manner this whole business was transacted. Not satisfied with employing real-estate agents, whose usual occupation was to prepare abstracts of titles, Mrs. Green employs Duncan, not to examine the title, and to pronounce upon its validity, as is usual for a lawyer to do in such cases; but the only question asked him, as he testifies, 'was whether Lakenan's deed, in that form, would pass the title,' and he told them it would. It certainly seems odd that a quitclaim deed, only, should be required of Lakenan, who appears to be a man of means, while a conveyance with full covenants of warranty is exacted from Mrs. Hickman for the same property, she being described in that deed as a 'widow lady,' and not possessed, it would seem, of any other property to make her warranty good. And then look at another point. Though Mrs. Hickman had been living on that lot for some three years, exercising all the visible and outward *indicia* of absolute ownership, yet this quitclaim deed to her in 1889 recited a consideration of $2,000, as if the property had just been bought. Furthermore, it would seem that, before possession was obtained by Mrs. Green, she was informed by one of these plaintiffs that Mrs. Hickman only had a life interest in the property. Moreover, the deed executed by Mrs. Green was drawn, in all respects, like the destroyed deed,—that it conveyed the forty-acre farm to Mrs. Hickman and 'her bodily heirs.' Taking all these circumstances into consideration, it is difficult to see how the lower court could find Mrs. Green was a purchaser without notice.

"4. Mrs. Green was not a competent witness, because the other contracting party was dead, and therefore she could not testify in her own favor. Rev. Stat. 1889, § 6918; *Chapman* v. *Dougherty*, 87 Mo. 617, 56 Am. Rep. 469; *Meier* v. *Thieman*, 90 Mo. 433; *Emmel* v. *Hayes*, 102 Mo. 186, 11 L. R. A. 823. But these remarks are not to be understood as denying to her the right to combat by her testimony what others had testified she had done and said in their presence.

"5. But the motion to exclude her testimony came too late. The general rule is that where a party fails to object to incompetent evidence, and it has been received absolutely and unconditionally, and not upon an unperformed promise to show its relevancy, it cannot afterwards be stricken out. 1 Rice, Ev. §§ 258, 259, and cases cited; *State* v. *Hope*, 100 Mo. 347, 8 L. R. A. 608.

"6. The relation of attorney and client is not established until a proposal is made by the would-be client to engage the services of the attorney, and his acceptance of the employment; but this proposal, and its acceptance, may arise either from express contract, or from clear implication. But until these two things concur, the relation of attorney and client does not exist, and, of consequence, communications made to the attorney in such circumstances are not privileged. Weeks, Attorneys at Law, §§ 183, 185. Under this view, if Mrs. Green went to Mr. Jesse, and, without engaging his services as an attorney, asked him to destroy the original deed from Lakenan to Mrs. Hickman and her children, and to supply its place by writing another, such a communication would not be privileged.

"7. But it would not be privileged for a far weightier reason: The privilege does not extend to, nor shelter, advice concerning, nor assistance in, proposed infractions of the law. 1 Whart. Ev. 3d ed. § 590, and cases cited; 7 Am. & Eng. Encyclop. Law, p. 108, and cases cited. If, therefore, Mr. Jesse was thus approached by Mrs. Green, any communication of the sort not being privileged, he would be compelled to testify in regard to it.

"8. If the plaintiffs who are adults, after being made fully aware of their rights in the premises, have ratified the transaction already mentioned by dealing with the property for which the exchange was made, as their own, of course they would be estopped to proceed further; but in order to estop them the evidence should be clear of their being fully aware of their rights. It is scarcely necessary to add that the doctrine of estoppel would not apply to the infant minors; and they, not having taken any part in the transaction, are not required to make any conveyance of their interest in the 40-acre farm. Indeed, being minors, it is out of their power to do so. And under the ruling in *Oraig* v. *Van Bebber*, 100 Mo. *loc. cit.* 589, even if the 40 acres had been sold, and the proceeds squandered, they could repudiate the affair without tendering back the purchase price. All these matters, however, can be appropriately settled when this cause is returned to the lower court, and full and complete justice done between the parties litigant; and of course a decree can be made, divesting the title in the 40 acres out of the infant, and out of the adults, where the latter are not estopped.

"9. As to the improvements made by Mrs. Green on the lot in Mexico, if she made them after engaging in the questionable transactions charged in the petition, she could not

hope to have such improvements considered in the adjustment of the equities of this cause. The judgment will be reversed and the cause remanded, with directions to proceed in conformity with this opinion."

The foregoing opinion was filed in division No 2, and met with the full concurrence of *Judge* Burgess, and is reported in 123 Mo. 180, but was transferred to court in banc because of the dissent of Gantt, *J.* Owing to the importance of the principles involved in this case, I have deemed it not improper to add to what I have already said a few additional observations.

1. I understand the rule of law to be that where one purchases an equitable interest in land, with notice of the fact that the legal title is outstanding in one other than his purchasee, that alone suffices to put the purchaser on inquiry and charge him with notice of all that to which such inquiry, if properly pressed, would lead. Wade says: "Where one purchases with notice of the fact that the legal title to the property is in some one else than his grantor, he is thereby put upon inquiry as to the nature and extent of his grantor's title, and, if such inquiries would lead to knowledge of circumstances affecting the title, he would be bound as by actual notice of such facts." Wade, Notice, 2d ed. § 18. In this case that was just the situation, for the legal title was outstanding in Lakenan, though Mrs. Green, in the paper signed by her, admitted Mrs. Hickman to be the owner of the town property. On this point, the learned spokesman of the majority gives utterance to these remarks: "Much stress is laid upon the fact that, when Mrs. Hickman and Mrs. Green began to trade, the title of record was in Lakenan, with Mrs. Hickman in possession. This is true, but there is absolutely no evidence that Mrs. Green knew anything whatever about this title of record." Before these words were given forth which fix the limits and set the bounds to our registry acts, I had supposed, as stated by all the authorities I had previously examined, that a deed placed on record was "constructive notice to all the world," and that in this respect there was "no difference in legal effect between actual and constructive notice." 8 Washb. Real Prop. 5th ed. 335. Wade says: "Where an instrument by which the title to real estate is affected is properly recorded, the record thereof is constructive notice to subsequent purchasers or incumbrancers under the same grantor. . . . Any instrument affecting the title, which is properly recorded, is absolute notice to every one subsequently dealing with the title, irrespective of whether such person has examined the records, or even had an opportunity to make an examination." Wade, Notice, 2d ed. § 97. And the same author states this "presumption of knowledge is conclusive." *Ibid.* And before the authoritative ruling aforesaid I had also supposed that a married woman was not exempt from the operation of our registry acts, and that the effect on a married woman of the recording of a deed would be precisely the same in imparting notice to her as it would be upon any other person whomsoever. The statute seems to sanction this hitherto entertained view, for it says that "every such instrument . . . shall import notice to all persons of the contents thereof." Rev. Stat. 1889, § 2419. In *Jones* v. *Kearney*, 1 Drury & W. 134, the lord chancellor of Ireland held that "a *feme covert* or an infant is just as much bound by notice as an adult."

If the authorities I have cited are to be deemed the safer guides on the point mentioned, and are in consequence to be followed, rather than the majority opinion, then we have presented a clear case of a married woman chargeable and charged with notice of an outstanding legal title in a person other than her proposed grantor, and therefore she was put on inquiry as to the nature and extent of that grantor's title. This being true, a prima facie case was made out against her, demanding that she exonerate herself from the attitude in which she was placed, by making all proper and legitimate inquiries as to the nature and extent of Mrs. Hickman's title. In such a case, when you prove that a person is put on inquiry, then the burden is shifted, and it belongs to him to shift the burden, thus cast upon him, off his own shoulders; to exonerate himself, by rebutting the presumption thus raised against him, by showing that he pushed all reasonable inquiries to their legitimate conclusion, but gained no information. If, on the other hand, he fail to make inquiry, or to prosecute it with due diligence, the presumption remains operative, and the conclusion of notice becomes absolute. 2 Pom. Eq. Jur. 2d ed. § 607. And it is the duty of a purchaser who has been put on inquiry to seek information from his grantor, and a failure to do this generally shows lack of due care and diligence in making inquiry. Id., p. 840, *note 2*. And there are cases which hold that such a purchaser, who neglects questioning his grantor, will be charged with notice of all he could have learned. *Sergeant* v. *Ingersoll*, 7 Pa. 340, 15 Pa. 348; *Espin* v. *Pemberton*, 3 De G. & J. 547. In the first of these cases, Gibson, *Ch. J.*, observed: "A purchaser without notice must appear to have acted, not only with good faith, but with extreme vigilance, for equity refuses to protect the careless and the slothful;" and thereupon he rules Mrs. Sergeant chargeable with notice because she failed to make inquiry of her grantor what the legal title was outstanding in another, and because she failed to make a like inquiry of the one holding the outstanding legal title. Numerous authorities illustrate the position that in many circumstances an examination of the records and questioning the grantor would not be sufficient, unless the inquiry were further prosecuted among third persons from whom information could probably be obtained, and that a neglect to make such inquiry, which, though prompted by the situation and demanded by the circumstances, had not been made, left the party whose duty required "due inquiry" still chargeable with constructive notice. 2 Pom. Eq. Jur. p. 841, *note 3*, and cases cited. Applying to the case at bar the principles heretofore announced, it will be readily seen that

Mrs. Green did not fulfill the true measure of diligence in making inquiries of her grantor as to the title, nor of Lakenan; indeed, she repels the idea, and denies his statement that she heard him say anything concerning the situation and nature of the title. Nor does she pretend that she even so much as asked Mrs. Hickman a single question as to the nature and extent of her title, and as to the why and wherefore of the title remaining outstanding in Lakenan; and this, too, although she had been in to see Mrs. Hickman and the house two or three weeks before she got the deed or "traded." Who can doubt that had Mrs. Green asked Mrs. Hickman about the title, or that, if Lakenan had been asked in whom the title was, she would have received a reply adequate to all the demands of due diligence, honesty, and good faith? But she sedulously refrained from making such inquiries, and therefore stands before us charged with the constructive notice which she received at the outset, and with the presumption aforesaid, which it was her duty to rebut, unrebutted.

2. A like line of remark and authorities applies to the possession of Mrs. Hickman; she had been in the open and notorious possession of the premises for three years, acting as the owner of the same, and the owner of an unrecorded deed to herself for life, remainder to her bodily heirs. This being the posture of affairs, a duty was devolved on Mrs. Green to make inquiries of her intended grantor as to the nature and extent of her title, and also of Lakenan, the record owner, similar to those mentioned in the next preceding paragraph. Authorities supporting this view are there referred to; they exist in abundance. In *Vaughn* v. *Tracy*, 22 Mo. 417, 25 Mo. 318, 69 Am. Dec. 471, it was ruled that possession and apparent ownership brought home to the second purchaser are evidence of knowledge in such second purchaser of a prior unrecorded deed to the occupant as ought, in ordinary circumstances, to satisfy a jury that the second purchaser purchased with knowledge of the prior deed. This ruling has been constantly followed ever since, and cases showing this are cited in the former opinion herein delivered. Why should this case be deemed *dehors* the familiar rule? What extraordinary circumstances are there disclosed in this record which forbid its application in the present instance? There are none, and Mrs. Green, on this score also, remains charged with the constructive notice arising from occupancy and apparent ownership, because she has not rebutted the prima facie case made against her by showing proper though fruitless inquiries made. This fact of the prior unrecorded deed could not be ferreted out by searching the records. It rested alone in parol, and could only have been developed and unearthed by oral inquiry; and inquiry which Mrs. Green was as competent herself to make as any one, but an inquiry which neither she nor any one for her attempted to make. It is iterated, however, with great insistence, that the records were searched, an abstract made, and the title examined, but this idea of searching the records for an unrecorded deed, and calling it due inquiry to do so, reminds one of the anecdote of Nelson, who, bidden to withdraw his vessel from a naval battle when he should see displayed a signal from his admiral's ship, and being told that the signal flag was flying, clapped the glass to his blind eye, and said: "I don't see the signal." In the very recent case of *Freeman* v. *Moffit*, 119 Mo. 280, the cases of *Vaughn* v. *Tracy*, *supra*, and nearly all of the subsequent cases in this court on this subject of evidence of constructive notice of a prior unrecorded deed arising from possession of land by an apparent owner, and of the duty of inquiry in such circumstances, were cited, quoted from, discussed, and reaffirmed. Among them was the case of *Leavitt* v. *La Force*, 71 Mo. 353, from which this extract is made: "If Winans had ventured to examine the land upon which he contemplated taking an incumbrance, which he did take on the 26th of March, immediately upon his return home, he would have had an opportunity to ascertain from Morton, who was in possession as Leavitt's tenant, the true state of the title, and under whom he held. It was his duty, when offering himself as a witness, to have left nothing unexplained which would induce unfavorable inferences in regard to his bona fides." In *Freeman's Case*, *supra*, an action of ejectment, Wilkinson was in possession, and had thus been in possession by his tenant for nearly a year, at the time plaintiff came down to Polk county, examined and bought the land. The lower court expressly found plaintiff to be an innocent purchaser, but this court, speaking through the learned author of the majority opinion, held that such finding was an error of fact and an error of law, remarking, after quoting the prevalent rule from *Vaughn* v. *Tracy*, *supra*, etc., that "we think there was strong evidence of notice to plaintiff of Wilkinson's title when he bought, and that, if he had not ignored all the ordinary rules of prudence, he would have learned of the true state of the title, and that Wilkinson was the owner. The fact of Moffit's possession put him on inquiry, and he should not have blindly shut his eyes to the truth as it existed, and the court should have so declared in an instruction." I am entirely unable to see why the same principle, on similar facts, should not dominate the present case, and Mrs. Green be held a purchaser with notice as a matter of law, she not having made the proper inquiries, and being therefore chargeable with constructive notice. Nor does it matter that the lower court expressly found that Mrs. Green was an innocent purchaser. This was done, as already seen in *Freeman's Case*, by the lower court, but its finding was rejected and repudiated by this court, even in action at law; and in the quite recent case of *Blount* v. *Spratt*, 113 Mo. 48 (Macfarlane, *J.*, speaking for the court), it was ruled that equity cases are substantially triable *de novo* in this court, and that this court would not be bound by the findings of the lower court, nor would the supervisory control of this court over the lower court be abrogated by such findings.

To the same effect is *Hamilton* v. *Armstrong*, 120 Mo. 597.

Holding these views, I am constrained to dissent from the majority opinion. I hold that the facts in this record show the clearest and strongest case of notice of any record I have ever examined.

Brace and **Burgess**, *JJ.*, concur in the foregoing opinion.

OHIO SUPREME COURT.

LAKE SHORE & MICHIGAN SOUTHERN R. CO., *Plff. in Err.*,
v.
Harvey P. PLATT *et al.*

(52 Ohio St. —.)

***A conveyance of lands situated upon a navigable stream,** the description being by courses and distances from a fixed monument and establishing a boundary line coincident with the line of navigation, conveys the grantor's title as far as the central thread of the stream.

(June 25, 1895.)

ERROR to the Circuit Court for Lucas County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover possession of certain land under the waters of the Maumee River. *Reversed.*

Statement by **Shauck**, *J.*:

January 17, 1876, Platt *et al.* brought ejectment in the common pleas court of Lucas county to recover the subaqueous ground lying between the former and present dock lines along the Maumee river and in front of a part of lot 11 in the city of Toledo. Each party asserts title in fee to such ground, and their rights depend upon the following material facts as shown by the pleadings and the stipulations upon which the cause was submitted in the common pleas:

In 1852 Harriet O. Hall was the owner in fee of lot 11 which included the premises in controversy. August 9, 1852, the Lake Shore Company (its predecessor), commenced proceedings in the probate court to appropriate lands for railroad purposes. The appropriation by meets and bounds carried the line of the company's property thus acquired to the former dock line which was approximately parallel with the shore line and where there was available, for purposes of navigation, a depth of water somewhat exceeding nine feet. The company at once took possession of the lands acquired for landing, dock and terminal purposes (for which purposes they had been acquired) and built its dock upon the line established.

June 21, 1855, Mrs. Hall executed to the company a deed for the same property for the express purpose of assuring its title. The description in this deed also carried the line to the former dock line, and granted the premises described "with all privileges and appurtenances to the same belonging."

The company took possession and constructed the docks necessary for traffic in connection with boats navigating the river and lakes, upon the dock line which was established by authority.

September 10, 1869, Mrs. Hall conveyed to Platt *et al.* a number of tracts of land, including lot 11, but expressly "reserving that portion of tract 11 which lies northwesterly of the center of the river road, the same being now in possession of the railroad company," such reservation including the premises now in controversy.

Thereafter the dock line was changed for the purpose of accommodating vessels of greater draught, and the railroad company docked out to the new line thus established, completing the reconstruction of its dock in July, 1878.

April 18, 1874, Mrs. Hall by quitclaim granted to Platt *et al.* all her interest in lot 11.

In the court of common pleas Platt *et al.* recovered, and that judgment was affirmed by the circuit court.

Mr. **George C. Greene**, with *Mr.* **E. D. Potter, Jr.**, for plaintiff in error:

The warranty deed to the railroad company, made in 1855, covered the title to the property described in the deed, together with all the privileges and appurtenances to the same belonging, including the riparian rights.

Morgan v. *Mason*, 20 Ohio, 410, 55 Am. Dec. 464; *Pickering* v. *Stapler*, 5 Serg. & R. 107, 9 Am. Dec. 336.

One who owns land bounding and abutting on the navigable rivers of this state owns to the center of the stream.

Gavit v. *Chambers*, 3 Ohio, 496; *Walker* v. *Ohio Board of Public Works*, 16 Ohio, 548; *Lamb* v. *Rickets*, 11 Ohio, 316; *Benner* v. *Platter*, 6 Ohio, 510; *Hopkins* v. *Kent*, 9 Ohio, 14; *Watson* v. *Peters*, 26 Mich. 508; *Luce* v. *Carley*, 24 Wend. 451, 35 Am. Dec. 637; *June* v. *Purcell*, 36 Ohio St. 396; *Day* v. *Pittsburg, Y. & C. R. Co.* 44 Ohio St. 406.

There are no apt words in this deed to the railway company showing any intention on the part of the grantors to exclude the plaintiff in error from the use, occupation, and enjoyment of the bed of the river, lying in front of the premises conveyed.

Norcross v. *Griffiths*, 65 Wis. 599, 56 Am. Rep. 642; *Goodin* v. *Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95; *Knickerbocker Ice Co.* v. *Forty-second Street & G. Street Ferry R. Co.* 65 How. Pr. 211; *Rippe* v. *Chicago, D. & M. R. Co.* 28 Minn. 18; 1 Rorer, Railroads, 402; *Chenango Bridge Co.* v. *Paige*, 83 N. Y.

Headnote by the COURT.

NOTE.—For collection of authorities upon the question of the effect of bounding a grant by a stream, see *note* to Chandos v. Mack (Wis.) 10 L. R. A. 207.

178, 38 Am. Rep. 407; *Smith* v. *Rochester*, 92 N. Y. 465, 41 Am. Rep. 290; *Carli* v. *Stillwater Street R. & Transfer Co.* 28 Minn. 373, 44 Am. Rep. 393; *Kent* v. *Taylor* (N. H.) 6 New Eng. Rep. 191; *O'Donnell* v. *Kelsey*, 10 N. Y. 412; Washb. Easem. 105, 124; *East & West R. Co. of Alabama* v. *East Tennessee, V. & G. R. Co.* 22 Am. & Eng. R. R. Cas. 90, and *note*; *Sumner* v. *Seaton*, 47 N. J. Eq. 103; *Richardson* v. *Prentiss*, 48 Mich. 88.

The defendants in error having knowledge of and permitting the plaintiff in error to take actual possession of the property in dispute and improve it at a large expense and outlay, and the same being a part of its right of way and terminal property in Toledo with main and side tracks thereon and necessary in the daily use and operation of its road, should not be permitted to maintain an action of ejectment for the same, but their remedy, if they have one, is by action at law to recover the value of the property taken.

Goodin v. *Cincinnati & W. Canal Co.* 18 Ohio St. 169, 98 Am. Dec. 95; *Pryzbylowicz* v. *Missouri River R. Co.* 17 Fed. Rep. 492, 3 McCrary, 587; *Taylor* v. *Chicago, M. & St. P. R. Co.* 68 Wis. 327; *Paterson, N. & N. Y. R. Co.* v. *Kamlah*, 42 N. J. Eq. 93; *Lawrence* v. *Morgan's Louisiana & T. R. & S. S. Co.* 39 La. Ann. 427; *Indiana, B. & W. R. Co.* v. *McBroom*, 114 Ind. 198; *Evansville & T. H. R. Co.* v. *Nye*, 118 Ind. 223; *Omaha & N. W. R. Co.* v. *Redick*, 16 Neb. 313; *Cincinnati* v. *Kemper*, 2 Week. L. Bull. 5.

Whether the title of the owner of such lots extends beyond the dry land or not, he is certainly entitled to the rights of a riparian proprietor whose land is bounded by a navigable stream; among those rights are access to the navigable part of the river from the front of his lot, the right to make a landing, wharf or pier for his own use or for the use of the public, subject to such general rules and regulations as the legislature may see proper to impose for the protection of the rights of the public.

Yates v. *Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Gavit* v. *Chambers*, 3 Ohio, 496; *Benner* v. *Platter*, 6 Ohio, 505; *June* v. *Purcell*, 36 Ohio St. 398; *Wright* v. *Howard*, 1 Sim. & Stu. 203; *Handly* v. *Anthony*, 18 U. S. 5 Wheat. 384, 5 L. ed. 115; *Ex parte Jennings*, 6 Cow. 518, 16 Am. Dec. 447; *Whitehurst* v. *McDonald*, 8 U. S. App. 164, 52 Fed. Rep. 683; *Day* v. *Pittsburg, Y. & C. R. Co.* 44 Ohio St. 406; *Illinois Cent. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018; *Meyers* v. *Mathis*, 42 La. Ann. 471; *Luce* v. *Carley*, 24 Wend. 451, 35 Am. Dec 637; *Seneca Nation of Indians* v. *Knight*, 23 N. Y. 498; *Watson* v. *Peters*, 26 Mich. 508; *Norcross* v. *Griffiths*, 65 Wis. 599, 56 Am. Rep. 642; *Richardson* v. *Prentiss*, 48 Mich. 88.

Mr. **Frank H. Hurd**, for defendant in error:

A call for a river carries the boundary to the center of the river, where it is not a navigable stream, at common law. But this is only in those cases where the river *eo nomine* is made the boundary.

Jones v. *Soulard*, 65 U. S. 24 How. 65, 16 L. ed. 608; *Boston* v. *Richardson*, 13 Allen, 146; *Luce* v. *Carley*, 24 Wend. 453, 35 Am. Dec. 637; *Mott* v. *Mott*, 68 N. Y. 254; *White's Bank of Buffalo* v. *Nichols*, 64 N. Y. 70; *Kingsland* v. *Chittenden*, 6 Lans. 20; *Gove* v. *White*, 20 Wis. 434; *Walker* v. *Ohio Board of Public Works*, 16 Ohio, 540; *June* v. *Purcell*, 36 Ohio St. 397.

Where any one is the owner of the soil under the water by virtue of his grant being extended to the center of the channel, when it is bounded by the river, he can dispose of this land under the water just as any other land he owns. He may divide it into water lots and sell them. He may convey it separately from the upland or he may sell part of it with the upland, and retain the balance, or convey it to a third party. What he has done is a question of interpretation of the conveyance from which the intention is to be derived.

Gould, Waters, p. 45; *Bradford* v. *Cressey*, 45 Me. 13; *Hatch* v. *Dwight*, 17 Mass. 298, 9 Am. Dec. 145; *Storer* v. *Freeman*, 6 Mass. 440, 4 Am. Dec. 155; *Tyler* v. *Hammond*, 11 Pick. 218; *Child* v. *Starr*, 4 Hill, 374; 3 Kent, Com. p. 434; *Den* v. *Wright*, 1 Pet. C. C. 69; *Watson* v. *Peters*, 26 Mich. 508; *Chicago* v. *Rumsey*, 87 Ill. 351; *Jackson* v. *Hathaway*, 15 Johns. 453, 8 Am. Dec. 263; *Trustees of Schools* v. *Schroll*, 120 Ill. 521; Tyler, Boundaries, p. 123; Hall, Rights in Seashores, p. 155; *Moses* v. *Eagle & Phœnix Mfg. Co.* 62 Ga. 456; *Rivas* v. *Solary*, 18 Fla. 124.

If he bounds the land by the river *eo nomine* the grantee takes to the thread; if he conveys by metes and bounds the title of the grantee is limited by the boundaries fixed.

We find no power given the company to condemn or to hold private property to its exclusive use, solely for wharf purposes.

Iron R. Co. v. *Ironton*, 19 Ohio St. 299; *Walsh* v. *Barton*, 24 Ohio St. 28; *Pennsylvania Co.* v. *Platt*, 47 Ohio St. 366.

Where a grantor has the power to grant the fee or an easement in a particular piece of land, if he grants the easement, it could not have been his intention to convey the fee.

Mott v. *Mott*, 68 N. Y. 254.

In a river like the Maumee where the riparian owner, when the land is bounded by the river, takes to the center of the stream, the right to build wharves is dependent upon the ownership of the soil under them, and whoever erects a wharf upon soil not his own is a trespasser.

The right to build wharves on soil owned by the state or public is a franchise which the adjacent owner enjoys from the state, subject to the public right of navigation.

East Haven v. *Hemingway*, 7 Conn. 202; *Coburn* v. *Ames*, 52 Cal. 398, 28 Am. Rep. 634; *Hamlin* v. *Pairpoint Mfg. Co.* 141 Mass. 57; *Parker* v. *Rogers*, 8 Or. 189; Houck, Rivers, p. 187; *Wharf Case*, 3 Bland, Ch. 373; *Grant* v. *Davenport*, 18 Iowa, 179; *Naglee* v. *Ingersoll*, 7 Pa. 201.

The right of the adjacent owner to build wharves where he holds the title to the soil to the center of the river depends upon the ownership of the soil, which he may exercise by carrying out the wharves to the point of navigability, subject to the supervision of the state or municipality and without making obstruction to navigation.

Houck, Rivers, p. 188; Wood, Nuisances, § 490; *Atty-Gen.* v. *Earl of Lonsdale*, L. R. 7 Eq. 389; *Jeffersonville* v. *Louisville & J. S. Ferry Co.* 27 Ind. 100; 1 Dill. Mun. Corp. 3d

ed. 1155; *Nicoll* v. *Gardner*, 13 Wend. 289; *Hogan* v. *Campbell*, 8 Port. (Ala.) 34; *Norfolk City* v. *Cooke*, 27 Gratt. 435; *Delaware & H. Canal Co.* v. *Lawrence*, 2 Hun, 186; *Middleton* v. *Pritchard*, 4 Ill. 521, 38 Am. Dec. 112; *Chicago* v. *Laflin*, 49 Ill. 176; *Rice* v. *Ruddiman*, 10 Mich. 141; *Ryan* v. *Brown*, 18 Mich. 207, 100 Am. Dec. 154; *Walker* v. *Ohio Board of Public Works*, 16 Ohio, 544; *Hickok* v. *Hine*, 23 Ohio St. 528, 13 Am. Rep. 255.

When the riparian proprietor owns to the center of the river his right to build wharves depends upon the ownership of the soil, and if he cannot wharve out to the point of navigability, except by building upon the land of another, he will be a trespasser if he does so, unless he first obtains the latter's consent.

Lembeck v. *Nye*, 8 L. R. A. 578, 47 Ohio St. 336; *People* v. *Jones*, 112 N. Y. 603.

Shauck, J., delivered the opinion of the court:

At the dates of the appropriation by the company and the subsequent grant of June 21, 1855, Mrs. Hall, the grantor, and the railway company, the grantee, were alone interested in what is now the subject of controversy. In the practical interpretation of its rights acquired by the appropriation and the grant, the company took actual possession not only of the bank of the stream but of so much of the river as might be necessary to reach the established dock line at a depth of water of nine feet.

By the deed of September 10, 1869, Platt *et al.* acquired no title to the premises in controversy, for they were expressly excepted from the operation of the deed. Not only so, but by the terms of the reservation or exception, the grantees were notified that the grantor had, by a former conveyance, granted to the company the premises now in controversy.

The exception was not of "so much of tract 11 as the railroad company now occupies," but it was of "that portion of tract 11 which lies northwesterly of the river road, the same being now in possession of the railroad company." This was express notice to the grantees that the company was in possession not only of the bank of the stream but of all that portion of tract 11 which lay between the bank and the central thread of the stream.

On April 13, 1874, when the defendants in error received from Mrs. Hall the quitclaim under which they now assert title, they found that the company had extended its docks over the disputed premises to the newly established dock line. This had been done in the assertion of the rights acquired by virtue of the appropriation and the deed of June 21, 1855, and with the acquiescence of Mrs. Hall to whom these parties now look as the common source of title.

The defendants in error took nothing by the quitclaim, because, not only the terms of their former deed, but the actual possession of the company, affected them with notice of the rights now asserted by the company, which rights their grantor could not then contest, since she had acquiesced in the company's possession continuously from the date of the appropriation.

But from a consideration of the rules which prevail in the construction of grants of this character, we think the premises in controversy passed to the company by the terms of the deed of 1855. It is true of that deed, as well as of the previous proceedings to appropriate, that the Maumee river was not named as the boundary of the lands appropriated or conveyed. But by the strictest construction that could be placed upon the deed it conveyed not only the land upon the bank of the stream, but all that lay between the water's edge and the original dock line projected where a depth of nine feet of water was available for the purposes of navigation. The terms of the grant do not admit of any broader claim on behalf of the grantor than that she did not expressly convey to the central thread of the stream. If title to the subaqueous lands, lying between the former and present dock lines, remained in her, it was by virtue of a presumption operating in her favor, notwithstanding the location of the lands expressly granted, the obvious purposes of the grant and the limited and incidental use of which alone the lands in controversy are susceptible.

The lands were acquired by the company for landing, dock, and terminal purposes. That these purposes were within the contemplation of all the parties is indicated by the location of the lands upon a navigable stream and the express grant of that portion of the stream which was necessary to make the grant available for that purpose.

The ground in controversy is insusceptible of absolute and unqualified dominion, being incidental to the shore and subject to the public right to navigate the stream. Because of the permanent character of the riparian and public rights involved, the case is broadly distinguishable from those of grants bounded on streets and highways which may be abandoned and their sites thus restored to a condition in which they may be subject to absolute and unqualified dominion. For the same reason the case is distinguishable from those of grants of lands bounded by swamps, ponds, and lakes that are not navigable and are subject to drainage. The use of the stream for the purpose of navigation was not only within the contemplation of the parties to the deed from Mrs. Hall to the company, but it was the principal and most obvious element of the value of the lands expressly granted.

Those considerations would seem to justify the presumption that a grant of this character is to the central thread of the stream unless apt terms are employed to limit it.

And such appears to be the settled view of the courts of the country. Well-considered cases in which this doctrine is held are, *Garit* v. *Chambers*, 3 Ohio, 496; *Walker* v. *Ohio Board of Public Works*, 16 Ohio, 543; *June* v. *Purcell*, 36 Ohio St. 396; *Watson* v. *Peters*, 26 Mich. 508; *Luce* v. *Carley*, 24 Wend. 451, 35 Am. Dec. 637; *Norcross* v. *Griffiths*, 65 Wis. 499, 56 Am. Rep. 642; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *St. Clair County* v. *Lovingston*, 90 U. S. 23 Wall. 46, 23 L. ed. 59.

To the application of this doctrine it is

quite immaterial whether the stream be named as a boundary of the lands granted or there be a description by courses and distances from a fixed monument whereby a line is established coincident with the stream. The doctrine regards the substance of the grant and not its form. *Watson* v. *Peters*, and *St. Clair County* v. *Lovingston*, *supra*.

It is true that the common law regarded only those streams as navigable which are subject to the ebb and flow of the tides; and, in this view, the difference between riparian and littoral titles becomes unimportant, since they alike terminate at the water's edge, the title to the residue of the alveus being in the public. While this view has been taken in some of the American cases, it cannot be regarded as the view generally received. Nor could it avail the defendants in error. The manifest result of these cases is that riparian and alvean rights are inseparable, whatever may be the nature or extent of those rights. Alvean rights appertain to the riparian title and do not depend upon title to the subaqueous land. That such rights are incapable of severance from the riparian title to which they are incident was distinctly held in *Lake Superior Land Co.* v. *Emerson*, 38 Minn. 406. The conclusion reached in that case was adversely criticised by the same court in *Hanford* v. *St. Paul & D. R. Co.*, 43 Minn. 104, 7 L. R. A. 722, where it was considered that the rights may be severed if they are of such a nature that they may be enjoyed separately from the adjacent land to which they were originally appurtenant. It was accordingly held that submerged lands lying between the high land upon the shore and the line of navigation might be severed from such high land; and that conclusion would result from the consideration that such submerged lands, being susceptible of reclamation without interference with public rights, might become the subject of the riparian title to which access to and use of the navigable waters would attach as an incident. But it was not there held that one may own that which he cannot enjoy.

Since a plaintiff in ejectment must recover, if at all, by virtue of his own title, the contention of the defendants in error would not be aided by the conclusion that the lands in controversy are incapable of private ownership.

Confining ourselves to the requirements of the case, we conclude that the lands in controversy passed to the plaintiff in error by the deed from Mrs. Hall because they were not by clear and apt terms excepted from its operation, and for the additional reason that, it being an express grant of her lands to the line of navigation with all the privileges and appurtenances to the same belonging, the right asserted by the grantee is necessary to satisfy the express terms of the deed. Gould, Waters, § 179; Wood, Nuisances, § 491; *Morgan* v. *Mason*, 20 Ohio, 402, 55 Am. Dec. 464.

The views expressed in *Lembeck* v. *Nye*, 47 Ohio St. 336, 8 L. R. A. 578, were not intended to have, and cannot have, any application to a case of this character. The lands there in controversy lay under water that was not navigable. By the clear terms of the syllabus the case was limited to lands thus situated; and in the principal opinion prominence is given to the consideration that the lake there in controversy was susceptible of private ownership, and the views here expressed were recognized as controlling in cases of navigable streams.

It is not necessary to consider the evidence offered by the plaintiff in error, in support of its plea of estoppel, as the right for which it contends is fully established by the stipulations.

Judgments of the Circuit Court and Court of Common Pleas reversed, and judgment for plaintiff in error.

PENNSYLVANIA SUPREME COURT.

Hiram H. GRAYBILL
v.
PENN TOWNSHIP MUTUAL FIRE INSURANCE ASSO. OF LANCASTER COUNTY, *Appt.*

(170 Pa. 75.)

Smoked meats taken from a smoke-house to a storage room as fast as they are cured are contents of the smoke-house within the meaning of a policy in separate sums upon a butcher's shop and its contents and the smoke-house and its contents, where it was the understanding of the parties that the smoked meats taken out of the smoke-house for storage were properly insured as contents of the smoke-house, and recovery may be had therefor when burned with the butcher shop, although the smoke-house is not burned.

(July 18, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Lancaster County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

Messrs. **A. F. Hostetter** and **Eugene G. Smith**, for appellant:

An executed written contract cannot be pushed aside by the uncorroborated testimony of a single witness.

Rowand v. *Finney*, 96 Pa. 196; *Martin* v. *Berens*, 67 Pa. 459; *Murray* v. *New York, L. & W. R. Co.* 103 Pa. 43; *North & West Branch R. Co.* v. *Swank*, 105 Pa. 561.

Previous negotiations of the parties are presumed to be merged in the written instrument.

Phillips v. *Meily*, 106 Pa. 543; *Juniata Bldg. & Loan Asso.* v. *Hetzel*, 103 Pa. 507; *Sylvius* v. *Kosek*, 117 Pa. 76; *Frey* v. *Heydt*, 116 Pa. 611.

No doubt the contents which were destroyed by fire, being smoked meat, had some time

NOTE.—As to the location of movable property as affecting fire insurance thereon, see *note* to Benton v. Farmers Mut. F. Ins. Co. (Mich.) 26 L. R. A. 227.

See also 39 L. R. A. 545; 43 L. R. A. 838.

before been also the contents of the smoke-house. But wherever they might have been sometime, or howsoever often they may have been removed, cannot be material. At the time of the fire they were the "contents" of the building destroyed and were insured for $400, which the defendant company is now and always has been ready to pay.

Cooper v. *Farmers Mut. F. Ins. Co.* 50 Pa. 307, 88 Am. Dec. 544.

Messrs. **W. U. Hensel** and **J. Hay Brown,** for appellee:

The testimony was simply descriptive of the term "contents" as used in this policy. There was no stipulation in the policy that the meat insured was insured only in the smoke house, while there was positive testimony that the president of the company knew exactly what the insured intended by the term "contents," and that by no possibility could the smoke-house have held $500 worth of meats at one time. There was no dispute that the property was destroyed, nor as to its value. "It is the duty of the court to interpret a contract."

Folsom v. *Cook*, 115 Pa. 539; *Codding* v. *Wood*, 112 Pa. 371.

The contract being interpreted by the court, it is the function of the jury "to determine whether it is established by proof."

The testimony shows the positive promise to pay the full amount of the policy by the officers of the company, which, in itself, if believed by the jury, would be a waiver of any forfeiture for an alleged breach in removing the meat from the smoke-house to the meat-room.

Wood, Fire Ins. 949; *Greenfield* v. *Massachusetts Mut. L. Ins. Co.* 47 N. Y. 439; *Williams* v. *Hartford Ins. Co.* 54 Cal. 442, 35 Am. Rep. 77.

Contracts of insurance being prepared by the insurer, must be construed most strongly against the company insuring.

Strunk v. *Firemen's Ins. Co.* 160 Pa. 345.

The knowledge of the president of the company, who went there to survey the premises, and who subsequently wrote the policy, that the meat would not be kept permanently in the smoke-house, must be imputed to the company itself, and it cannot now take exception to or advantage of the fact that the meat was removed from the smoke-house to the smoke-room.

2 May, Fire Ins. 3d ed. § 507, p. 1108; *Viele* v. *Germania F. Ins. Co.* 26 Iowa, 9, 96 Am. Dec. 88; *Benson* v. *Ottawa Agr. Ins. Co.* 42 U. C. Q. B. 282; *McMaster* v. *Insurance Co. of North America*, 55 N. Y. 222, 14 Am. Rep. 239.

The question whether a change of circumstances in the situation, use, or condition of the property insured increases the risk, is purely one of fact for the jury, and their finding is conclusive.

Wood, Fire Ins. § 243; *Williams* v. *People's F. Ins. Co.* 57 N. Y. 285.

When an agent of an insurance company erroneously describes the property in an application for a policy of insurance prepared by him and signed by the insured, the company cannot in case of loss defend by reason of the misdescription.

Susquehanna Mut. F. Ins. Co. v. *Cusick*, 109 Pa. 157.

Williams, *J.*, delivered the opinion of the court:

This case turns upon the meaning of the word "contents as used in the policy of insurance sued on. A ground barn and a butcher shop were insured as one building for the sum of $400, and the contents were insured for $400 more. A smoke-house was insured for $5 and its contents for $500. The barn, and butcher shop were burned with their contents. The smoke-house was not burned, but its contents, which had been removed to a storage room in one end of the butcher shop were wholly consumed. The question presented on this appeal is whether the smoked meats in the storage room, which were taken there as fast as they were cured in the smoke-house, were contents of the smoke-house, within the meaning of the policy, and were to be paid for by the company as part of the loss for which it was liable. Words must be understood in the sense in which they are commonly used in the business to which the contract in which they are found relates. This contract was to insure the buildings, machinery, and stock of a butcher. The president of the company proposing to insure was on the ground. The buildings and the property were examined by him. The evidence shows that in the barn and butcher shops there were a steam-engine and a boiler with conveniences for handling dressed cattle, machinery for chopping or grinding meat, and for making bologna and other sausages. These as the plaintiff alleges constitute the contents of the barn and butcher shop that were insured for $400. The smoke-house and storage room were also pointed out to him, and it was explained to him as the plaintiff testifies, that the smoke-house could hold but a small amount of meat at one time while the process of smoking was going on, but the hams, sausage, bacon, or other meat was removed from the smoke-house when cured and stored in the storage room, and that what was wanted was insurance on the smoked goods. The plaintiff says that the president stated that the smoked meat would be properly insured as contents of the smoke-house, and these words were written in the application and policy with that understanding, viz., that they would include and cover the smoked meats taken out of the smoke-house for storage in the room used for that purpose. The learned judge of the court below left this evidence to the jury for their consideration, telling them if they were satisfied by it the word "contents" used in connection with the smoke-house was understood and intended by both insurer and insured to cover the smoked meat in store, whether actually in the smoke-house or not, the plaintiff would be entitled to recover to the extent of $500 for his loss on these goods. This is assigned as error, and the contention of the appellant is that it permitted an alteration to be made in a written instrument upon the uncorroborated testimony of the plaintiff. But the word "contents" is not a certain and definite description of any particular class of goods. Its meaning must be ascertained by considering the contents, the nature and methods of the business for which the building whose con-

tents are to be insured is to be used, and the understanding and intentions of the parties as expressed at the time the insurance was contracted for. Thus we learn from the evidence in this case that the contents of the butcher shop were not made up of slaughtered cattle, but of a steam engine and various pieces of machinery: while the contents of the smoke-house included hams, bacon, bologna sausages, and other forms of smoked meat. This is, in the absence of a detailed description of the articles in the body of the policy, the only way in which the character and value of the contents of a building can be shown. But the defendant alleges that as the building was not burned its contents could not be. This is a *non sequitur*. The contents might be destroyed while outside the building and when that happens the question of the plaintiff's right to recover must depend on whether the purpose of the removal was such as to detach the goods permanently from the building and create a new or an increasing hazard not contemplated when the contract for insurance was made. The investigation of this question is not an attempt to reform the contract, but to determine its meaning and extent. This rule in equity governing the reformation of contracts is not applicable therefore, but the jury is at liberty to determine the question presented to them in this case by the preponderance of the evidence. The evidence, showing the capacity of the smoke-house, the necessity for the removal of the smoked meat as soon as it was properly cured to some place near by for storage while a fresh supply of meat for smoking was put in its place, the location of the storage room and quantity of smoked meats kept in store ready for sale, was relevant to the inquiry in this case, and was properly admitted. So was the evidence tending to show that the attention of the insurer was called to the manner in which the smoke-house was used and the smoked meats stored; that he was informed that the smoked meats were what were to be insured in connection with the smoke-house, and that, with full knowledge of all the facts, he selected the word "contents" as a proper and sufficiently descriptive word to cover the smoked meats whether in the smoke-house undergoing the process of smoking, or in the storeroom after its completion. The facts and circumstances thus brought to the attention of the court and jury were helps to a correct exposition of the words the parties had employed. They tended to corroborate the plaintiff's version of the contract, and to sustain his claim. They were persuasive in their character, and, as we infer from their verdict, satisfied the jury that the words "contents of the smoke-house" were understood and intended by both parties to cover the smoked meats passing through the smoke-house to the room near by in which they were stored till needed for the supply of customers.

We see no error in the rulings complained of, and *the judgment is affirmed.*

NEW HAMPSHIRE SUPREME COURT.

AMOSKEAG MANUFACTURING CO.
v.
Town of CONCORD.

(66 N. H. 562.)

Land covered by water held back by a dam for furnishing power is assessable for taxation, at its enhanced value in the town in which it lies under a statute making real estate taxable where situated, although the power is used in another town.

(July 31, 1891.)

PETITION by the Amoskeag Manufacturing Company to the Supreme Court in Merrimack County for relief from taxation which had been assessed against it by the town of Concord. *Case discharged.*

Petitioner owns land on both sides of the Merrimack river which is situated as Garvin's Falls. There is a dam across the river for the creation of a water power and the dividing line between the towns of Concord and Bow is the middle of the river. Petitioner utilized its water-power entirely in the town of Bow, and the power has never been used on the Concord side. Petitioner claimed that in fixing the value of its real estate for taxation in Concord the water-power should be excluded.

Further facts appear in the opinion.

Messrs. **David Cross** and **E. H. Woodman,** for plaintiff:

In *Winnipiseoges Lake Cotton & Woolen Mfg. Co.* v. *Gilford,* 64 N. H. 337, a corporation organized for the purpose of managing and controlling the vast water-power of a lake situated in a dozen or more New Hampshire towns was held taxable in Gilford where the dam was situated or where the waters of the lake were poured out or managed and controlled. The location of the water of the lake had nothing to do with the place of taxation.

Water-power as such is not taxable.

Where a dam extends across a river, the thread of which was the dividing line between two towns, but the water created thereby was applied exclusively to drive mills situated in one of the towns, it was held that the water-power was not subject to taxation in the other town.

Boston Mfg. Co. v. *Newton,* 22 Pick. 22; Burroughs, Taxn. ed. 1887, p. 229.

In Vermont the courts claim that the water-power applied to a mill or factory, to the extent to which it is applied, becomes a part of the mill or factory itself; and when unimproved it is to be taxed with the land to which it is attached if its existence adds value to it.

NOTE.—For cases somewhat akin to the above, see Paris v. Norway Water Co. (Me.) 21 L. R. A. 525, and *note.*

Bellows Falls Canal Co. v. *Rockingham*, 87 Vt. 622; Hilliard, Taxn. § 33, chap. 5.

Mr. **Harry G. Sargent**, for respondent: Water-power, as such, is not taxable.

Burroughs, Taxn. 229.

Real estate shall be taxed in the town in which it is situate.

Gen. Laws, chap. 54, § 11.

The only fact to be ascertained is, Where is the land situated? The commissioners have found in this case that land to the value of $12,000 is situated in Concord; and this finding is conclusive.

Cocheco Mfg. Co. v. *Strafford*, 51 N. H. 455; *Winnipiseogee Lake Cotton & Woolen Mfg. Co.* v. *Gilford*, 64 N. H. 337.

Where a company owned a water-power which they rented out and which was exempt from taxation, it was held to be proper, in estimating the value of lands not exempt, to take into consideration the increased value of such lands by reason of their proximity to the water-power.

Burroughs, Taxn. p. 228; *State* v. *Flavell*, 24 N. J. L. 370.

Allen, *J.*, delivered the opinion of the court:

The valuation of the plaintiffs' property for purposes of taxation has been agreed upon by the parties, and the only question in the case is, How much in value of the water-power created by the dam upon the Merrimack river, one half of which is in Concord and one half in Bow, shall be assessed to Concord? Whatever water-power is used, is used by means of a canal on the Bow side of the river, where it is used in operating a pulp mill there. The value of the whole water-power created by the dam and fall in the river is fixed at $25,000, and the referees have awarded that the plaintiffs shall be assessed in Concord upon $12,000, or $500 less than one half in value of the whole water-power. It does not appear from the case that the cost of constructing the canal, or of appliances for conducting the water to the mill, all of which are in Bow, was included by the referees, or understood by the parties to be included, in the valuation of $25,000. That sum was fixed as the value of the whole water-power, not including the value of the dam and canal embankments and mill appendages, and the committee's finding must have been that, of the water-power, $500 more than one half in value of the whole water-power,—that is, of the reservoir,—is in Bow. The water-power is created by means of a dam at the fall in the river, and the supply of power is made constant and uniform by means of the reservoir made by the dam, and every part of the reservoir contributes to the amount and constancy of the supply of water-power. The power may be applied to operating a mill below any part of the dam, or upon a canal, or various canals, running from the reservoir; but whenever the power is applied, it is created by means of the dam and reservoir above, where it is constantly replenished and stored. Real estate must be taxed in the town in which it is situated (Gen. Laws, chap. 53, § 2; Id. chap. 54, § 11), and the words "land," "lands," or "real estate," shall include "lands, tenements, and hereditaments, and all rights thereto and interests therein." Id. chap. 1, § 20. Water, or water-power as such, and as a separate item of property, is not the subject of taxation. But when the water is confined, by means of a dam or otherwise, in a reservoir, and is poured out through a narrow canal, furnishing power for operating a mill, the land of which the basin or reservoir is composed, has its value for taxable purposes greatly, if not enormously, increased. In point of law, the capacity of the basin for receiving, holding, and pouring out a constant supply of water, is a quality of the land. *Cocheco Mfg. Co.* v. *Strafford*, 51 N. H. 455, 472. "Water-power, or rights in a reservoir of water, are an interest in the land upon and by which they are created, and, by the express terms of the statute, must be taxed in the town where the land of which they are a part is situated." *Winnipiseogee Lake Cotton & Woolen Mfg. Co.* v. *Gilford*, 64 N. H. 337, 348. The basin or reservoir in this case, "the land upon and by which the water-power is created," is one half in Concord, and the plaintiffs must be assessed for one half the agreed value of the water-power there. The contention that, because the water-power, so far as it is used at all, is used in Bow, it makes a case for taxation wholly there, and not at all in Concord, is supported upon no just ground, and is fully met by the statute upon the subject, which declares that "real estate shall be taxed in the town in which it is situate." "If a riparian owner of a watercourse running through the towns A., B., and C., builds a dam across it in the town of C. and thereby flows his lands in A. and B., he does not thereby repeal the act of the legislature which fixed the boundaries of the towns, nor does he thereby exercise the legislative power of enacting that any part of his real estate shall not be taxed in the town in which it is situate." *Cocheco Mfg. Co.* v. *Strafford*, 51 N. H. 478.

The case is not changed, but made stronger, if possible, in the same direction, when the dividing line of the towns is the thread of the river, which divides the reservoir and the dam in the direction of the running water, instead of by a line running across the stream. If, because the water-power created by the dam and reservoir is used to operate a mill in Bow, that power for some purposes has become annexed to the mill, it is none the less, in point of law and for purposes of taxation, a quality which composes the reservoir; and the land, with its value increased by the use of the water-power upon it, is taxable in Concord, where it is situated.

Case discharged.

Blodgett, *J.*, did not sit. The others concurred.

MARYLAND COURT OF APPEALS.

David J. LEWIS, *Appt.*,
v.
DAILY NEWS COMPANY OF CUMBERLAND.

(.....Md.....)

1. **Falsely to publish of a person** that he "would be an anarchist if he thought it would pay," is libelous.

2. **Defining alleged libelous terms in a paraphrastic way and pointing out that they were intended to apply** to the plaintiff, is strictly within the office of an innuendo.

(June 19, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Allegany County in favor of defendant in an action brought to recover damages for the alleged publication of a libel. *Reversed.*

The facts are stated in the opinion.

Messrs. **Ferdinand Williams** and **W. C. Devecmon,** for appellant:

Any written or printed publication which holds a person up to scorn or ridicule or to a feeling of contempt or execration, or which imputes or implies his commission of a crime not directly charged, is libelous. So also is any printed publication which tends to lower him in the confidence of the community.

13 Am. & Eng. Encyclop. Law, pp. 294, 295; Newell, Defamation, pp. 43, 77, 78; Odgers, Libel & Slander, pp. 1–4.

Any publication injurious to the social character of another and not shown to be true or to have been justifiable, is actionable as a false and malicious libel.

Hagan v. *Hendry*, 18 Md. 177; *Snyder* v. *Fulton*, 34 Md. 128, 6 Am. Rep. 314.

Damages are a presumption of law.

1 Chitty, Pl. 396, 400, 408; *Pfitzinger* v. *Dubs*, 64 Fed. Rep. 696; *Shilling* v. *Carson*, 27 Md. 175, 92 Am. Dec. 632; *Peterson* v. *Sentman*, 37 Md. 140, 11 Am. Rep. 534; Odgers, Libel & Slander, 291, 293.

To write of one that he is thought no more of than a horse thief or counterfeiter is libelous.

Nelson v. *Musgrave*, 10 Mo. 648.

"A publication stating that the plaintiff is about to commence a suit for libel, but that he will not like to bring it to trial in Otsego county because he is known there" is libelous.

Cooper v. *Greeley*, 1 Denio, 347.

The word "crank" can be made libelous by proper colloquium and innuendo.

Walker v. *Tribune Co.* 29 Fed. Rep. 827.

The word "skunk" is held to be libelous *per se*.

Masuere v. *Dickens*, 70 Wis. 83.

To call a man an anarchist is libelous *per se*.

Cerveny v. *Chicago Daily News Co.* 13 L. R. A. 864, 139 Ill. 345.

The words, "You cannot get P. down any lower than he is; he is low enough; you can't get him down any lower; you can't spoil a rotten egg,"—were held grossly libelous *per se*.

Pfitzinger v. *Dubs*, 64 Fed. Rep. 696.

Messrs. **David W. Sloan, Robert R. Henderson,** and **John G. Wilson,** for appellee:

To enable the plaintiff to recover the publication must be libelous *per se*, in (a) imputing to him criminal conduct which would subject him to corporal punishment (*Wagaman* v. *Byers*, 17 Md. 183); or in (b) imputing to him conduct which tends to injure his reputation and expose him to hatred and contempt among honorable men (*Negley* v. *Farrow*, 60 Md. 175, 45 Am. Rep. 715; *Newbold* v. *The J. M. Bradstreet & Son*, 57 Md. 52, 40 Am. Rep. 426; 13 Am. & Eng. Encyclop. Law, p. 325); or of such a character that special damage to the plaintiff may result from the publication as the natural and proximate, though not the necessary, consequence of the publication.

Newbold v. *The J. M. Bradstreet & Son*, *supra*; *Walker* v. *Tribune Co.* 29 Fed. Rep. 827; *Pollard* v. *Lyon*, 91 U. S. 225, 23 L. ed. 308.

When words are not actionable *per se* special damage must be alleged.

Stone v. *Cooper*, 2 Denio, 293; *Goldberger* v. *Philadelphia Grocer Pub. Co.* 42 Fed. Rep. 42; *Dorsey* v. *Whipps*, 8 Gill, 457; *Wilson* v. *Cottman*, 65 Md. 190; Odgers, Libel & Slander, 1st Am. ed. 289; *Cook* v. *Cook*, 100 Mass. 194; *Williams* v. *Hill*, 19 Wend. 305; 1 Poe, Pl. § 174.

It can hardly be contended that the language complained of imputes to the plaintiff the commission of a crime such as would subject him to corporal punishment.

At most this merely charges him with having a guilty mind and to charge a man with having guilty thoughts or a guilty intent is not to charge him with the commission of a crime.

13 Am. & Eng. Encyclop. Law, p. 353.

The publication charges the plaintiff with nothing more than vacillation in his political beliefs. He had "made several talks" before a Populist club, he was representing the sixth district on this occasion by proxy, and if it would advance his political ambitions he would join any other political organization. It is facetious in its character.

At most it is a harmless bit of pleasantry. The matter has been very much magnified and an importance attached to it which it does not deserve. An actionable libel cannot be created out of nothing.

Press Co. Limited v. *Stewart*, 119 Pa. 603; *Donaghue* v. *Gaffy*, 54 Conn. 257.

To say of the plaintiff that under certain conditions he would be an anarchist, and to say it in the connection in which it was used as appears from the record, would no more subject the plaintiff to ridicule or contempt than to call him a "crank" and in *Walker* v. *Tribune Co.*, 29 Fed. Rep. 829, it was said that the word "crank" would not necessarily im-

NOTE.—This, the second case in this series of reports in which the question of liability for using the word "anarchist" as an epithet has arisen, is rather stronger than the former one which it cites, Cerveny v. Chicago Daily News Co. (Ill.) 13 L. R. A. 864, in that the charge is not directly that complainant is an anarchist but that he would be such for pay.

See also 39 L. R. A. 734.

ply that a man had been guilty of a crime, nor tend to subject him to ridicule or contempt to say of him that he is capricious or subject to vagaries or whims.

Every reflection upon a man's character or motives does not constitute a libel in law and the super-sensitive person whose conduct is commented upon or criticised will not have his litigious spirit gratified by the courts, unless the court can see from the article that the language used tends to injure him.

Goldstein v. *Foss*, 6 Barn. & C. 154, 2 Younge & J. 145; *Robinson* v. *Jermyn*, 1 Price, 11; *Hackett* v. *Providence Teleg. Pub. Co.* (R. I.) 29 Atl. Rep. 145; *Trimble* v. *Anderson*, 79 Ala. 514; *Mulligan* v. *Cole*, L. R. 10 Q. B. 549; *People* v. *Jerome*, 1 Mich. 142; *Goldberger* v. *Philadelphia Grocer Pub. Co.* 42 Fed. Rep. 42; *Stone* v. *Cooper*, 2 Denio, 293; *Rice* v. *Simmons*, 2 Harr. (Del.) 417, 31 Am. Dec. 766; *Capital and Counties Bank* v. *Henty*, 7 App. Cas. 744; *Stuart* v. *Bragg*, 10 Q. B. 908.

In this state the question as to whether the declaration contains a good cause of action is always matter of law, and it is for the court to determine on demurrer whether what is charged in the count amounts in law to slander.

Avirett v. *State*, 76 Md. 520; *Peterson* v. *Sentman*, 87 Md. 153, 11 Am. Rep. 534; *Van Vechten* v. *Hopkins*, 5 Johns. 211, 4 Am. Dec. 339.

It is not the nature of an innuendo to beget an action.

Sheely v. *Biggs*, 2 Harr. & J. 368, 3 Am. Dec. 552; *Arrow S. S. Co.* v. *Bennett*, 78 Hun, 81; *Williams* v. *Stott*, 1 Cromp. & M. 675; 1 Chitty, Pl. 14th Am. ed. 406.

McSherry, J., delivered the opinion of the court:

This is an action of trespass on the case for libel. The declaration contains three counts. A demurrer to the whole declaration was filed, and, upon being ruled good, judgment was entered for the defendant, and the plaintiff then took this appeal. The defendant is the owner, proprietor, and publisher of a newspaper called the "Daily News." The words which are complained of, and which were published by the defendant, are as follows: "Mr. davy lewis, proxy for some one in the Sixth district, a member of the Populist Club in this city, before which he has made several talks, who would be an anarchist if he thought it would pay." Meanings are ascribed to these words by the innuendoes employed in the three counts of the narr. The demurrer, of course, admits the publication of the alleged defamatory language by the defendant, its untruthfulness, and the malice which prompted its promulgation; but raises the questions—First, whether the words, as explained by the innuendoes, are actionable; and secondly, whether the innuendoes fairly express the effect and meaning of the published words.

Upon demurrer, it is always the province of the court to determine whether the words charged in the declaration amount in law to libel or slander. *Dorsey* v. *Whipps*, 8 Gill, 462; *Haines* v. *Campbell*, 74 Md. 158; *Avirett* v. *State*, 76 Md. 510. And it is equally matter of law as to whether an innuendo is good; that is to say, whether it is fairly warranted by the language declared on, when that language is read, either by itself, or in connection with the inducement and colloquium, if there be an inducement and colloquium set forth. *Avirett* v. *State*, *supra*; *Solomon* v. *Lawson*, 8 Q. B. 828. But the innuendo cannot enlarge, extend, or add to the sense or effect of the words declared on, or properly impute to them a meaning which the publication, either in itself or taken in connection with the inducement and colloquium, does not warrant or fairly imply. Now, what words are libelous? "It is well settled that any publication which tends to injure one's reputation, and expose him to hatred or contempt, if made without lawful excuse, is libelous." *Negley* v. *Farrow*, 60 Md. 175, 45 Am. Rep. 715; *Snyder* v. *Fulton*, 34 Md. 128, 6 Am. Rep. 314; *Hagan* v. *Hendry*, 18 Md. 191. Malice in an action of this kind consists in intentionally doing, without justifiable cause, that which is injurious to another; and everything injurious to the character of another is in this action taken to be false, until it is show by plea to be true. Therefore, every publication injurious to the character is, in law, false and malicious, until the presumption of falsehood is met by plea of the truth, or the presumption of malice is removed by showing a justifiable occasion or motive. 1 Hare & W. Lead. Cas. ed. 1857, 116, *notes* to the case of *Steele* v. *Southwick*, 9 Johns. 214.

The words complained of charge that the plaintiff "would be an anarchist if he thought it would pay," and the innuendo defining their import in the first count is: "Meaning thereby, and intending to charge, that the plaintiff would, for a money consideration, be an anarchist." The second count, after setting forth a definition of the word "anarchist," explains the meaning of the alleged libelous publication to be that the plaintiff would, for a money consideration, be an anarchist, and engage in the unlawful, treasonable, and felonious designs and acts of anarchists. And the third count avers that the word "anarchist" means a person who, actuated by mere lust of plunder, seeks to overturn by violence all constituted forms and institutions of society and law and order, and all right of property; and that the words "if he thought it would pay" mean that the plaintiff would, if he thought it would inure to his personal gain, from mere lust of plunder, endeavor to destroy all right of property and all law and order. Falsely publishing of an individual that he is an anarchist is libelous. *Cerveny* v. *Chicago Daily News Co.* 139 Ill. 198, 18 L. R. A. 864. The declaration alleges that an anarchist is universally accepted by all law-abiding persons in all countries as meaning an enemy and conspirator against all law and social order, and as one who uses unlawful, violent, and felonious means to destroy property and human life, and as one who is treasonable to the government under which he lives and employs assassination of persons in authority as means of accomplishing his unlawful designs against society. Obviously, then, to publish

of and concerning an individual that he is such an enemy of law, of order, of society, and of human life, is grossly libelous, and is far from merely charging him, as suggested in the argument, with being only a political propagandist, advocating visionary schemes; for anarchy, as defined in the declaration, and as generally understood, is avowed hostility to all governments, and open antagonism to all political parties, every one of which professes to support some form of government, and generally that which its members consider the best. It cannot be doubted that all law-abiding, right-thinking men regard with abhorrence the individual who justifies or approves of the bloody and atrocious means to which anarchists resort, the world over in furtherance of their reckless and revolutionary designs, against every form of government and against every right of property. It is equally apparent that to accuse another of being an anarchist in the sense in which the term is generally accepted is to accuse him of that which will inevitably injure his reputation, and expose him to obloquy and ignominious reproach. If this be so, then to publish of another that he "would be an anarchist if he thought it would pay" is to impute to him the possession of that degree of moral obliquity and turpitude which would mark him as a fit person, if he were personally benefited thereby, to do the violent and felonious acts of which anarchists are known or believed to be guilty. It fixes upon him a stigma which would cause all honest and upright people to shun him, because a man who would be an anarchist if it would pay him to be one is of necessity not only a person devoid of all moral restraint, but one under the dominion of the worst of human passions, and ready, for self-aggrandizement, to commit the most grievous crimes against the state, against society, and against the individual. And it matters not whether the alleged motive that influences him be an expectation of pay in actual money, or the hope of personal gain, inspired by the mere lust of plunder; for in either event the obvious meaning of the charge is that for gain, however acquired, he would be willing to become an obdurate criminal, an enemy of mankind, and a conspirator against the government under which he lives. Surely, such a person would merit universal execration; and to charge that an individual would be thus guilty for gain would undeniably subject him to contempt and hatred, and would therefore be actionable in itself.

It only remains to inquire whether the innuendoes do more than point out or define the meaning of the libelous words; and about this there can be no possible difficulty. They neither enlarge them, nor give to them a significance at variance with their natural and ordinary meaning. The plaintiff is named in the article. He is named, too, in such a manner as necessarily to expose him to ridicule, for the initial letters of both his Christian and surname are printed in small type, with an obvious view of belittling him in the public estimation. The innuendoes further set forth the meaning of the words "anarchist" and "pay;" and they ascribe to them their usual and generally accepted import, defining them in a paraphrastic way, and pointing out that they were intended to apply to the plaintiff. This is strictly within the office of an innuendo.

For the reasons we have given, we consider the declaration sufficient in law. We do not deem it necessary to examine and review the various cases cited by the appellee's counsel in the exceptionally able arguments made by them at the bar, because the law respecting libel is too well settled in Maryland to be shaken by decisions elsewhere, even if, upon a strict analysis, those decisions were shown to be in conflict with our own.

Judgment reversed, with costs above and below, and new trial awarded.

MASSACHUSETTS SUPREME JUDICIAL COURT.

COMMONWEALTH of Massachusetts
v.
Alexander McCANCE.

(.....Mass.....)

The parts of a book which are obscene, indecent, and impure, when the whole book is not so, must be described or referred to in an indictment so specifically that they can be identified by the evidence, if they are not set out according to their tenor because unfit to appear on the record.

(June 24, 1895.)

EXCEPTIONS by defendant to rulings of the Superior Court for Suffolk County made during a trial of an indictment against him for selling obscene books, which resulted in his conviction. *Sustained.*

The facts are stated in the opinion.

Mr. **P. Henry Hutchinson** for defendant.

Mr. **Frederick E. Hurd,** for plaintiff:

An obscene publication need not be spread at length upon the records by a recital thereof in full in the indictment.

Com. v. *Holmes*, 17 Mass. 336; *Com.* v. *Wright*, 139 Mass. 382; *Com.* v. *Tarbox*, 1 Cush. 66.

It is the law of England that in an indictment at common law for publishing an obscene book, it is not sufficient to describe the book by its title only, but the words thereof alleged to be obscene must be set out, and if they are omitted the defect will not be cured by a verdict of guilty, and the indictment will be bad.

Bradlaugh v. *Queen*, L. R. 3 Q. B. Div. 607.

On an indictment at common law for exhibiting an obscene picture Tilghman, *Ch. J.*,

NOTE.—As to the unlawfulness of obscene and indecent publications, see *note* to *Re* Worthington Co. (N. Y.) 24 L. R. A. 110.

in *Com.* v. *Sharpless*, 2 Serg. & R. 108, 7 Am. Dec. 632, said, with reference to the objection, that the indictment did not sufficiently describe the offense. "I am for paying some respect to the chastity of our records. These are circumstances which may be well omitted."

Field, *Ch. J.*, delivered the opinion of the court:

This is an indictment under Stat. 1890, chap. 70. The defendant is charged with "knowingly, unlawfully, feloniously, wickedly, and scandalously" selling "to one Jefferson H. Parker a certain book, then and there called 'The Decameron of Boccaccio,' and which said book, upon the title-page thereof, was then and there of the tenor following, that is to say: 'The Decameron; or Ten Days' Entertainment of Boccaccio. A Revised Translation by W. K. Kelly, with Portrait and Ten Illustrations, Drawn and Engraved by Leopold Flameng. Published for the Trade,'—and which said book, then and there contained, among other things, certain obscene, indecent, and impure language, and manifestly tending to the corruption of the morals of youth, which said book is so lewd, obscene, indecent, and impure that the same would be offensive to the court here, and improper to be placed upon the records thereof, wherefore said jurors do not set forth the same in this indictment," etc. The defendant moved to quash the indictment for this among other reasons, that "the indictment sets forth, in no legal and sufficient terms, wherein said book is amenable to the penalties denounced by the statute; no specification of any offending passage is exhibited." This motion was overruled, and the defendant excepted.

The exceptions also recite as follows: "The government introduced in evidence the book described in the indictment, and caused to be read the following passages from the said book: Novel 1, third day; novel 2, fourth day; novel 4, fifth day; novel 7, sixth day; novel 8, eighth day; novel 9, ninth day. No evidence of the character of the book was adduced by the commonwealth other than the book itself." The book introduced in evidence is a volume of 710 printed pages, most of which are in the English language, but a few pages are in the original Italian language, with a translation of these into the French language appended. There is a short preface, and at the end of some of the novels are short historical notes by the translator, and each day's entertainment is preceded by an introduction. The Decameron of Boccaccio is a book well known to students of literature, and contains ten novels or stories, for each of ten days' entertainment. Of these 100 novels six only were introduced in evidence by the commonwealth. We cannot know what parts of the book the grand jury found to be obscene, indecent, and impure, and we know of no way whereby from the indictment the defendant could know before the trial what parts of the book would be put in evidence by the commonwealth. The first precedent, so far as we know, for an indictment in this form, is the second count in the indictment in *Com.* v. *Holmes*, 17 Mass. 335. In that case the court says: "The second and fifth counts in this indictment are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient. This would be to require that the public itself should give permanency and notoriety to indecency in order to punish it." This decision has been followed by many of the courts in this country. See *People* v. *Girardin*, 1 Mich. 90; *State* v. *Pennington*, 5 Lea, 506; *McNair* v. *People*, 89 Ill. 441; *Fuller* v. *People*, 92 Ill. 182; *State* v. *Brown*, 27 Vt. 619; *State* v. *Griffin*, 48 Tex. 588; *State* v. *Smith*, 17 R. I. 871; *United States* v. *Bennett*, 16 Blatchf. 338, Fed. Cas. No. 14,571. No authorities are cited in *Com.* v. *Holmes*, and the opinion in *Com.* v. *Wright*, 1 Cush. 46, shows that the decision in *Com.* v. *Holmes* must be regarded as an exception to the general rule of pleading relating to libelous publications. *Com.* v. *Tarbox*, 1 Cush. 66, decides that in an indictment for publishing an obscene paper, if the indictment purports to set out the alleged publication, it must do it in the very words of the paper, and the court says that "the excepted cases occur whenever a publication of this character is so obscene as to render it improper that it should appear on the record; and then the statement of the contents may be omitted altogether, and a description thereof substituted; but, in this case, a reason for the omission must appear in the indictment by proper averments." See *Com.* v. *Dejardin*, 126 Mass. 46, 30 Am. Rep. 652. *Com.* v. *Wright*, 139 Mass. 332, where the indictment was quashed, decides that the indictment "must at least by some general description identify the paper" which is alleged to contain obscene matter, and which the defendant is charged with publishing. This question of the mode of pleading in cases of this kind was considered in England by the court of appeals, in *Bradlaugh* v. *Queen*, L. R. 3 Q. B. Div. 607, and it was unanimously decided that the words alleged to be obscene must be set out according to their tenor. The two principal Massachusetts cases were considered, and the decision in *Com.* v. *Holmes* was not approved. Id. 620, 638, 641. But the weight of authority in this country is in favor of the decision in *Com.* v. *Holmes*, and the principle of that decision has been several times recognized by this court as correct, and we think that it must be regarded as an established rule of law in this commonwealth. It remains to be considered whether the present indictment contains a reasonably specific description of the obscene, indecent, and impure language which it is alleged that the book, among other things, contains. The Decameron of Boccaccio was probably not written for the purpose of corrupting the morals of youth. It was written long before the invention of printing, when the number of persons who could read were few, and it is supposed to represent the taste of many cultivated people of the world in Italy at the time. It was read for the entertainment of men and women. Parts of it are coarse, and

according to the standards of modern times, are obscene, indecent, and impure, and other parts of it are decent and pure enough to be read by the present generation. Because it is not a book which is wholly obscene, indecent, and impure, the book is described in the indictment as containing, "among other things, certain obscene, indecent, and impure language." If books of this character are to be regarded as within the provisions of Statute 1890, chapter 70, upon which we express no opinion, we think it reasonable that the parts of the book which the grand jury find to be obscene, indecent, and impure should be described or referred to in the indictment so specifically that they can be identified by the evidence, unless they are set out according to their tenor. In the present indictment it cannot be known that the defendant has not been indicted upon evidence relating to certain parts of the book, and convicted upon evidence relating to certain other parts. A picture or print has no tenor, and must of necessity be set out by description, but printed words always can be set out according to their tenor. If this is not done because it is alleged that the language is too indecent to be placed on the records of the court, we think that, in the absence of any statute regulating the procedure, the law requires that the language complained of should be identified by such a description or reference that it may be know that the indictment was founded upon the language which is put in evidence and relied upon at the trial. If the obscene language complained of is found only in some passages in a book, the rest of which is free from obscenity, the book as a whole should not be presented, but only the book as containing these obscene passages. The records of the court of common pleas or of the supreme judicial court for the county of Worcester contained no copy of the book entitled "Memoirs of a Woman of Pleasure," referred to in the indictment in *Com.* v. *Holmes*, but apparently the whole book was presented, and the indictment was at common law. The statutes on the subject were first enacted here in Rev. Stat., chap. 130, § 10. It may be suggested that on a motion to quash the indictment the court cannot take judicial notice of the contents of the book referred to in the indictment. But it appears by the indictment that the book referred to contains other things than the obscene language complained of, and no attempt has been made in the indictment to distinguish between these other things and the obscene language, and no excuse has been given in the indictment for not designating the part of the book complained of, and the evidence shows that the indictment might easily have described or referred to the novels put in evidence so that the defendant could have known to what he was called upon to answer at the trial. We are of opinion that the indictment is not reasonably specific, and that it should have been quashed. The exceptions taken at the trial need not be considered.

Exceptions sustained.

MICHIGAN SUPREME COURT.

ST. JOHNS MANUFACTURING CO.
v.
Orrin W. MUNGER, *Plff. in Err.*

(.....Mich.....)

Fraud of promoters in procuring a subscription to stock of a corporation before its organization is not a defense against an assessment on the stock by the corporation after the subscriber has carried out his contract and united with others in forming the corporation, but his remedy is restricted to an action against the wrongdoer.

(July 2, 1895.)

ERROR to the Circuit Court for Clinton County to review a judgment in favor of plaintiff in an action brought to enforce payment of an assessment upon a stock subscription. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Fedewa & Walbridge,** for plaintiff in error:

The plaintiff cannot accept the advantages and refuse to assume the obligations.

Busch v. *Wilcox*, 82 Mich. 315.

A subscriber, on discovering the fraud, may rescind by notification to the corporate authorities, or he may wait until sued upon the subscription and then set up the fraud as a defense to the action at law.

2 Cook, Stock & Stockholders, § 152.

In all cases where the subscription is taken by a promoter or unauthorized agent, it cannot retain the subscription and repudiate the representations. It must assume both or neither.

Crump v. *United States Min. Co.* 7 Gratt. 353, 56 Am. Dec. 116; *Battelle* v. *Northwestern Cement & Concrete Pave. Co.* 87 Minn. 89; 2 Cook, Stock & Stockholders, § 707; *Wilson* v. *Kings County Elev. R. Co.* 114 N. Y. 487; *Stanton* v. *New York & E. R. Co.* 59 Conn. 272; *Davis* v. *Montgomery Furnace & Chemical Co.* (Ala.) 8 So. Rep. 496; *Whitney* v. *Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Bommer* v. *American Spiral Spring Butt & Hinge Mfg. Co.* 81 N. Y. 468; *Reichwald* v. *Commercial Hotel Co.* 106 Ill. 439.

The rule that fraud vitiates all contracts at the option of the person defrauded, applies as well to stock subscriptions in a corporation as to other contracts.

Vreeland v. *New Jersey Stone Co.* 29 N. J. Eq. 188; *Duffield* v. *E. T. Barnum Wire & Iron Works*, 64 Mich. 294; *Low* v. *Connecticut & P. R. R. Co.* 45 N. H. 370, affirmed 46 N. H. 284; *Hall* v. *Vermont & M. R. Co.* 28 Vt. 401;

NOTE.—As to effect of promoter's fraud upon right of corporation against subscriber, see *note* to Yale Gas Stove Co. v. Wilcox (Conn.) 35 L. R. A. 100.

Virginia Land Co. v. *Haupt*, 90 Va. 533; *French* v. *Ryan* (Mich.) 62 N. W. Rep. 1016.

Messrs. **Spaulding, Norton & Weimer,** for defendant in error:

The defendant is chargeable in law with knowledge that this soliciting committee could not bind a company not yet in existence by any representations they might make.

Miller v. *Wild Cat Gravel Road Co.* 57 Ind. 241.

The company could not have agents, as it was not yet in existence.

Battelle v. *Northwestern Cement & Concrete Pave. Co.* 37 Minn. 89; *New York & N. H. R. Co.* v. *Ketchum*, 27 Conn. 180; *Rockford, R. I. & St. L. R. Co.* v. *Sage*, 65 Ill. 329, 16 Am. Rep. 587.

The company never knew the committee except as subscribers, afterwards, to the capital stock. Their representations to the defendant were those of strangers or outsiders, were immaterial, and could not bind the company.

Morawetz, Priv. Corp, 807; 1 Cook, Stock & Stockholders & Corp. Law, 141; *Miller* v. *Wild Cat Gravel Road Co. supra.*

To work a ratification, the alleged verbal representations must have been made by an actual agent, or one whose action is ratified with knowlege of what he has done.

McGraw v. *Germania F. Ins. Co.* 54 Mich. 149.

The only remedy is by an action at law against the person who induced the taking of the shares.

Duranty's Case, 26 Beav. 270.

Any representations made by the committee were personal and not binding on the company afterwards organized.

Carmody v. *Powers*, 60 Mich. 26; *Rockford, R. I. & St. L. R. Co.* v. *Sage*, 65 Ill. 328, 16 Am. Rep. 587; 1 Cook, Stock & Stockholders & Corp. Law, § 141.

Neither those signing the articles of association, nor any one representing them as agents, could determine what the company would or should do after its organization.

Fox v. *Allensville, C. S. & V. Turnp. Co.* 46 Ind. 31; *Bish* v. *Bradford*, 17 Ind. 498; 2 Beach, Priv. Corp. 852, and cases cited.

The defense comes too late.

1 Cook, Stock & Stockholders & Corp. Law, § 161; Morawetz, Priv. Corp. 810, and *note.*

Hooker, J., delivered the opinion of the court:

The plaintiff recovered a judgment against the defendant upon an assessment on the capital stock of the corporation to which the defendant was a subscriber. Upon the trial the plaintiff's counsel objected to evidence in support of the notice accompanying the plea, which objection was sustained, and the case turns upon the sufficiency of the facts stated in the notice as a defense. These facts are substantially as follows: Prior to January 1, 1893, R. M. Steel, of St. Johns, and others, had been carrying on a manufacturing business in that city, under the name of the St. Johns Manufacturing Company. Some time before the date mentioned, a proposition had been made by Steel to a number of the citizens of St. Johns to incorporate said business with a capital of $300,000, of which $200,000 was to be preferred stock, and $100,000 common stock; and some time in 1891 the defendant subscribed for fifty shares of common stock by signing an agreement of which the following is a copy, viz.: "Whereas, the St. Johns Manufacturing Company is to be incorporated as a stock company, with a capital stock of $300,000, we do each of us severally subscribe and agree to pay for the number of shares of said stock set opposite our respective names, the par value of said shares to be $10 each. The stock hereby subscribed to be paid in twenty equal monthly installments, commencing October 20, 1891, with seven per cent interest on unpaid portions after January 1, 1892, or all or any part in excess thereof may be paid at any time at the option of the subscriber." Prior to said subscription, the defendant had no knowledge of the extent or profits of said business carried on by Steel and others. Prior to the time that the defendant subscribed as aforesaid, a meeting was held at St. Johns, which was attended by Steel and a great number of citizens of the place, for the purpose of considering the advisability of forming a corporation to carry on said business, and a committee was appointed by said meeting for the purpose of soliciting subscriptions for stock in the proposed corporation. Said committee consisted of citizens of St. Johns, who proposed to and did subscribe for part of the stock of said company. Said committee, "in order to induce" defendant to subscribe for stock, represented to him that the said business had for a series of years been a very prosperous and money-making one, and that during the period it had manufactured tables it had never paid less than 10 per cent a year on capital invested of $300,000, and had paid as high as 17 or 18 per cent a year on said amount of capital. Said committee further represented to the defendant that the business was to be capitalized in the sum of $300,000, of which $200,000 was to be preferred stock, and $100,000 common stock; that the former was to be paid an annual dividend of 6 per cent from the earnings of the company, and the common stock was to be paid the balance of the profits, which would be at least 14 to 20 per cent per year. The machinery was to be invoiced and appraised at its cost value by disinterested persons, and turned in as part of the capital, and the common stock was to have "such representation on the board of directors, so that they could protect their interests." It was further stated that the practice of the former company of issuing to its workmen and others coupons payable at the St. Johns Mercantile Company (an institution in which said Steel had a large interest) should be discontinued, and that such coupons should thereafter be made payable at all the stores in St. Johns. The notice alleges, further, that the defendant "relied upon" each of such representations, and was thereby induced to subscribe for such stock. The notice states that preferred stock to the amount of $199,000 is owned by Steel; that

the new company has continued to issue coupons payable as before, and not at the stores of St. Johns generally; that Steel's stock was paid for by him by turning over to the new company the plant, machinery, stock, and material connected with the business before the incorporation of plaintiff; and that such property was not invoiced and appraised by disinterested persons, but was turned in at more than its cost value; and that each representation made by said committee to the defendant, and by which he was induced to subscribe for said stock, was untrue; and that he had no knowledge of its falsity, either at the time he subscribed or at the time of his payment of $100 upon said subscription. The notice asserts further that the by-laws adopted by said corporation are antagonistic to the right of the holders of the common stock, and unjustly prefer the holders of the preferred stock, to an extent that renders the common stock worthless, and that such by-laws were adopted by the votes of the holders of the preferred stock, to the detriment of the holders of the common stock, and against the protest of some of the latter; that the majority of the directors have been selected by the holders of the preferred stock, and the board has ignored the interests of the holders of the common stock. It is further alleged that the plant has been used for many other purposes than those represented to be contemplated, and for some unauthorized purposes. The foregoing comprises the essential allegations of the defendant's notice, and, if it states a sufficient defense, the judgment must be reversed; but, if it does not, it was proper to sustain the objection made by the plaintiff's counsel, and the judgment should be affirmed. *Spicer* v. *Bonker*, 45 Mich. 630.

Counsel for the defendant say that the plaintiff company is bound by the representations of the citizens' committee which procured the defendant's subscription by misstatements, the benefit of which it cannot receive and retain without assuming responsibility for the representations. This is an attempted application of the rule that, by accepting the benefits of a contract made by an agent, the principal is bound by the undertakings and promises of the agent. A number of cases are cited to sustain this contention, which, manifestly, must rest upon the proposition that the citizens' committee was an agent of the company which its efforts created. Among the cases ctied are many which support the general rule above stated, viz., that a principal must assume the obligations, if he wishes the benefits, of an unauthorized contract made by an agent. As stated by Paley: "Contracts made for the benefit of another, but without his privity or direction, may be rejected or affirmed at his election. But, by making the election to affirm it, he adopts the agency altogether, as well that which is detrimental as that which is for his benefit. And, in seeking to enforce contracts entered into by agents, the principal is subject to have them impeached by any conduct of his agent which would have had that effect if proceeding from himself. Every species of fraud, misrepresentation, or concealment, therefore, in the agent, affects the principal's right to recover." Paley, Agency, 324; *Hitchcock* v. *Griffin & S. Co.* 99 Mich. 451. This doctrine was applied in the case of *Crump* v. *United States Min. Co.*, 7 Gratt. 352, 56 Am. Dec. 116, but in that case there was no question of the existence of the relation of principal and agent, and contract relations between the parties. Crump was a purchaser of stock from the pre-existing corporation, through its representative, authorized by the corporation to sell the stock. Most of the cases cited by counsel relate to contracts made with, or services performed by, promoters, previous to the organization of the corporation, upon an understanding with the prospective stockholders or some of them. It is uniformly held that such arrangements may be ratified by the corporation after organization. *Wilson* v. *King's County Elev. R. Co.* 114 N. Y. 488; *Bommer* v. *American Spiral Spring Butt Hinge Mfg. Co.* 81 N. Y. 468; *Rockford, R. I. & St. L. R. Co.* v. *Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Low* v. *Connecticut & P. R. R. Co.* 45 N. H. 370; *Stanton* v. *New York & E R. Co.* 59 Conn. 272; *Reichwald* v. *Commercial Hotel Co.* 106 Ill. 439; *Whitney* v. *Wyman*, 101 U. S. 392, 25 L. ed. 1050; *Battelle* v. *Northwestern Cement & Concrete Pave. Co.* 37 Minn. 89; *New York & N. H. R. Co.* v. *Ketchum*, 27 Conn. 170. But in the case of *Rockford, R. I. & St. L. R. Co.* v. *Sage*, *supra*, while admitting the doctrine of ratification, the court says that, "in the absence of an express promise, no promise to pay will be implied from the fact that the company, when organized, accepts and receives the benefit of the same;" and "a right of recovery against a corporation for anything done before it has a proper existence does not appear to rest upon any satisfactory legal principle. It is soon enough for such corporate bodies to enter into contracts incumbering their property when they are duly organized according to their charters, and have their chosen and impartial directors to conduct their business." In *Battelle* v. *Northwestern Cement & Concrete Pave. Co.*, *supra*, the court recognizes this doctrine, saying that, "while a corporation is not bound by engagements made on its behalf by its promoters before it is organized, it may after organization adopt them." In *New York & N. H. R. Co.* v. *Ketchum* the supreme court of Connecticut reaches the same conclusion. The same is unqualifiedly held in Indiana. See *Fox* v. *Allensville, C. S. & V. Turnp. Co.* 46 Ind. 36; *Miller* v. *Wild Cat Gravel Road Co.* 57 Ind. 244.

In the present case the defendant united with others to form a corporation, a preliminary subscription being obtained by a citizens' committee, chosen at a public meeting, all of the members of which became subscribers. The subscription was followed by the adoption and signing of articles of association. The corporation thereby became an entity, and those who subscribed the articles became stockholders. The proposition that such stockholder could charge the association with fraud because he was misled by the fraud of interested persons is sugges-

tive of troublesome results. If this can be done, and the stockholders thereby escape payment for his stock, other stockholders, innocent of the fraud, would find their responsibilities proportionately increased, and the burdens of the concern would be shifted upon those members who were unable to show that they became such through the fraud of others. There would be little stability to corporations, and little safety to stockholders, if this doctrine should be sustained. In this case there not only was not a corporation in existence to be a principal, but the facts set up in the notice do not show that there was an agent of a corporation. The promoters were persons who represented the meeting, or possibly themselves, or some prospective stockholder, who, for purposes of his own, desired to see the corporation organized. They cannot be said to be agents of the corporation in any sense. These subscribers contracted with each other to form a corporation, which they did. If one was guilty of fraud upon the others in procuring his subscription, a remedy should exist against such person. Doubtless, a subscriber who is induced by fraud to agree to join in the organization of a corporation might refuse to do so on discovering fraud; but, by carrying out his agreement and uniting with others, he has assumed new relations with them and the public, after which his remedy is restricted to action against the wrongdoers. See 4 Am. & Eng. Encyclop. Law, p. 201, and *notes; Carmody* v. *Powers*, 60 Mich. 26.

We think the judgment should be affirmed.

Ordered accordingly.

The other Justices concur.

FLORIDA SUPREME COURT.

Raymon C. REYES *et al.*, *Appts.*,
v.
George C. MIDDLETON *et al.*

(.....Fla.....)

***1. A deed or other instrument purporting to convey land** that shows upon its face that the grantors therein were out of possession of the land granted at the time of its execution, and that such land at the time was adversely held by another, is void upon its face, as to such adverse occupant, and, as to him, does not create such a cloud upon his title as will authorize the interposition of a court of equity on his behalf for its removal.

2. It is well settled that a court of equity will never lend its aid, by injunction, to restrain the libeling or slandering of title to property, where there is no breach of trust or contract right involved, but that in such cases the remedy, if any, is at law, and that the alleged insolvency of the libelant, in such cases, will not, of itself, authorize the interference of the court of equity.

(July —, 1895.)

APPEAL by defendants from a judgment of the Circuit Court for St. Johns County in favor of plaintiffs in an action brought to recover damages for slander of title. *Reversed.*

The facts are stated in the opinion.

Messrs. **M. C. Jordan** and **W. A. MacWilliams**, for appellants:

A bill in equity which states only a pretended title to the defendant, and prays for relief against it on the ground of an apprehended injury, cannot be maintained.

Puterbaugh, Ch. Pl. & Pr. ed. 1874, p. 536; *Torrent* v. *Muskegon Boom Co.* 22 Mich. 354; *Fletcher* v. *Tollet*, 5 Ves. Jr. 3; Montague, Eq. Pl. 94.

*Headnotes by TAYLOR, J.

NOTE.—For the law upon the question of slander of title, see *note* to Burkett v. Griffith (Cal.) 18 L. R. A. 707.

Where a party files a bill to quiet title to land, or to prevent or remove a cloud, it is necessary to establish a legal title as against the claim of the parties defendant.

Stewart v. *Stewart*, 19 Fla. 846.

A complainant seeking to obtain a cancellation of defendant's title must show himself to be the owner in law or in equity; and if (the burden of proof being on him) he fails to establish his title, it is immaterial whether defendant's title is good or bad.

Hart v. *Bloomfield*, 66 Miss. 100.

Messrs. **C. P. Cooper** and **J. C. Cooper** for appellees.

Taylor, J., delivered the opinion of the court:

On the 26th day of July, A. D. 1888, George C. Middleton, Charles E. Gard, Burton W. Cole, William H. Erwin, Betsy P. White, William S. Vansickle, Isaac N. Vansickle, Marion R. Cooper, Frank F. Smith, Joseph Randall (as administrator of the estate of Erastus Randall, deceased), R. M. Simms, W. H. Simpson, Ira S. Bunker, Edgar F. R. Fripp, and T. B. George, all of the county of St. Johns, as complainants, filed their bill in equity in the circuit court of St. Johns county against Ramon C. Reyes (in his own right, and as administrator of the estate of Jose B. Reyes, deceased), Carmen Reyes, Innocencia Reyes, Maria del Rosario Reyes, Gabina Andreu, and Emanuel P. Andreu, her husband, and Adolphus N. Pacetti, all of St. Johns county. The bill alleges, in substance: "That the complainants are severally seised and possessed, in fee, of certain portions of that tract of land situated in St. Johns county, Florida, known as section 37 in township 8 south, of range 29 east, located on Moultrie creek, the same being a Spanish grant confirmed to Jose B. Reyes, containing 223.10 acres; the several respective portions thereof owned and possessed severally by the respective complainants being particularly described in divers deeds of the same to them, that are attached to the bill as exhibits there-

to. That complainants are now, severally, in the actual possession of the several portions of said section of land conveyed to each of them severally by said deed exhibits, and that they, and those under whom they claim, have been in the actual possession of same ever since the year 1873. That each of complainants have made improvements upon their several tracts of land, by clearing, cultivating, and fencing same, and by building houses thereon and planting orange groves thereon, and by the making and cultivation thereof, and that the said several tracts or portions of said land described in said deed exhibits are the homes of each of complainants, severally, to whom said tracts are, in and by said deeds, duly conveyed. That the said defendants set up and assert some pretended claim of title to or interest in said lands, by reason of their alleged claim that they, with the exception of Adolphus N. Pacetti, are the heirs-at-law of one Jose B. Reyes, the grantee to whom said lands were duly confirmed as a Spanish grant. That complainants have no personal knowledge whether or not the defendants are in fact the heirs-at-law of said Jose B. Reyes, but they say that said defendants have no title whatever to said lands; the same having been duly and regularly assessed in the year A. D. 1853, and duly and regularly sold on the 1st day of May, A. D. 1854, by one R. B. Canova, the then sheriff and *ex officio* tax collector of St. Johns county, Florida, for nonpayment of taxes, and said lands having been then and there purchased by the state of Florida, and a deed for same having been executed by said Canova, as said tax collector, to the register of public lands of said state of Florida, and on the 4th day of February, A. D. 1878, sold and conveyed to one B. F. Oliveros by the then commissioner of lands and immigration of said state of Florida in accordance with the statutes in such cases provided. That by reason of said preceding sales and conveyances the said Jose B. Reyes, and those claiming under him, were divested of title to said land, and the same became vested in said B. F. Oliveros, who, on the 24th day of February, A. D. 1874, filed said deed for record in the clerk's office of St. Johns county, state of Florida, and that he entered into actual occupancy of said land in the year 1873, and that the said Oliveros, and those claiming under him, including your orators, have been in the actual, open, notorious, adverse, and exclusive occupation and possession of said above-described real estate ever since the same was so taken possession of by said Oliveros up to the date of filing this bill, and that complainants are now in the actual, open, notorious, adverse, and exclusive occupation and possession of said lands, and neither of the said defendants are now, or ever have been, in the occupation or possession of any part of said land. That, by conveyances through divers different persons from the said Oliveros to complainants, they have acquired the title to said land, and are now seised of title in fee thereto, that appears by the record of deeds of said county of St. Johns, and that defendants have no title whatever to said lands That the defendant Adolphus N. Pacetti claims some interest in said land by reason of an alleged power of attorney to him, coupled with an interest in said land, executed by the other of said defendants to said Pacetti on the 21st day of September, 1883, and recorded in book of Miscellaneous Records, C, pages 61 and 64 of Records of St. Johns County, Florida; said alleged power of attorney purporting to authorize said Pacetti, in the name of the other of said defendants, or of said Ramon C. Reyes, as administrator aforesaid, to sue for recover, and gain possession of said land, in consideration of an interest therein, as therein stated, as will appear by a certified copy of said power of attorney attached to the bill as an exhibit. That for some years past, to wit, since about the 21st day of September, A. D. 1883, said defendants, and particularly said Ramon C. Reyes and Adolphus N. Pacetti, although out of possession of said land, and the records of said county showing the title of complainants to same, as above set forth, have continuously and publicly stated to divers persons in said county, and in the city of St. Augustine particularly, that they, the said Reyeses, as heirs-at-law of Jose B. Reyes, owned said land, and that said Pacetti was their agent and attorney in fact, with said alleged one-half interest therein, in the matter of taking possession of and asserting title to said land, and in some manner have openly asserted that complainants had no title to said land; and said defendants, from time to time since the 21st day of September, A. D. 1883, have posted up, and caused to be posted up, in many public places, and distributed to divers persons, in the city of St. Augustine, in said county, printed and written circulars, warning and threatening all persons against buying said land of complainants, and of lawsuits that will result therefrom, and offering to sell the same themselves, through Ramon C. Reyes, in his own right, and as administrator aforesaid, or through Adolphus N. Pacetti, thereby clouding and traducing the title of your orators to said land, all of which will more fully appear by reference to one of said circulars as posted up by said defendants, attached to the bill as an exhibit. That for several years they desired and urged the defendants Ramon C. Reyes and Adolphus N. Pacetti to bring the proper actions at law against your orators to test the title between your orators and said defendants to said land, your orators being more than willing that said title should be tried and settled; but although said defendants threatened, from time to time, to bring such action, they did not do so, up to the 16th day of August, 1887, when said Ramon C. Reyes, as administrator, commenced an action in ejectment against one of your orators, Charles E. Gard, on the law side of this court, in which suit issue was joined, and the same was ready and called for trial, but said Reyes, as plaintiff therein, by his attorney, dismissed said suit. And although your orators have waited some time since for said defendants to commence new actions to test their said alleged claim of title to said land, yet they have not done so, but continue to make their said alleged public assertions

and claims of title to said land, although still out of possession of same, and to post and distribute similar circulars as to the title to said land. That said defendants, by said methods of claiming title to said lands and warning others against the title of your orators, and offering to sell your orators' said land, and by the record of said alleged power of attorney to the defendant Adolphus N. Pacetti, prevent your orators from selling same, or disposing of it, or raising money on it as security, and generally lessen its value in the estimation of purchasers and persons dealing in real estate; and your orators are therefore prevented from the entire use, enjoyment, and benefit of said property, and the title to same is, in fact and in law, clouded thereby, and your orators, being in possession, have no adequate remedy at law for said injury. That they fear and apprehend, and have reason to fear, that, unless restrained by decree of this court, the defendants will continue to assert that the title to said land is in defendants, and will continue to publicly state that the said Reyeses, as heirs-at-law of Jose B. Reyes, own said land, and that said Pacetti is their agent and attorney in fact for the purposes of asserting title to said land, and will assert that your orators have no title to said land, and will post up, and cause to be posted up, in public places, and distributed to divers persons, printed and written circulars, warning and threatening all persons against buying said land of your orators, and of lawsuits that will result therefrom, and offering to sell same themselves, through the said Ramon C. Reyes, in his own right and as administrator aforesaid, or through the said Pacetti, thereby clouding and traducing the title of your orators to said land. That by reason of defendants' alleged claim of title they may bring separate actions at law against each of your orators, thereby occasioning a multiplicity of suits. That said defendants, particularly Ramon C. Reyes and Adolphus N. Pacetti, have no property, above their legal exemptions, out of which any judgment for damages could be satisfied, that your orators, or either of them, might obtain against said defendants, or either of them, for said alleged slanders upon the titles of your orators to said land."

The prayers of the bill are that the defendants, and all persons claiming through or under them, be perpetually enjoined from alleging or asserting title in themselves to said land, or any claim thereto, or right therein, and from instituting any suits to assert title to, or to recover possession thereof, and from disturbing complainants in any manner in the enjoyment, use, and possession of said land, and that complainants' title thereto may be decreed to be good and indefeasible, as against said claims of title thereto of the said defendants; that said power of attorney from the defendants Reyes to the defendant Pacetti be decreed to be delivered up and canceled, and adjudged to be null and void, and canceled of record where same is recorded. There is a prayer for general relief.

The defendants demurred to the bill upon the ground of a want of equity in the bill, and because the complainants claim to hold separate interests in separate pieces of property, and the damages, if any, would be separate and distinct, and the complainants are therefore improperly joined; and for uncertainty. This demurrer was overruled, and this ruling is the first error assigned. Attached to the bill, as an exhibit thereto, is a power of attorney from the defendants Reyes to the defendant Pacetti, authorizing the latter to sue for and recover possession of any and all lands and claims to which the Reyeses may be entitled by inheritance or otherwise, and to put the Reyeses in possession thereof; and this instrument contains also an agreement with Pacetti, entitling him to one half of all lands and other property that he may recover for the Reyeses, in consideration of his services in and about the recovery thereof. This instrument, the bill assumes, is a cloud upon the complainants' title; and its delivery and cancellation, as such cloud, are prayed for. We do not think that it constitutes such a cloud upon the complainants' title as will authorize the maintenance by them of a bill in equity for its removal. Upon its face, when its features as a conveyance to Pacetti of an interest in the lands is considered, it shows that the grantors were, at the time of its execution, out of possession of the lands proposed by it to be conveyed; and, according to the well-settled rule of this court, it was therefore a nullity, and void upon its face, as to the complainants, who were at the time of its execution in possession of the lands in dispute adversely to such grantors. *Doe* v. *Roe*, 13 Fla. 602; *Levy* v. *Cox*, 22 Fla. 546; *Gould* v. *Carr*, 33 Fla. 523, 24 L. R. A. 130. It is further the well-settled rule of this court that a deed or other instrument that is void upon its face, and that cannot sustain an action, in the absence of rebutting proof, cannot be said to be such a cloud upon a title as will authorize the interposition of equity for its removal. *Davidson* v. *Seegar*, 15 Fla. 671; *Barnes* v. *Mayo*, 19 Fla. 542; *Sloan* v. *Sloan*, 25 Fla. 53. We do not think, therefore, that the bill here makes out such a case as will authorize a court of equity to exert its power of removing cloud on title.

The next ground of relief set up by the bill, and the one mainly relied upon by the complainants, is that the defendants are, and have been, traducing and slandering the title of complainants to the lands described, by declaring themselves to be the true owners thereof, and that complainants had no title thereto, and by posting up notices or placards warning purchasers from buying any of said lands from any one but themselves, under penalty of purchasing lawsuits, etc. Under this last phase of the bill, there is no allegation as to any overt act of interference by the defendants with the complainants in their quiet use, enjoyment, and possession of the lands. Neither is it alleged that the defendants have interfered in any way directly with the land itself, by any attempt to possess themselves, or to dispossess the complainants, thereof; but the substance of the allegations is simply that the defendants

are and have been libeling and slandering the title of complainants to said lands, and the prayer of the bill, upon this phase of it, is that they be restrained and enjoined from so slandering and libeling it in future. There is no allegation that the defendants have brought, or are about to, or threaten to, bring any action or actions against the complainants, or any of them, to test their claims to the lands, or to question complainants' title thereto. It seems to be well settled that a court of equity will never lend its aid, by injunction, to restrain the libeling or slandering of title to property, where there is no breach of trust or contract involved, but that in such cases the remedy, if any, is at law, and that the alleged insolvency of the libelant, in such cases, will not, of itself, authorize the interference of the court of equity. *Boston Diatite Co.* v. *Florence Mfg. Co.* 114 Mass. 69, 19 Am. Rep. 310; *Wetmore* v. *Scovell*, 3 Edw. Ch. 523, 6 L. ed. 748; *Brandreth* v. *Lance*, 8 Paige, 24, 4 L. ed. 330, 34 Am. Dec. 368; *Mauger* v. *Dick*, 55 How. Pr. 132; *Life Asso. of America* v. *Boogher*, 3 Mo. App. 178; *Singer Mfg. Co.* v. *Domestic Sewing-Mach. Co.* 49 Ga. 70, 15 Am. Rep. 674; *Clark* v. *Freeman*, 11 Beav. 112; *Seeley* v. *Fisher*, 11 Sim. 581; *Prudential Assur. Co.* v. *Knott*, L. R. 10 Ch. App. 142.

It is further contended here that the complainants are entitled to the relief prayed, upon the ground of the prevention of a multiplicity of suits; and this contention is based upon the idea that the complainants are numerous, and that each of them owns a separate parcel of the land in controversy, and that each of them is subject to a several action of ejectment by the defendants for the respective parcels of the land owned by each. We do not think that the facts set up by the bill disclose a case calling for the interposition of a court of equity to prevent a multiplicity of suits; but, besides this, the bill distinctly alleges that the defendants will not bring ejectment to test the title, though often solicited and invited to do so by the complainants.

It follows from what has been said that the demurrer of the defendants to the bill of complaint should have been sustained, and that the court below erred in overruling same.

The decree appealed from is reversed, with directions to sustain the defendants' demurrer to the bill, and that the bill be dismissed.

ILLINOIS SUPREME COURT.

CHICAGO & ALTON R. CO., *Appt.*,
v.
PEOPLE of the State of Illinois, *ex rel.* Jacob WINDMILLER.

(153 Ill. 409.)

A bridge owned by a bridge company but used exclusively for railroad purposes and leased forever to a railroad company subject to determination of the lease for default of the lessee to perform its terms and conditions, is not railroad property which can be assessed as such with the railroad track by the Illinois state board of equalization instead of the local assessor.

(November 26, 1894.)

APPEAL by defendant from a judgment of the County Court for Pike County in

NOTE.—*Jurisdiction as to taxation of bridge over river forming boundary of a state or its divisions.*

The general course of the decisions is to hold that in all cases of bridges to which a special rule is not made applicable by statute the local authorities are to assess for taxation whatever portion of the bridge is within their jurisdiction.

General rule.

In Cornish Bridge Propra. v. Richardson, 8 N. H. 267, it is said it has been suggested that bridges upon the Connecticut river are not taxable in New Hampshire because they are partly within the state of Vermont. It is not necessary in order to the taxation of a bridge under the statute that it should all be within a single town. There is nothing exempting bridges over the Connecticut river from its operation and although it is true that a portion of the abutment of all such bridges is within the limits of Vermont and the toll-houses may be actually there situated, we cannot think that it was the intention of the legislature to exclude such bridges from taxation on that account while others are taxed. The terms of the act are entire. Charters to build such bridges to take tolls must be granted here. The waters of the river are within the jurisdiction of this state and of course nearly all the structure; and the bridges being substantially within the limits of this state would probably never be deemed a proper subject of taxation in Vermont even if the charter had also been procured there to authorize the erection.

In New York a toll-bridge is assessable as real estate in the town in which it is located. Hudson River Bridge Co. v. Patterson, 74 N. Y. 365.

The abutments and piers of the bridge crossing the Delaware river from Phillipsburg to Easton are taxable as real estate in the township of Phillipsburg to the center of the river. State v. Mets, 29 N. J. L. 122.

All those portions of the bridges over the Potomac river which are within the limits of the state of Maryland are taxable in the county in which they are situated, if they are owned by corporations whose principal office for the transaction of business is not within the state. O'Neil v. Virginia & M. Bridge Co. 18 Md. 1, 79 Am. Dec. 669.

That part of the Portsmouth toll-bridge extending from Portsmouth, N. H., to Kittery, Me., which is located in Kittery is assessable for taxation there although the owners reside in Portsmouth. Kittery v. Portsmouth Bridge Co. 78 Me. 93.

A local assessor has no right to assess any portion of a bridge which is without the limits of the state. Keokuk & H. Bridge Co. v. People, 145 Ill. 596.

Bridges between Iowa and Illinois are locally assessable in Iowa to the middle of the main channel of the river, that is to a point midway between the banks. Dunleith & D. Bridge Co. v. Dubuque County, 55 Iowa, 558.

If a city's jurisdiction extends to low-water mark on the opposite side of the river and it grants a bridge company the right to build a bridge on the

See also 29 L. R. A. 73; 35 L. R. A. 759.

favor of relator in a proceeding brought to compel payment of delinquent taxes. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Matthews, Higbee & Grigsby,** for appellant:

The exclusive power to assess "railroad track" is conferred upon the state board of equalization, and an assessment upon the same property by the local assessor will be a double assessment, and the tax extended upon the latter assessment will be illegal and void.

Chicago, & A. R. Co. v. *People,* 98 Ill. 350; *Chicago & A. R. Co.* v. *People,* 99 Ill. 464; *Peoria, D. & E. R. Co.* v. *Goar,* 118 Ill. 184; *Chicago & A. R. Co.* v. *People,* 129 Ill. 571.

By right of way can only be understood the land used as a way for the road.

Chicago, B. & Q. R. Co. v. *Paddock,* 75 Ill. 616; *Chicago & A. R. Co.* v. *People,* 98 Ill. 350.

Where the charter of a railroad company authorizes it to acquire by lease, purchase, or otherwise other roads, etc., and provides that property so acquired shall become the property of the corporation lessee, the courts will give effect to such provision, and property thus leased will become, for purposes of taxation, at least, the property of the lessee.

2 Rorer, Railroads, p. 1507, and cases cited; *Huck* v. *Chicago & A. R. Co.* 86 Ill. 352.

The Act of 1878, providing that "all bridge structures across any navigable stream forming the boundary line between the state of Illinois and any other state shall be assessed by the township assessor in the county where the same is located as real estate," was not intended to change the method of taxing railroad property, or the mode of assessing it, but to apply to bridges not constituting a railroad track exclusively, and to make such structures real estate, for the purpose of collecting taxes thereon.

Anderson v. *Chicago, B. & Q. R. Co.* 117 Ill. 26.

A lease in perpetuity is equivalent to an absolute conveyance.

Chicago, B. & Q. R. Co. v. *Boyd,* 118 Ill. 73.

Messrs. **M. J. Scrafford** and **William Brown** also for appellant.

Messrs. **Williams & Williams,** with *Mr.* **Averill Beavers,** for appellee:

If the bridge in question is owned by the Mississippi River Bridge Company, and the Chicago & Alton Railroad Company owns a railroad track on and across the same, then there is a separate and distinct ownership and it should be segregated, and the bridge structure proper assessed as "real estate," and the track as railroad track.

State v. *Mississippi River Bridge Co.* 109 Mo. 253; *St. Louis & S. F. R. Co.* v. *Williams,* 53 Ark. 58; *Cass County* v. *Chicago, B. & Q. R. Co.* 2 L. R. A. 188, 25 Neb. 348; *Quincy Railroad Bridge Co.* v. *Adams County,* 88 Ill. 615; *St. Joseph & D. I. R. Co.* v. *Devereux,* 41 Fed. Rep. 14; *State* v. *Metz,* 29 N. J. L. 122.

No lease, for however long a period, accompanied with conditions of defeasance or forfeiture, can in any sense of the term be equivalent to an absolute deed of conveyance.

State v. *Mississippi River Bridge Co. supra.*

Although the description of the land may be defective, appellant by entering its appearance and urging general objections, waived the right to object to the sufficiency of the notice of application for judgment.

People v. *Dragstran,* 100 Ill. 286; *People* v. *Sherman,* 88 Ill. 165.

If the Mississippi River Bridge Company has

condition that it shall have the right to tax it, it will have the right to tax all of the bridge within its corporate limits. Henderson Bridge Co. v. Henderson (Ky.) 14 S. W. Rep. 85, affirmed 90 Ky. 498.

Such portion of a bridge owned by a private corporation as is within the limits of a municipal corporation is subject to assessment by it for local taxation. St. Louis Bridge Co. v. East St. Louis, 121 Ill. 238.

Bridges over the Mississippi river between Illinois and Missouri are taxable for state and local purposes by Illinois as far as they are east of the middle of the main channel of the river. St. Louis Bridge Co. v. People, 125 Ill. 226; Buttenuth v. St. Louis Bridge Co. 123 Ill. 535.

A bridge which lies partly in the District of Columbia and partly in Virginia cannot be assessed by the District on its entire length. Only that part within the District can be assessed. Alexandria Canal, R. & Bridge Co. v. District of Columbia, 1 Mackey, 217.

In Arkansas where the boundaries of a municipal corporation extend only to high-water mark on navigable rivers a municipal corporation can tax only that part of a bridge across such river which is above high-water mark although the bridge to the middle of the stream is within the county in which the municipality is located. Fort Smith & V. Bridge Co. v. Hawkins, 12 L. R. A. 487, 54 Ark. 609.

A toll bridge owned by a corporation and leased to a railroad company reserving the right to lease it to other parties should not be assessed by the railroad assessors but by the local assessors of the counties in which it is located. St. Louis & S. F. R. Co. v. Williams, 53 Ark. 58.

The bridge across the Ohio river at Louisville is subject to taxation by the state to the low-water mark on the Ohio side, but it cannot be taxed by the city of Louisville although within its limits as it is not upon territory over which the power of taxation has been extended to the city. Louisville Bridge Co. v. Louisville, 81 Ky. 189.

The United States Supreme Court in Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900, cites the case of Louisville Bridge Co. v. Louisville, as having been affirmed in 89 Kentucky but the opinion was never reported there.

Bridges across the Missouri river at St. Joseph between Missouri and Kansas can be assessed by the local authorities in Missouri only to the center of the stream. St. Joseph & G. I. R. Co. v. Devereux, 41 Fed. Rep. 14.

If a bridge is constructed, not as a part of a railroad, but as an independent structure, it is subject to local taxation although a railroad subsequently acquires the title to it and runs its train over it and returns it as part of its road-bed to the railroad assessors of the state. *Ibid.*

In Central Vermont R. Co. v. St. Johns, Mont. L. Rep. 4 Q. B. 406, a municipal corporation whose limits extended to the middle of a navigable river was held to have jurisdiction to tax the portion of a railroad bridge across the river which was within its limits. But a *note* to the report of that case states that it was reversed in 14 Can. Sup. Ct. Rep. 288, 12 Legal News, 490. The grounds of the reversal do not, however, appear.

Under the New Jersey railroad taxation acts,

an interest in the bridge as lessee, owner, or otherwise, then it is not exclusively owned by appellant, and should be assessed as real estate. *Anderson* v. *Chicago, B. & Q. R. Co.* 117 Ill. 26.

Wilkin, *Ch. J.*, delivered the opinion of the court:

The county collector of Pike county applied to the court below at its May term, 1892, for a judgment against certain property for delinquent taxes assessed against it by the assessor of one of the townships of that county for the year 1891. The assessment was against a fractional piece of land containing 21 38-100 acres, as belonging to the Mississippi Bridge Company. The Chicago & Alton Railroad Company appeared, and filed objections to the application, setting up that the property was part of its railroad, denominated by law "railroad track," and as such subject to the assessment by the state board of equalization, and not by any local assessor; that the same had been regularly returned to, and duly assessed by, said board for the year 1891, and the assessment fully paid. The county court, upon hearing the evidence offered in support of and against the objections, overruled the same, and gave judgment accordingly for the amount of the tax assessed,—$2,289. From that judgment this appeal is prosecuted.

That the property in question is subject to taxation is not denied, nor is it claimed that it was unfairly assessed by the local assessor. His assessment is challenged on the sole ground that he had no authority of law for making it. Appellant maintains that the property was railroad property, assessable only by the state board of equalization. Appellee insists it is liable to taxation under the Act approved and in force May 1, 1878, entitled "An act to provide for the assessment and taxation of bridges across navigable streams on the borders of this state," wherein it is provided that such bridge shall be assessed by the township assessors in the townships where the same are located as real estate. Rev. Stat. chap. 120, § 1 (2 Starr & C. Anno. Stat. p. 2124). The controlling question in the case, raised by the objections filed below, is, Was the objector entitled to have the property assessed to it as railroad property? If it was, it may be conceded for the purposes of this decision that the state board of equalization alone had power to assess it. Whether objector had the right to demand that the assessment should be against it as for railroad property, in our view of the case, depends upon the ownership of the property. If the railroad company was the owner, it could not be lawfully assessed under section 1, chapter 120, *supra*, but only by the state board of equalization as railroad track. *Anderson* v. *Chicago, B. & Q. R. Co.* 117 Ill. 26. If, on the other hand, it was owned by the Mississippi Bridge Company, to whom it was assessed by the township assessor, we think it equally clear that the railroad company could have nothing to say as to how or by whom it should be assessed. In other words, if it was owned by the bridge company, it could not be assessed as railroad property. The fact that the structure was a railroad bridge, and used exclusively as such, would not entitle its owner to have it assessed as railroad property, unless that owner was a railroad company. Railroad property, to be assessable by the state board of equalization as "railroad track," must not only be

which only apply to corporations of that state, a Pennsylvania corporation which obtains the consent of New Jersey to construct a bridge over the Delaware river is not taxable under that act but under the general taxation laws of the state. State v. Mutchler, 42 N. J. L. 461.

Where the states disagree as to the true extent of their boundaries there may be some conflict in the claims to taxation but the courts are pretty well agreed as to the grounds upon which the claim to tax should rest. For the rulings as to the extent of jurisdiction over rivers and lakes forming state boundaries, see *note* to Buck v. Ellenbolt (Iowa) 15 L. R. A. 187.

Statutory rules.

A bridge across a navigable stream forming a part of the boundary between Illinois and another state, constructed and used exclusively by a railroad company as part of its continuous track, is for the purpose of taxation a railroad track to be assessed by the state board of equalization and not by the board of local assessors. Anderson v. Chicago, B. & Q. R. Co. 117 Ill. 26.

In Chicago, M. & St. P. R. Co. v. Sabula, 19 Fed. Rep. 177, where a statute made railroads assessable by a special board appointed by the state and not by local authorities and bridges over certain rivers assessable by local authorities, there being at the time no bridges owned by railroad companies there, it was held that when a railroad bridge was built it was assessable by local authorities the same as other bridges and not by the special assessing board.

In Iowa by statute all bridges are to be assessed by the executive council except those over the Mississippi and Missouri rivers, and they are to be assessed by the assessors of the local districts in which they are situated. Missouri Valley & B. Railroad & Bridge Co. v. Harrison County, 74 Iowa, 283.

A bridge built by a bridge company under a charter giving all railroad companies an equal right to use it does not become a part of a railroad so as to be assessed as such by its being leased to one company forever subject to defeasance for failure to comply with the conditions of the lease. State v. Mississippi River Bridge Co. 109 Mo. 253.

Where the right to bridge a navigable stream must be obtained from congress the bridge is not a part of the right of way, road-bed, or superstructure within the meaning of an act making such assessable by the state board of equalization, but local authorities may assess such portions of it as are within their jurisdiction. Cass County v. Chicago, B. & Q. R. Co. 2 L. R. A. 188, 25 Neb. 843.

Effect on commerce.

Taxation of a bridge over a navigable river between two states although it is used to carry interstate commerce is not a regulation of commerce among the states or taxation of any agency of the federal government. Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. ed. 900.

Taxation on capital stock.

The companies may be taxable on their capital stock as well as on the bridge property. Quincy Railroad Bridge Co. v. Adams County, 88 Ill. 615.

H. P. F.

so used, but it must be the property of a railroad company. The question is not whether the property could have been assessed to appellant by the local assessor. The public authorities might have elected to so assess it, the railroad company being in possession and control of it; and, if they had done so, the company would, we think, have had the right to insist upon the assessment being made by the state board. But the question here is, Had appellant a right to say the property could only lawfully be assessed against it? If an individual or corporation should construct a railroad bridge over a stream on the borders of this state, and allow a railroad company to use it in connection with other parts of its track, whether under a lease, by charging tolls, or otherwise, the bridge would certainly not thereby become railroad property in the sense that the owner could insist upon its being assessed as such. If it would, the Act of May 1, 1878, providing for the taxation of bridges, cannot in any case be applied to railroad bridges. Nor would the fact that the railroad company using the bridge had agreed with the owner to pay all taxes assessed against it give such railroad company the right, as against the public, to say it should be assessed in a particular way. We regard the foregoing propositions as so self-evident that argument is unnecessary in their support. They are sustained by *St. Louis & S. F. R. Co.* v. *Williams*, 53 Ark. 58.

The facts as to the ownership and acquisition of this property are briefly these: In August, 1870, the Chicago & Alton Railroad Company leased from the Louisiana & Missouri River Railroad Company a line of railroad leading west from the Mississippi river at Louisiana, Mo., "together with the steam ferry boats necessary to conduct the business of said railroad across the Mississippi river for a term of one thousand years," at a rental of a per cent given of the gross earninga. The lease provided that, if the ferry should be discontinued, the railroad company should not be required to account for proceeds which might be earned by its operation and management, and, if a bridge should be substituted therefor, the earnings of it should not be taken as a part of the gross earnings of the railroad in determining the rental under the lease. The following November it also leased "forever," from the St. Louis, Jacksonville & Chicago Railroad Company, a road extending east from the river opposite Louisiana, thus giving it a line east and west connected by ferry across the Mississippi river. In March, 1871, the Louisiana & Missouri River Railroad Company was authorized by an act of congress to build a bridge over the river for the use of its railroad. The Mississippi Bridge Company is a corporation organized under the laws of this state and Missouri with authority to construct and maintain a bridge at the same point. On July 5, 1873, this bridge company entered into a contract with the Louisiana & Missouri River Railroad Company, agreeing at its own expense to acquire the land necessary for approaches, and to construct the railroad bridge in question; and in carrying out that contract the bridge company purchased the 21 38-100 acres of land for right of way, and for earth with which to construct the easterly approach thereto. Some time after its completion, the bridge company, as party of the first part, leased the bridge to appellant railroad company, as party of the second part, and to its successors and assigns, forever, upon the terms and conditions therein set forth. The property is described in the lease as "all and singular the bridge of the party of the first part from the city of Louisiana, in the county of Pike, in the state of Missouri, across the Mississippi river, to the county of Pike, in the state of Illinois, and its appurtenances, appendages, and protections, and all franchises and property of the party of the first part, however or whenever acquired, or which may be hereafter acquired." The railroad company agreed, among other things, to use the bridge as part of its railroad line, and keep it in repair, pay all taxes thereon, pay the salaries of the officers of the bridge company, its bonded indebtedness, and an annual dividend of 7 per cent upon its stock. The lease also provides that if the party of the second part, or its successors or assigns, shall fail to keep and perform the covenants, conditions, and agreements therein contained, the party of the first part may re-enter, etc. It is insisted on behalf of appellant that this is a lease in perpetuity, and therefore has the force and effect of an absolute conveyance. If that position could be maintained, the case would be within the decision in *Anderson* v. *Chicago, B. & Q. R. Co.*, *supra*, and free from difficulty. The lease is not, however, in absolute perpetuity, but may be terminated at any time upon default of the lessee to keep and perform its terms and conditions, and in different ways recognizes the paramount ownership of the property as remaining in the lessor. The terms and conditions of this conveyance are all inconsistent with an intention to pass the absolute title to the lessee. It is, to all intents and purposes, but a lease, though for a term which may continue for all time, the absolute ownership remaining in the lessor. *Chicago, B. & Q. R. Co.* v. *Boyd*, 118 Ill. 78, cited by counsel, is not in point. There the Fox River Railroad Company, as is stated in the opinion, "granted and demised to complainant in perpetuity all its property, real and personal, and all the privileges and franchises it had under its charter from the state;" and we said: "That was equivalent to an absolute conveyance." That conveyance was unconditional. It is certainly not to be supposed that the parties to the instrument now before us made it with the purpose of conveying the absolute ownership of the property, when by a much simpler form of deed they could have clearly expressed such a purpose. *State* v. *Mississippi River Bridge Co.* 109 Mo. 253. In that case the question was whether the Missouri portion of this same bridge was liable to taxation; and the court, after stating the facts bearing upon the construction of the bridge, and fully considering the same lease now under consideration, said: "It is clear from this statement of the substance of the instrument that, notwithstand

ing the long term the tenancy may endure, the paramount title remains in the bridge company." If the decision in that case is followed by us, an affirmance of the judgment below must result, and we see no good reason for dissenting from the views there expressed.

It is said, however, that the ownership of the property was determined there upon the lease alone, whereas the further contention is made by appellant that the bridge, when completed, belonged to the Louisiana & Missouri River Railroad Company, subject to whatever rights, if any, the Chicago & Alton Railroad Company had to its exclusive possession and use under the conveyance from the bridge company, dated December 8, 1877, and further subject to the right of the Chicago & Alton Railroad Company to the same as after-acquired railroad track of the Louisiana & Missouri River Railroad Company under the lease from that company dated August 1, 1870. These positions both rest upon the assumption that the bridge company never owned the bridge, but that it originally belonged to the Louisiana & Missouri River Railroad Company. The assumption is, in our opinion, unwarranted by the facts. It is wholly irreconcilable with the lease from the bridge company to appellant. That instrument not only describes the bridge as belonging to the bridge company, but throughout recognizes no right of property therein in either this appellant or the Louisiana & Missouri River Railroad Company. The contract between the last-named company and the bridge company for the construction of the bridge does, in one part of it, state that the railroad company employs the bridge company as its agent and servant to construct and maintain the bridge; but it also contains the stipulation that the bridge company is to advance for the railroad company the money for the building and maintenance of the same, and in consideration thereof, and the acquiring and constructing the approaches to the bridge, the bridge company should "forever have the exclusive possession and use of said bridge, without let or hindrance of or from the said party of the first part [the railroad company], which exclusive possession and use is agreed to be in liquidation of all sums of money advanced by said party of the second part, and for its services to be performed under this agreement." The language "shall forever have the exclusive possession and use of said bridge," in its connection, we think shows that the parties intended that the bridge company should become the owner of the structure when completed. Certainly, appellant and that company so construed it when they made the lease of December 8, 1877. It appears from the evidence that appellant furnished the money to the bridge company with which to build the bridge, and that it was in fact built for its sole benefit, so far as that could be done in view of the right of other railroad companies to use it under the act of congress authorizing its construction, and counsel seem to insist that therefore appellant should be held to be the owner of the property. There is certainly enough in these and other facts proved to raise an inquiry as to why appellant did not take a deed for the property from the bridge company instead of leasing it, but we are unable to see upon what principle courts can be asked to ignore the direct and positive evidence of title as the parties have made it, and hold that appellant is the owner by construction merely that it may be assessed by the state board of equalization, instead of the local assessor. Either from necessity or of its own volition, appellant has never become the absolute owner of the property, but has left the legal title to the same in the Mississippi Bridge Company, and it is therefore subject to taxation against the latter by the township assessor of the town in which it is located.

The judgment of the County Court is therefore right, and it will be affirmed.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH of Kentucky
v.
HENDERSON BRIDGE CO.

(.....Ky.....)

1. **The right of the state to tax the franchise of a bridge corporation** created by it is not defeated by the fact that the company had obtained from another state the privilege of extending its bridge from the boundary of that state at low-water mark of the river to the high lands, and had acquired from congress the privilege of maintaining the bridge across a navigable river, and the designation of the bridge as a post-road.

2. **Interstate business is not taxed** by taxing the franchise of a bridge company which maintains a toll bridge between states.

3. **The "capital stock" of a corporation** within the meaning of Stat., § 4079, from which the value of its tangible property is to be deducted in order to find the value of its corporate franchise for the purpose of taxation, means the entire property, real and personal, tangible and intangible, including assets and franchise.

4. **Debts of a corporation cannot be deducted** in finding the value of its franchise as the difference between the values of its capital stock and tangible property where the constitution requires the property of corporations to be taxed like that of individuals, and debts of the latter are not deducted from their property for taxation.

5. **The value of a franchise** for the purpose of taxation is the benefit derived from its possession.

NOTE.—As to taxation of bridge between two jurisdictions, see *note* to case immediately preceding this one.

(May 25, 1895.)

CROSS-APPEALS from the Circuit Court for Franklin County in an action brought to enforce payment of a tax upon defendant's bridge franchise; the plaintiff appealing from so much of the judgment as reduced the value placed upon the franchise by the board of assessors and defendant appealing from so much of the judgment as held its franchises subject to taxation. *Reversed on plaintiff's appeal; affirmed on defendant's appeal.*

The facts are stated in the opinion.

Mr. **William J. Hendrick** for the Commonwealth.

Messrs. **Helm & Bruce** for defendant.

Grace, J., delivered the opinion of the court:

This was an action filed in the Franklin circuit court by the commonwealth of Kentucky against the Henderson Bridge Company, seeking to recover of defendant the sum of $3,675.91, the amount of taxes claimed to be due and payable to the state by said company on its franchise as a corporation created by the laws of Kentucky, its property being located in the state of Kentucky, for and during the year 1894, under a valuation and assessment made by the board of valuation and assessment, viz., the auditor, secretary of state, and treasurer, as established by law, valuing said franchise as of date September 15, 1893; the value of said franchise being fixed at $865,157.46, excluding therefrom the value of the real estate and personal property owned by said defendant in this state; said company being chartered and incorporated by the state of Kentucky as the Henderson Bridge Company; the defendant having been so assessed, and the tax rate being 42½ cents on each $100 in value of its franchise, of which assessment defendant was duly notified, and demand being made for amount due, failed to pay. The answer of defendant is divided into three paragraphs, not in either, however, denying its incorporation under and by the state of Kentucky, nor that its property and franchise is located in Kentucky. Defendant says: First. That though it obtained its charter from the state of Kentucky to build this bridge, yet that it also obtained important rights, powers, faculties, franchises, and privileges from the state of Indiana; that under and by its charter from Kentucky it could only build its structure to low-water mark on the north side of the Ohio river; that being the northern boundary of the state of Kentucky. Defendant recites in this paragraph sundry provisions from the general incorporation law of the state of Indiana, as of date March 2, 1875, as amended by Act of the legislature of date April 8, 1881, showing specially by this amendment that any foreign corporation duly incorporated under the laws of another state to build bridges over any of the streams forming the boundary line between the state of Indiana and such other state might have and enjoy all the rights, privileges, and franchises granted under and by their general laws to any home company formed and incorporated under their laws for that purpose; then reciting other provisions under the general incorporation laws of the state of Indiana, whereby it says it was finally authorized to construct, build, and operate so much of its structure as extended and was situated within the state of Indiana, and, in addition, to build so much trestle and embankment, and place thereon a railroad, as would take trains crossing this bridge out to the highlands. And it says that without these rights, privileges, and franchises the franchise granted by authority of Kentucky is and was of little or no value. From the recitals of the law of Indiana as made one might suppose that this company might have been incorporated under the laws of the state of Indiana had it so desired to extend and complete its structure and approach to this bridge on the Indiana side. The material defect of this plea, however, is that it does not allege that it was so incorporated under and by any law, general or special, of the state of Indiana. It only says that, being incorporated under and by the laws of Kentucky as the Henderson Bridge Company, that then it was granted certain powers and privileges under the laws of Indiana, not denying that it actually built, nor that it now owns and operates, its bridges and the approaches thereto under and by the charter and incorporation of the legislature of Kentucky. But it may be further said, suppose this charter was supplemented by a similar charter by the state of Indiana, authorizing the construction of that portion of the bridge north of low-water mark of the Ohio river, and that the state of Indiana levies and collects its tax both on the tangible property and the franchise, this would be but the exercise of a lawful and rightful authority and power. What possible excuse could this be to the defendant for refusing to pay taxes on its tangible property in Kentucky, and on its franchises granted in Kentucky? It is possible that it may then obtain franchises from both states, and acquire property in both, and exercise its franchise powers in both, and deny its duty to pay taxes to either. This part of defendant's plea is insufficient. Again, defendant says it was authorized and empowered to build and operate its bridge by permission and authority of the congress of the United States; that congress prescribed the dimensions and height of said bridge, and provided that, when built, same should be deemed a post-route; that these were important powers, franchises, and privileges, without which neither the incorporation of its company, nor any franchise granted it by the state of Kentucky, was of any value. It affirms in its brief the right and power of the congress of the United States to charter companies, and to grant franchises to same, to build bridges over any and all navigable streams in the United States, and cites in support of this contention the case *Luxton* v. *North River Bridge Co.*, reported 153 U. S. 525, 38 L. ed. 808. It is not necessary, in order to the decision of this case, to question the power claimed, nor the authority of the case quoted. The commonwealth is not undertaking in this suit to impose or collect any tax from defendant on any franchise granted it by authority of the United States, and hence this decision has no application. The same objection lies to this part of the defendant's answer that is taken to that part of same pertaining to the state of Indiana: and

that is that defendant does not affirm (as, of course, it could not truthfully) that it was in fact incorporated under and by the authority of the United States, or any act of congress, or that it built its bridge under any such act of incorporation or authority, not denying, as before stated, its incorporation under and by the laws of Kentucky, and not denying the fact that under and by said act of incorporation it was created a body corporate, and from this charter it derived its powers to build, own, operate, and collect tolls on, said bridge. Neither does counsel for defendant properly distinguish between rights, powers, and franchises granted by the state of Kentucky, under which it built, and to-day owns, this property, and the duties and burdens imposed by the congress of the United States, but confuses these duties and burdens with grants, privileges, and franchises in this: that while the defendant was created by the laws of Kentucky, and given the rights, powers, and franchises that it enjoys in the construction of this bridge, all that the congress of the United States undertook to do was to impose certain burdens and limitations on this power, by prescribing certain rules and regulations pertaining to the building of this bridge, so that its construction should in no wise interfere with the free navigation of the open river. This was quite legitimate, and altogether proper, and clearly within the power and duty of congress. And again congress declared that this bridge, when so constructed and built, should be deemed a post-route. Yet neither of these things can in any just or appropriate sense be regarded rights, powers, privileges, or franchises conferred by the government of the United States, but as burdens imposed only. So this part of the answer of defendant was also defective and wholly insufficient, and the court below should have sustained the demurrer to the first paragraph of same, embracing these items noticed.

The second paragraph of defendant's answer is as follows: "The defendant says that its bridge between the city of Henderson and the state of Indiana is used entirely for transporting interstate business,—transporting passengers and freight between the states of Indiana and Kentucky. The defendant therefore insists and alleges that the imposition of a tax by the state of Kentucky upon the franchise of the defendant corporation is a tax upon its right to do interstate business, and is an unlawful burden upon, and an attempt upon the part of the state of Kentucky to regulate commerce between the states, in violation of that provision of the Constitution of the United States which confers powers on congress to regulate commerce between the states." This paragraph again shows gross misapprehension on the part of defendant and its counsel of the questions involved in this case. This is a question only of the right of the state of Kentucky to levy and collect of defendant a tax upon its property owned and situated exclusively in Kentucky, and upon the value of its franchise as a corporation, created under and by the authority of the state of Kentucky, and upon a business being wholly done within the borders and limits of the state, and this tax, to the same extent precisely as that assessed and levied on all other corporations created by the laws of Kentucky, situated and doing business in its jurisdiction. This tax is only to the extent that the taxes of all individuals owning property situated in Kentucky may be assessed and collected, and not a farthing more. We are at a loss to see how this demand by the state of this corporation of the same tax that under the constitution and laws of the state must be paid by all other corporations has anything to do with regulating commerce between the states, or how it in any wise interferes with the constitutional inhibition of any act of congress ever passed on this subject. We apprehend that neither under this clause in reference to the regulation of commerce between the states, nor under any other clause in the constitution, has congress ever undertaken to lessen, impair, abridge, or take away the right of any state within the federal union to levy and collect the same rate of taxes on the property of corporations and individuals situated and resident within its boundary, though they may, for the time being, be engaged in commerce, that it levies upon the property of all other corporations and individuals. Certain it is that congress has never yet undertaken to pass such law; neither is it probable that it ever will undertake so to do, at least while its halls are filled with representatives of the people, worthy by reason of their intelligence and character to fill such high positions. And if such a dangerous and destructive law should be passed, what lawyer doubts that the courts of the United States would immediately declare it null and void, as at once destroying the sovereign power of the states on this subject of taxation. This defendant company is not engaged in commerce or transportation at all. It has no authority or power or franchise to engage in commerce or transportation. It was simply authorized to build this bridge, and, when built, then the railroads that may be engaged in transportation, and so indirectly engaged in commerce, may transport merchandise and passengers over its structure, in consideration of a reasonable rate of toll for so doing. This is all; nothing more. This defendant, the Henderson Bridge Company, is no more, in fact not as much, engaged in commerce between the states as each and every railroad in the United States that anywhere on its line may cross from one state into another, conveying freight and passengers. And if, under this pretense, this bridge company can be rightfully and lawfully excused from the payment of its lawful taxes to the state of Kentucky, assessed and levied, as we will hereafter demonstrate, at the same rate, and estimated in the same mode or manner, as that of all other taxes on corporations, then under the same pretext can the property of every railroad of the United States, whose line at any place extends from one state into another, and who is thus necessarily engaged in transporting freight and passengers from one state into another, be likewise exempted from taxation. We deem this proposition incontrovertible, and simply to state it is to show the utter shallowness and fallacy of the pretext by and under which this defendant corporation seeks to shield and protect itself from its just and lawful share of the public burden. In this case the property upon which this tax has been assessed, being only

that portion of its structure that extends to the low-water mark on the north side of the Ohio river, is as much within the territorial limits of the state of Kentucky as if it were situated at the geographical center of the state, and, being so situated, is subject to the authority and lawful jurisdiction of the state to same extent as any other piece of property in the limits of the state, subject only to the constitutional inhibition that it shall in no wise obstruct the navigation of said stream. The true line was fixed by the original compact between Virginia and the federal government, whereby Virginia under her right to all territory north of the Ohio was extended to low-water mark on the north side of said stream. And this has always been recognized by both the states bordering on this stream, as well as by the federal government. It has never been questioned. This line,—low-water mark on the north side of the Ohio river,—like all other lines considered with reference to mathematical accuracy, has no element of width or space. It is as clearly and as sharply defined by its own terms as the lines between Indiana and Illinois or Ohio and Michigan. This court has never questioned the right or the power of congress to regulate commerce between the states in any and every legitimate way and manner, and yet it confesses it has but little patience with the many unwarrantable and indefensible demands constantly being presented in this court, torturing and perverting this right into a protection for many derelictions of public duty. We believe, however, this is the first time that this power has been appealed to to destroy the right of taxation by the state of property situated within its territorial limits. The demurrer filed by the commonwealth to this paragraph of the answer was properly sustained by the court below.

The only remaining questions are as to the value of the franchise of the defendant corporation, and the mode and manner of assessing the same; these questions being presented (rather in an argumentative way) by the third paragraph of defendant's answer. To show that the value of the franchise as fixed by the board of valuation and assessment, viz. $865,157.46, is too high, and that the mode of ascertainment adopted was erroneous, the defendant relies chiefly on this clause in the 4079th section of the Kentucky Statutes: "That said board from said statement [referring to a sworn statement required to be made by the president of the company] and from such other evidence as said board may have if such corporation, company, or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company, or association as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state or in the counties where situated. The remainder thus found shall be the value of its corporate franchise, subject to taxation as aforesaid." The next section, pursuing substantially the same lines of procedure, applies to corporations organized under the laws of other states, and having property and doing business in this state, as well as in other states, provides for an assessment and an apportionment, and, as to the merits of this controversy, is not material. And, to speak more definitely of defendant's contention, it depends on the meaning to be given to the words "capital stock of the corporation," found in the section quoted. This word "stock" we find used by legislatures and by different juridical writers and courts in several different senses, and that its particular meaning must generally be determined by the matters in hand, the thing in the mind of the legislator or the court, the context as well as the clause wherein it may be found. Mr. Lowell, in his work on Transfer of Stock (section 4), says: "Stock has been succinctly designated as 'the sum of all the rights and duties of the shareholder.' Again, it has been used to denote (1) the capital stock, (2) the shares of stock or of the stockholders, and (3) as being applied so as to include both. While the term 'capital stock' generally means the fund or property put in or subscribed by members of the corporate body, yet it may mean the capital put in, and the accumulations of same, not distributed as dividends or profits." Again, it is said that the value of the capital stock is measured by that of the corporate property. An interesting description of this term "stock" or "capital stock," and what it may mean, is found in case of *People* v. *Coleman*, 126 N. Y. 433, 12 L. R. A. 762. We make the following extracts: "The capital stock of a company is one thing, and that of the shareholders is another, and a different, thing. That of the company is simply its capital existing in money or property or both, while that of the shareholders is representative, not merely of that existing and tangible capital, but also of surplus, of dividend-earning power of franchise, and the good-will of an established and prosperous business. The capital stock of the company is owned and held by the company in its corporate character. The capital stock of the stockholders they own and hold in different proportions as individuals. The one belongs to the corporation, the other to the corporators. The franchise of the company, which may be deemed its business opportunity and capacity, is the property of the corporation, but constitutes no part or element of the capital stock, while the same franchise does enter into and form a part, and a very essential part, of the shareholders' capital stock. While the nominal or par value of the capital stock and of the share stock is the same, the actual value is often widely different. The capital stock of the company may be wholly in cash or in property or both, which may be counted and valued. It may have, in addition, a surplus consisting of some accumulated and reserved fund, or of undivided profits, or both; but that surplus is no part of the company's capital stock. . . . But that surplus does enter into and form part of the share stock, for that represents and absorbs into its own value surplus as well as capital, and the franchise in addition; so that the property of every company may consist of three separate and distinct things, which are its capital stock, its surplus, and its franchise; but these three things, several in the ownership of the company, are united in the ownership of the shareholders. The share of stock covers, embraces, represents all three in their totality,

for it is a business photograph of all the corporate possessions and possibilities." In this case, while it is apparent that the court uses the term "capital stock" of the company or corporation in its most limited sense, it yet makes it clear that the corporation, the company, in its property rights, represents and embraces both capital stock, strictly so speaking, the tangible property owned by the company as well, the surplus, undivided earnings, if any, and the franchise; and while that court describes the shares of stock owned by the several individual members of the corporation as representing in interest and value all these things, yet the same things all combined constitute and are the property of the corporation or company. So, again, we find it said by a New York court in *Barry* v. *Merchants Exchange Co.*, 1 Sandf. Ch. 307, 7 L. ed. 340, "that the corporation is not limited in its ownership of property by the amount fixed as its capital stock." Again, Mr. Cook, in his work on Stock & Stockholders (section 9), says: "That while capital stock is to be clearly distinguished from the amount of property owned by the corporation, yet occasionally it happens that under the terms of statutes relating to taxation, which have been drawn without regard to the technical meaning of the words, the courts will construe the capital stock to mean all the actual property of the corporation; but this is for the purpose of carrying out the meaning of the statute, and is not the real meaning of the term." Again, it is said that the property of a corporation may embrace not only the property contributed by the stockholders, but that otherwise obtained by it under its charter. See *Williams* v. *Western U. Teleg. Co.* 93 N. Y. 162.

Thus we see what a varied meaning this term "capital stock" may have. So that it becomes necessary to examine and see what was the object and meaning of the legislature when using this term in the clause before quoted from section 4079 of our Statutes. In this examination it becomes important to notice those clauses of the constitution in reference to revenue and taxation, and see what was contemplated and enjoined by that instrument in reference to taxation. Section 172 provides: "That all property not exempt from taxation, by this constitution, shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale. . . ." Section 174 provides: "That all property whether owned by natural persons or by corporations, shall be taxed in proportion to its value, unless exempted by this constitution, and all corporate property shall pay the same rate of taxation paid by individual property. Nothing in this constitution shall be construed to prevent the general assembly from providing for taxation, based on income, licenses, or franchises." Thus it is manifest that what the constitution intended to be taxed was property,—all property; and, as to corporations, not only all tangible property, but that it intended to leave the legislature of the state free to tax the franchise of corporations if it so desired; that the property of a corporation should be taxed as the property of an individual. It will be observed that in these several sections quoted "capital stock," "stock," and "shares of stock" are not mentioned as being appropriate terms to designate the subjects of taxation, but it says "property," "all property," etc., so that there might be no confusion as to what that instrument intended. Neither is there any reason to suspect that the legislature did not understand the language and meaning of the constitution when it came to frame the revenue laws of the state under it now under consideration. Neither is there reason to suspect that it did not intend and endeavor in good faith to carry into effect the intent and meaning of the constitution. So that we may safely interpret all words and phrases (of doubtful and uncertain meaning) in accordance with and so as to effectuate and carry out that intent.

We find that the legislature, in framing the first revenue law under this new constitution, declared that all property, both real and personal, should be assessed for taxation at its fair cash value at a fair voluntary sale, etc. We find that by section 4020 the legislature for the purposes of taxation of corporations divided their property into tangible and intangible, leaving the tangible to be assessed by the officer of the county where the same was situated, but as to the intangible (which term was used as synonymous with "franchise") directed that that should be valued and taxed as provided in section 4077. We find by section 4077 that "every railway company or corporation, . . . bridge company, . . . as also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise, not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, and taxing district where its franchise may be exercised." The auditor, treasurer, and secretary of state are created a board of valuation and assessment for fixing the value of said franchise. They are to designate when this tax shall be payable, and to apportion same, when more than one jurisdiction may be entitled to a share of such tax. Section 4078 gives some general directions as to how this board of valuation and assessment shall proceed to determine the value of this franchise which is to be taxed. It provides that the president or chief officer of such corporation shall, between the 15th day of September and the 1st day of October, annually, make a statement under oath, showing the following facts, viz.: The name, place of business, kind of business, etc., engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months before the 15th day of September of the year when the statement is made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or [and] net earnings or income, including interest on investments and incomes from all other sources, within twelve months preceding the time of making the statement; the amount and kind of tangible property in this state, and where sit-

uated, assessed, or liable to assessment in this state, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale; and such other facts as the auditor may require,—all this indicating as clearly as it is possible for language to indicate that the object of the legislature was that the board of valuation and assessment should thus be able to form a correct estimate of the value of the entire property of the company or corporation whose case they were investigating. Then follows the clause in section 4079, before quoted, requiring the board, from the statement, and from all evidence before it, to proceed to fix the value of the capital stock (meaning the entire property) of the company or corporation, and that from the amount thus fixed they shall deduct the assessed value of the tangible property of the company or corporation assessed in the state or in the county where situated, and that the balance thus found should be the value of the corporate franchise subject to taxation as aforesaid. So that the question returns, Did the legislature mean by the expression "capital stock" only the amount of money that may have been paid in by the stockholders, or did it mean to embrace and include by that term the entire property, of every kind and description, tangible and intangible, embracing not only capital stock originally paid, but all property afterwards acquired and then owned by the company, as well as any surplus undivided profits then on hand, and all other assets, as well as its franchise?

In the light of the foregoing provisions of the constitution, and of the act of the legislature, and of the instructions given to the board of valuation and assessment, and of the sworn statement demanded of the president of the company, on which, with other testimony, to make this valuation, we are constrained to say that by this term "capital stock" the legislature meant to include the entire property, real and personal, tangible and intangible, assets on hand, and its franchise as well; and that, when so embraced and construed and valued as an entirety, then to take off the tangible property already assessed, and that the net balance will show and shall be the value of the franchise to be taxed under section 4077. This was the construction given to these several clauses by the board of valuation and assessment, and we entertain no doubt of its correctness. All the property of the corporation cannot be taxed in any other way. The total value of the property of this corporation was thus fixed at $2,900,000, and the evidence in the record abundantly supports the correctness of this estimate. While it is true that the technical capital stock of the company was based on $1,000,000, yet under their charter they were authorized to borrow money and issue bonds in aid of the enterprise for which they were incorporated, and they did issue $2,000,000 in bonds, and put the proceeds of these bonds, combining same with the $1,000,000 capital stock, in the building of their bridge and its approaches, so that they had invested in said enterprise not only the $1,000,000 stock, but proceeds of the $2,000,000 in bonds; and the evidence shows the property in its entirety is worth what it cost. But defendants argue that they should not be taxed on the debt that they owe. They are not so taxed. Of course, a debt cannot be made the subject of taxation as against the one who owes it. But, on the other hand, neither can an outstanding debt be deducted from the value of any property in assessing same for taxation. It cannot be done in behalf of an individual; is never done; and when the constitution requires that the property (not stock or capital stock, but property) of all corporations must be taxed in the same manner as the property of an individual, then it is manifest that neither can a corporation, in an assessment of its property for taxation, obtain any credit for any debt that it may owe. This proposition we think absolutely clear. Furthermore, the board of valuation and assessment, following out the line claimed by defendant, after determining the value of the entire property of the defendant, fixing same at $2,900,000, deducted from this amount the value of said property, including the railroad and that portion of the bridge proper situated beyond or north of low-water mark, as shown by the evidence, and leaving as the value of the property in Kentucky the sum of $1,514,893; and this was then apportioned by deducting the value of the tangible property listed in Henderson county, viz., $649,735.54, and leaving $865,157.46 as the value of the franchise of defendant to be taxed under this proceeding. These valuations are clearly within the evidence as shown by the record. It is supported by the sworn statement of the president of the company (after correcting all mistakes in same). It may also be observed in the simple fact that the market value of the stock of the company is in the aggregate $900,000, when we know that the bonds taking precedence of the stock in the sum of $2,000,000 must be good, otherwise the stock could have no value, and thus that the property and franchise must be worth the $2,900,000. Again, it is shown that the annual gross income for the year preceding this valuation was $217,072.21,—enough to pay an annual interest on both bonds and stock of more than 7 per cent,—or, making another estimate, this $217,072 would pay an annual interest on the value of the tangible property as taxed in Indiana and given in to the county of Henderson of nearly 17 per cent. So that the large earning capacity of this property, based on its tangible value only, authorizes us to assume that it lies in its franchise, which is the right to charge tolls on every locomotive, freight and passenger car, ton of freight, and passenger that passes over its road. And this rate of toll is practically, up to this time, in the discretion of the company, the legislature not having undertaken to limit or control the same, and make same reasonable. But it is insisted by counsel in argument that the state of Kentucky has no right to tax the franchise granted by it to this company, and they rely upon the authority of the case of *California* v. *Pacific R. Cos.*, 127 U. S. 40, 32 L. ed. 157, 2 Inters. Com. Rep. 153. We have examined these cases, and find that the facts upon which they are made to turn (the very foundation of the decision) are totally dissimilar and unlike the facts in this case, and, consequently, that however sound and correct the law announced in those cases may be (and we do not question it), it has no application to this case. Counsel for

appellants copy some two pages of that decision into their brief, showing that the federal courts refused to allow the state of California to tax the franchise of said railroad companies. The court, after devoting many pages of that decision to a recital of the facts of the cases before it as found by the court below, and as the conclusion of fact on which the decision is made to turn, says: "That if, therefore, the Central Pacific Railroad Company is not a federal corporation, its most important franchises (including that of constructing a railroad from the Pacific Ocean to Ogden City) were conferred upon it by congress." Hence the court properly concluded that, the franchise of the road being incorporated and granted by the federal government, was not subject to taxation by the state of California,—a state of case wholly different from this case, as before shown in this opinion. Mr. Morawetz, in his work on Corporations (section 929), speaking of franchises and their value, says: "Care must be taken to distinguish between the different meanings of the word 'value.' One meaning of the word is 'price,' or the 'amount for which a thing can be sold.' In this sense franchises have clearly no value whatever, because by their nature they are not transferable. They cannot be sold or leased or mortgaged, nor can they be taken under execution. On the other hand, franchises clearly have a value if the word 'value' is used to signify the advantage derived from their possession; or, in other words, their utility. The value of a franchise, using the word 'value' in this sense, would not be measured by the cost or difficulty of obtaining the franchise, or by its exclusive character, but by the benefit derived from its possession." Thus the value of the franchise in this case aptly illustrates the meaning of the author. It should be further said that the findings in this board of valuation and assessment partake of a judicial nature. The defendant had its day in court. It did appear, on notice, before that board, and on evidence made its defense, and on this hearing that board rendered its decision in fixing the value of the franchise of defendant, granted by authority of the state of Kentucky. And this finding, if not conclusive, is entitled to a very high degree of consideration and authority, and it should not be lightly set aside or disregarded by the courts, unless the board proceeded upon an erroneous principle, or adopted an improper mode or manner of estimating the value of the franchise, or unless fraud is charged and shown to exist. It is not contemplated by the law that every corporation, company, or association operating under and enjoying a franchise from the state should, simply by denying the correctness of the valuation placed on its franchise by this board, put again the whole thing in issue, and have same reheard and adjudicated by the courts. It would be an inefficient system of revenue for the state if its just taxes against every such corporation, company, or association could only be collected at the end of a separate lawsuit against each. We have thus gone into the merits of this case at some length, knowing the importance of a correct interpretation of our existing revenue laws with reference to the taxation of the franchise of all corporations, companies, and associations operating under and enjoying the benefits of the same conferred by this state. The court below disregarded the finding of the board of valuation and assessment as to the value fixed on the franchise of this defendant company, supported as it was by the only other evidence introduced on the trial of the cause, and fixed the valuation of said franchise for the purpose of taxation at the sum of $140,000 only, and rendering judgment for the commonwealth on that basis (at 42½ cents on the $100 value of same, as fixed by law) for the sum of $595. From that judgment both parties appealed.

That judgment was erroneous, and on the appeal of the Commonwealth it is reversed, but affirmed on the appeal of the Henderson Bridge Company. It is now ordered that same be set aside and held for naught, and this cause is remanded for further proceedings consistent with this opinion.

ILLINOIS SUPREME COURT.

William E. RITCHIE, *Plff. in Err.*,
v.
PEOPLE of the State of Illinois.

(155 Ill. 98.)

1. **A statute providing that no female shall be employed** in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week prohibits both the employer and employé from entering into a contract of employment for a greater time and restricts their right to contract with each other with reference to the hours of labor.
2. **The privilege of contracting** is both a liberty and a property right of which one cannot be deprived without due process of law.
3. **The right to labor or employ labor** and make contracts in respect thereto upon such terms as may be agreed upon is included in the guaranty of Const., art. 2, § 2, that no person shall be deprived of life, liberty, or property without due process of law.
4. **While the right to contract may be subject to limitations** growing out of the duties which the individual owes to society, the public, or the government, the power of the legislature to limit such right must rest upon some reasonable basis and cannot be arbitrarily exercised.
5. **A statute entitled "An act to regulate the manufacture of clothing,** wearing apparel, and other articles, etc.," and providing in its body that no female shall be employed in any factory or workshop more than eight hours a day, will embrace only employment in the manufacture of articles of the same kind as those expressly enumerated.

NOTE.—As to constitutionality of statutes restricting contracts and business, see *note* to State v. Loomis (Mo.) 21 L. R. A. 739.

29 L. R. A.

See also 32 L. R. A. 445; 36 L. R. A. 533; 37 L. R. A. 103; 45 L. R. A. 603; 47 L. R. A. 52, 71, 380.

6. **A statute prohibiting the employment of females** in any factory or workshop for more than eight hours a day is unconstitutional as partial and discriminating in its character whether applying only to manufacturers of wearing apparel and like articles or as applying to manufacturers of all kinds of products.

7. **A statute prohibiting the employment of females in any factory** or workshop more than eight hours a day is unconstitutional as a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employé in a matter about which they are competent to agree with each other.

8. **The legislature in undertaking to impose an unreasonable and unnecessary burden** upon any one citizen or class of citizens transcends the authority intrusted to it by the constitution although it imposes the same burden upon all other citizens or class of citizens.

9. **The right to make contracts is inherent and inalienable** under Const., art. 2, § 1, declaring that all men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty, and the pursuit of happiness, and any attempt to unreasonably abridge it is unconstitutional.

10. **The police power** of the state is that power which enables it to promote the health, comfort, safety, and welfare of society.

11. **Statutes passed in pursuance of the police power of the state must not conflict with the constitution** and must have some relation to the end sought to be accomplished, and where their ostensible object is to secure the public comfort, welfare, or safety they must appear to be adapted to that end and cannot invade the rights of person and property under the guise of a police regulation where they are not such in fact.

12. **It is the province of the courts to determine** whether a statute purporting to be an exercise of the police power of the state, but taking away the property of a citizen or interfering with his personal liberty, is an appropriate measure for the promotion of the comfort, safety, and welfare of society.

13. **A statute prohibiting the employment of women in factories or workshops for more than eight hours a day** cannot be sustained as a police regulation for the promotion of the public health, on the ground that it is designed to protect women on account of their sex and physique, as sex is no bar under the Illinois constitution or laws to the right to contract, and the mere fact of sex will not justify the exercise of the police power for the purpose of limiting the exercise of such rights by a woman, unless there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare, and there is no reasonable ground why a woman should be deprived of the right to determine for herself how many hours during each day she can and may work in an employment conceded to be lawful in itself and suitable for her to engage in, even if the police power can be exercised to prevent injury to the individual engaged in a particular calling.

14. **A statute containing two distinct subjects** both of which are expressed in the title is wholly void under Const., art. 4, § 13, declaring that no act shall embrace more than one subject and that shall be expressed in the title; but if any subject be embraced which is not expressed in the title the act is void only as to so much thereof as shall not be expressed.

15. **Factory inspectors** provided for in Act June 17, 1893, are state officers or officers of the government within the provision of Const., art. 4, § 16, providing that bills making appropriations for the pay of members and officers of the general assembly and for the salaries of the officers of the government shall contain no provisions on any other subject.

16. **Act June 17, 1893, providing for the regulation of manufacturing establishments,** the appointment of factory inspectors, and making an appropriation therefor, although it contains an appropriation for the inspectors' salaries, is not an appropriation bill within Const., art. 4, § 16, making void provisions in appropriation bills upon any other subject.

17. **The title of Act June 17, 1893, "An act to regulate the manufacture of clothing,** wearing apparel, and other articles in this state and to provide for the appointment of state inspectors to enforce the same and to make an appropriation therefor," does not express two subjects because the appropriation for salaries of the factory inspectors provided for is a separate subject, as the words "appropriation therefor" do not necessarily imply that the appropriation is for such salaries but may be for the payment of their expenses.

18. **The appropriation in Act June 17, 1893, § 10, for the salaries of factory inspectors** is a subject not expressed in the title "An act to regulate the manufacture of clothing, wearing apparel, and other article in this state and to provide for the appointment of state inspectors to enforce the same and make an appropriation therefor," and is void under Const., art. 4, § 13, declaring that if a subject shall be embraced in an act which is not expressed in the title the act shall be void as to so much thereof as is not expressed.

(June 17, 1893.)

ERROR to the Criminal Court for Cook County to review a judgment convicting defendant of violating the provisions of the statute against employing women in factories for more than eight hours during each day. *Reversed.*

The facts are stated in the opinion.

Messrs. **Moran, Kraus & Mayer,** for plaintiff in error:

The title to the act in question, and the act itself, discloses at least three distinct subjects:

1. Regulating the manufacture of clothing, wearing apparel, and other articles.

2. Creating the offices of factory inspector, assistant factory inspector, and deputy factory inspectors, fixing their salaries and terms of office, and empowering the governor to fill the same by appointment.

3. Making an appropriation to pay the salaries and traveling expenses of the factory inspector, his assistant, and deputies.

If the act embraces two subjects, and both are expressed in the title, the entire act must be declared void.

People v. *Nelson*, 133 Ill. 565.

It cannot be questioned that the offices created by the present act are government offices.

United States v. *Maurice*, 2 Brock. 103; *Buna*

v. *People*, 45 Ill. 397; *Wilcox* v. *People*, 90 Ill. 186; *People* v. *Morgan*, Id. 558; *State* v. *Hyde*, 121 Ind. 20; Throop, Pub. Off. chap. 1; *Trimble* v. *People*, 19 Colo. 187; 19 Am. & Eng. Encyclop. Law, pp. 382–390; *United States* v. *Perkins*, 116 U. S. 483, 29 L. ed. 700.

There is here presented, therefore, an act for the accomplishment of at least two distinct purposes, both of which are expressed in the title, and which the constitution declares shall not be united and embraced in one act.

Section 5 of the Act places unwarranted restrictions upon the individual's right to contract.

State v. *Loomis*, 21 L. R. A. 789, 115 Mo. 307; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Gillson*, 109 N. Y. 389; *Godcharles* v. *Wigeman*, 113 Pa. 431; *Com.* v. *Perry*, 14 L. R. A. 325, 155 Mass. 117; *Ex parte Sing Lee*, 96 Cal. 354; *State* v. *Goodwill*, 6 L. R. A. 621, 33 W. Va. 179; *State* v. *Fire Creek Coal & Coke Co.* 6 L. R. A. 359, 33 W. Va. 188; *Leep* v. *St. Louis I. M. & S. R. Co.* 23 L. R. A. 264, 58 Ark. 407; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Frorer* v. *People*, 16 L. R. A. 492, 141 Ill. 171; *Ramsey* v. *People*, 17 L. R. A. 858, 142 Ill. 380; *Braceville Coal Co.* v. *People*, 22 L. R. A. 340, 147 Ill. 66; *Re Kubach, Petitioner*, 9 L. R. A. 483, 85 Cal. 274.

The police power, no matter how broad and extensive, is not above the constitution.

Re Jacobs and *People* v. *Gillson*, *supra*; *Civil Rights Cases*, 109 U. S. 11, 27 L. ed. 839; *Re Maguire*, 57 Cal. 604, 40 Am. Rep. 125; *Hoak Kow* v. *Nunan*, 5 Sawy. 552; Tiedeman, Pol. Powers, § 178; *Ex parte Whitwell*, 19 L. R. A. 727, 98 Cal. 73; *Mugler* v. *Kansas*, 123 U. S. 661, 31 L. ed. 210; Cooley, Const. Lim. 6th ed. 606, 607.

Before the law, the right to a choice of vocations cannot be said to be denied or intended to be abridged on account of sex.

Re Leach, 21 L. R. A. 701, 134 Ind. 665; *Minor* v. *Happersett*, 88 U. S. 21 Wall. 165, 22 L. ed. 627.

The law in question amounts to a prohibition against the laborer, because it makes the employment a misdemeanor.

Baker v. *Portland*, 5 Sawy. 566; *State* v. *Loomis*, 21 L. R. A. 789, 115 Mo. 307; *Com.* v. *Perry*, 14 L. R. A. 325, 155 Mass. 117.

In the absence of such a constitutional provision as that which makes the legislature the judge of what is "for the good and welfare of" the state and "for the government and order thereof and of the subjects of the same" the courts are designated as the proper forum in which to pass upon the justness and reasonableness of the law passed by the legislature.

Ex parte Whitwell, 19 L. R. A. 627, 98 Cal. 73; *Re Maguire*, 57 Cal. 610; *Mugler* v. *Kansas*, 123 U. S. 661, 31 L. ed. 210; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636.

Messrs. **John W. Ela** and **Alexander Bruce** for defendant in error.

Magruder, J., delivered the opinion of the court:

Upon complaint of the factory inspector appointed under the law hereinafter named, a warrant was issued by a justice of the peace of Cook county against plaintiff in error, and, upon his appearance and waiver in writing of jury trial, a trial was had resulting in a finding of guilty, and the imposition of a fine of $5, and costs. The complaint charged that, on a certain day in February, 1894, plaintiff in error employed a certain adult female of the age of more than eighteen years at work in a factory for more than eight hours during said day. The plaintiff in error took an appeal to the criminal court of Cook county, and waived a jury, and upon trial in that court before the judge without a jury he was convicted and fined. The case is brought to this court by writ of error for the purpose of reviewing such judgment of the criminal court.

Upon the trial of the cause the defendant below submitted written propositions to be held as law in the decision of the case. By these propositions the trial court was asked to hold that the act of the legislature of Illinois, entitled "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same, and to make an appropriation therefor," approved June 17, 1893 (Ill. Laws 1893, p. 99), and each and every section thereof, is illegal and void, and contrary to and in violation of the constitutions of Illinois and of the United States. The court refused all of the propositions so submitted and exception was taken by the defendant.

The present prosecution, as is conceded by counsel on both sides, is for an alleged violation of section 5 of said Act. That section is as follows: "No female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week."

"Factory" or "workshop" is defined in section 7 of the Act as follows: "The words, 'manufacturing establishment,' 'factory,' or 'workshop,' wherever used in this Act, shall be construed to mean any place where goods or products are manufactured or repaired, cleaned or sorted, in whole or in part, for sale or for wages."

Punishment for violation of the provisions of the Act is provided for by section 8 thereof in the following words: "Any person, firm, or corporation, who fails to comply with any provision of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than $8 nor more than $100 for each offense."

The main objection urged against the act, and that to which the discussion of counsel on both sides is chiefly directed, relates to the validity of section 5. It is contended by counsel for plaintiff in error that that section is unconstitutional as imposing unwarranted restrictions upon the right to contract. On the other hand, it is claimed by counsel for the people, that the section is a sanitary provision, and justifiable as an exercise of the police power of the state.

Does the provision in question restrict the right to contract? The words, "no female shall be employed," import action on the part of two persons. There must be a person who does the act of employing, and a person who consents to the act of being employed. Webster defines employment as not only "the

act of employing," but also "the state of being employed." The prohibition of the statute is, therefore, twofold, first, that no manufacturer, or proprietor of a factory or workshop, shall employ any female therein more than eight hours in one day, and second, that no female shall consent to be so employed. It thus prohibits employer and employé from uniting their minds, or agreeing, upon any longer service during one day than eight hours. In other words, they are prohibited, the one from contracting to employ, and the other from contracting to be employed, otherwise than as directed. "To be 'employed' in anything means not only the act of doing it, but also to be engaged to do it; to be under contract or orders to do it." *United States* v. *Morris*, 39 U. S. 14 Pet. 464, 10 L. ed. 543. Hence, a direction that a person shall not be employed more than a specified number of hours in one day, is at the same time a direction that such person shall not be under contract to work for more than a specified number of hours in one day. It follows that section 5 does limit and restrict the right of the manufacturer and his employé to contract with each other in reference to the hours of labor.

Is the restriction thus imposed an infringement upon the constitutional rights of the manufacturer and the employé? Section 2 of article 2 of the Constitution of Illinois provides that "no person shall be deprived of life, liberty, or property, without due process of law." A number of cases have arisen within recent years in which the courts have had occasion to consider this provision, or one similar to it, and its meaning has been quite clearly defined. The privilege of contracting is both a liberty and property right. *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492.

Liberty includes the right to acquire property, and that means and includes the right to make and enforce contracts. *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789. The right to use, buy, and sell property and contract in respect thereto is protected by the constitution. Labor is property, and the laborer has the same right to sell his labor, and to contract with reference thereto, as has any other property owner. In this country the legislature has no power to prevent persons who are *sui juris* from making their own contracts, nor can it interfere with the freedom of contract between the workman and the employer. The right to labor or employ labor, and make contracts in respect thereto upon such terms as may be agreed upon between the parties, is included in the constitutional guaranty above quoted. *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621; *Godcharles* v. *Wigeman*, 113 Pa. 431; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 22 L. R. A. 340. The protection of property is one of the objects for which free governments are instituted among men. Ill. Const. art. 2, § 1. The right to acquire, possess, and protect property includes the right to make reasonable contracts. *Com.* v. *Perry*, 155 Mass. 117, 14 L. R. A. 825. And where an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the constitution. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. The fundamental rights of Englishmen brought to this country by its original settlers and wrested from time to time in the progress of history from the sovereigns of the English nation, have been reduced by Blackstone to three principal or primary articles: "the right of personal security, the right of personal liberty, and the right of private property." 1 Bl. Com. p. 129. The right to contract is the only way by which a person can rightfully acquire property by his own labor. "Of all the 'rights of persons' it is the most essential to human happiness." *Leep* v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264.

This right to contract, which is thus included in the fundamental rights of liberty and property, cannot be taken away "without due process of law." The words "due process of law" have been held to be synonymous with the words "law of the land." *State* v. *Loomis*, and *Frorer* v. *People*, *supra*. Blackstone says: "The third absolute right, inherent in every Englishman, is that of property, which consist in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land." 1 Bl. Com. p. 138; *Re Jacobs*, *supra*. The "law of the land" is "general public law binding upon all the members of the community, under all circumstances, and not partial or private laws, affecting the rights of private individuals, or classes of individuals." *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869. The "law of the land" is the opposite of "arbitrary, unequal, and partial legislation." *State* v. *Loomis*, *supra*. The legislature has no right to deprive one class of persons of privileges allowed to other persons under like conditions. The man, who is forbidden to acquire and enjoy property in the same manner in which the rest of the community is permitted to acquire and enjoy it, is deprived of liberty in particulars of primary importance to his pursuit of happiness. If one man is denied the right to contract as he has hitherto done under the law, and as others are still allowed to do by the law, he is deprived of both liberty and property to the extent to which he is thus deprived of such right. In line with these principles, it has been held that it is not competent, under the constitution, for the legislature to single out owners and employers of a particular class and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which other owners or employers are permitted to make. *Millet* v. *People*, and *Frorer* v. *People*, *supra*; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 858.

We are not unmindful that the right to contract may be subject to limitations growing out of the duties which the individual owes to society, to the public, or to the government. These limitations are sometimes imposed by the obligation to so use one's own as not to injure another, by the character of property as affected with a public

interest or devoted to a public use, by the demands of public policy or the necessity of protecting the public from fraud or injury, by the want of capacity, by the needs of the necessitous borrower as against the demands of the extortionate lender. But the power of the legislature to thus limit the right to contract must rest upon some reasonable basis, and cannot be arbitrarily exercised. It has been said that such power is based in every case on some condition, and not on the absolute right to control. Where legislative enactments, which operate upon classes of individuals only, have been held to be valid, it has been where the classification was reasonable, and not arbitrary. *Leep* v. *St. Louis, I. M. & S. R. Co.* and *State* v. *Loomis supra.*

Applying these principles to the consideration of section 5, we are led irresistibly to the conclusion that it is an unconstitutional and void enactment. While some of the language of the act is broad enough to embrace within its terms the manufacture of all kinds of goods or products, other provisions are limited to the manufacture of "coats, vests, trousers, knee-pants, overalls, cloaks, shirts, ladies' waists, purses, feathers, artificial flowers or cigars, or any wearing apparel of any kind whatsoever." The act is entitled "An act to regulate the manufacture of clothing, wearing apparel and other articles, etc." Under the rule of construction heretofore laid down by this court, that general and specific words which are capable of an analogous meaning, being associated together, take color from each other, so that the general words are restricted to a sense analogous to the less general, it would seem that the general words, "and other articles," should be restricted to a meaning analogous to the meaning of the words, "clothing, wearing apparel," and, consequently that they would only embrace articles of the same kind as those expressly enumerated." *First Nat. Bank of Joliet* v. *Adam*, 138 Ill. 483; *Misch* v. *Russell*, 136 Ill. 22, 12 L. R. A. 125. But whether this is so or not, we are inclined to regard the act as one which is partial and discriminating in its character. If it be construed as applying only to manufacturers of clothing, wearing apparel, and articles of a similar nature, we can see no reasonable ground for prohibiting such manufacturers and their employés from contracting for more than eight hours of work in one day, while other manufacturers and their employés are not forbidden to so contract. If the act be construed as applying to manufacturers of all kinds of products, there is no good reason why the prohibition should be directed against manufacturers and their employés, and not against merchants, or builders, or contractors, or carriers, or farmers, or persons engaged in other branches of industry, and their employés therein. Women employed by manufacturers are forbidden by section 5 to make contracts to labor longer than eight hours in a day, while women employed as saleswomen in stores, or as domestic servants, or as bookkeepers, or stenographers, or type-writers, or in laundries, or other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose. The manner in which the section thus discriminates against one class of employers and employés and in favor of all others, places it in opposition to the constitutional guaranties hereinbefore discussed, and so renders it invalid.

But aside from its partial and discriminating character, this enactment is a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties. It substitutes the judgment of the legislature for the judgment of the employer and employé in a matter about which they are competent to agree with each other. It assumes to dictate to what extent the capacity to labor may be exercised by the employé, and takes away the right of private judgment as to the amount and duration of the labor to be put forth in a specified period. Where the legislature thus undertakes to impose an unreasonable and unnecessary burden upon any one citizen or class of citizens, it transcends the authority intrusted to it by the constitution, even though it imposes the same burden upon all other citizens or classes of citizens. General laws may be as tyrannical as partial laws. A distinguished writer upon constitutional limitations has said that general rules may sometimes be as obnoxious as special if they operate to deprive individual citizens of vested rights, and that, while every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. Cooley, Const. Lim. 5th ed. top p. 484, *355; *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, 4 L. ed. 559. Section 1 of article 2 of the Constitution of Illinois provides as follows: "All men are by nature free and independent, and have certain inherent and inalienable rights, among these are life, liberty, and the pursuit of happiness. To secure these rights and the protection of property governments are instituted among men, deriving their just powers from the consent of the governed." Liberty, as has already been stated, includes the right to make contracts, as well with reference to the amount and duration of labor to be performed as concerning any other lawful matter. Hence the right to make contracts is an inherent and inalienable one, and any attempt to unreasonably abridge it is opposed to the constitution. As was aptly said in *Leep* v. *St. Louis, I. M. & S. R. Co., supra:* "Where the subject of contract is purely and exclusively private, unaffected by any public interest or duty to person, to society or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract, or controlling the terms thereof."

An instance of the care with which this

right to contract has been guarded, may be found in chapter 48 of the Revised Statutes of this state, where an Act passed in 1867 makes eight hours of labor in certain employments a legal day's work, "where there is no special contract or agreement to the contrary," and the second section of which act contains the following provision: "nor shall any person be prevented by anything herein contained from working as many hours over time or extra hours as he or she may agree."

In *Ex parte Kuback*, 85 Cal. 274, 9 L. R. A. 482, an ordinance of the city of Los Angeles, making it a misdemeanor for any contractor to employ any person to work more than eight hours a day where the work was to be performed under any contract with the city, was held to be unconstitutional and void, the supreme court of California there saying: "It is claimed in support of the petition that this ordinance was unconstitutional and void. We think this objection is well taken. It is simply an attempt to prevent certain parties from employing others in a lawful business and paying them for their services, and is a direct infringement of the right of such persons to make and enforce their contracts. If the services to be performed were unlawful or against public policy, or the employment were such as might be unfit for certain persons, as, for example, females or infants, the ordinance might be upheld as a sanitary or police regulation, but we cannot conceive of any theory upon which a city could be justified in making it a misdemeanor for one of its citizens to contract with another for services to be rendered, because the contract is that he shall work more than a limited number of hours per day."

In the case of *Low* v. *Rees Printing Co.*, 41 Neb. 127, 24 L. R. A. 702, recently decided by the supreme court of Nebraska (opinion filed June 6, 1894), an act of the legislature of that state, providing that eight hours shall constitute a legal day's work for all classes of mechanics, servants, and laborers throughout the state, excepting those engaged in farm and domestic labor, and making violation of the provision a misdemeanor, was held to be unconstitutional and void, both as being special legislation, and as attempting to prevent persons, legally competent to enter into contracts, from making their own contracts.

But it is claimed on behalf of defendant in error that this section can be sustained as an exercise of the police power of the state. The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the constitution, and must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end; it cannot invade the rights of persons and property under the guise of a mere police regulation, where it is not such in fact; and where such an act takes away the property of a citizen or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society. *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Gillson*, 109 N. Y. 389.

There is nothing in the title of the Act of 1893 to indicate that it is a sanitary measure. The first three sections contain provisions for keeping workshops in a cleanly state and for inspection to ascertain whether they are so kept. But there is nothing in the nature of the employment contemplated by the act which is in itself unhealthy or unlawful, or injurious to the public morals or welfare. Laws restraining the sale and use of opium and intoxicating liquor have been sustained as valid under the police power. *Ah Lim* v. *Territory*, 1 Wash. 156, 9 L. R. A. 395; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205. Undoubtedly the public health, welfare, and safety may be endangered by the general use of opium and intoxicating drinks. But it cannot be said that the same consequences are likely to flow from the manufacture of clothing, wearing apparel, and other similar articles. "The manufacture of cloth is an important industry, essential to the welfare of the community." *Com.* v. *Perry*, *supra*. We are not aware that the preparation and manufacture of tobacco into cigars is dangerous to the public health. *Re Jacobs*, *supra*.

It is not the nature of the things done, but the sex of the persons doing them, which is made the basis of the claim that the act is a measure for the promotion of the public health. It is sought to sustain the act as an exercise of the police power upon the alleged ground that it is designed to protect woman on account of her sex and physique. It will not be denied, that woman is entitled to the same rights, under the constitution, to make contracts with reference to her labor as are secured thereby to men. The first section of the Fourteenth Amendment to the Constitution of the United States provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

It has been held that a woman is both a "citizen" and a "person" within the meaning of this section. *Minor* v. *Happersett*, 88 U. S. 21 Wall. 162, 22 L. ed. 627. The privileges and immunities here referred to are, in general, "protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole." *Slaughter-House Cases*, 83 U. S. 16 Wall. 86, 21 L. ed. 394. As a citizen, woman has the right to acquire and possess property of every kind. As a person, she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty, or property without due process of law. In-

volved in these rights thus guaranteed to her is the right to make and enforce contracts. The law accords to her, as to every other citizen, the natural right to gain a livelihood by intelligence, honesty, and industry in the arts, the sciences, the professions or other vocations. Before the law, her right to a choice of vocations cannot be said to be denied or abridged on account of sex. *Re Leach's Petition*, 134 Ind. 665, 21 L. R. A. 701.

The tendency of legislation in this state has been to recognize the rights of woman in the particulars here specified. The Act of 1867, as above quoted, by the use of the words, "he or she," plainly declares that no woman shall be prevented by anything therein contained from working as many hours over time or extra hours as she may agree; and thereby recognizes her right to contract for more than eight hours of work in one day. An Act approved March 22, 1872, entitled "An act to secure freedom in the selection of an occupation, etc.," provides that no person shall be precluded or debarred from any occupation, profession, or employment (except military) on account of sex." 1 Starr & C. Anno. Stat. p. 1056. The Married Woman's Act of 1874 authorizes a married woman to sue and be sued without joining her husband, and provides that contracts may be made and liabilities incurred by her and enforced against her to the same extent and in the same manner as if she were unmarried, and that she may receive, use, and possess her own earnings and sue for the same in her own name, free from the interference of her husband, or his creditors. Ill. Rev. Stat. chap. 68, §§ 1, 6, and 7.

Section 5 of the Act of 1893 is broad enough to include married women and adult single women, as well as minors. As a general thing it is the province of the legislature to determine what regulations are necessary to protect the public health and secure the public safety and welfare. But inasmuch as sex is no bar, under the constitution and the law, to the endowment of woman with the fundamental and inalienable rights of liberty and property which include the right to make her own contracts, the mere fact of sex will not justify the legislature in putting forth the police power of the state for the purpose of limiting her exercise of those rights, unless the courts are able to see that there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare proposed to be secured by it. *People* v. *Gillson*, *supra*.

Counsel for the people refer to statements in the text-books recognizing the propriety of regulation, which forbid women to engage in certain kinds of work altogether. Thus, it is said in Cooley on Constitutional Limitations, that "some employments . . . may be admissible for males and improper for females, and regulations recognizing the impropriety and forbidding women engaging in them, would be open to no reasonable objection." 5th ed. p. 745. Attention is also called to the above-mentioned Act of March 22, 1872, which makes an exception of military service and provides that nothing in the act shall be construed as requiring any female to work on streets, or roads, or serve on juries. But, without stopping to comment upon measures of this character, it is sufficient to say that what is said in reference to them has no application to the Act of 1893. That act is not based upon the theory that the manufacture of clothing, wearing apparel, and other articles is an improper occupation for woman to be engaged in. It does not inhibit their employment in factories or workshops. On the contrary, it recognizes such places as proper for them to work in by permitting their labor therein during eight hours of each day. The question here is not whether a particular employment is a proper one for the use of female labor, but the question is whether, in an employment which is conceded to be lawful in itself and suitable for women to engage in, she shall be deprived of the right to determine for herself how many hours she can and may work during each day. There is no reasonable ground—at least none which has been made manifest to us in the arguments of counsel—for fixing upon eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow. But the police power of the state can only be permitted to limit or abridge such a fundamental right as the right to make contracts, when the exercise of such power is necessary to promote the health, comfort, welfare, or safety of society or the public; and it is questionable whether it can be exercised to prevent injury to the individual engaged in a particular calling. The court of appeals of New York, in passing upon the validity of an Act "to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses," etc., has said: "To justify this law it would not be sufficient that the use of tobacco may be injurious to some persons, or that its manufacture may be injurious to those who are engaged in its preparation and manufacture; but it would have to be injurious to the public health." *Re Jacobs*, *supra*. Tiedeman, in his work on Limitations of Police Power, says: "In so far as the employment of a certain class in a particular occupation may threaten or inflict damage upon the public or third persons, there can be no doubt as to the constitutionality of any statute which prohibits their prosecution of that trade. But it is questionable, except in the case of minors, whether the prohibition can rest upon the claim that the employment will prove hurtful to them. . . . There can be no more justification for the prohibition of the prosecution of certain callings by women, because the employment will prove hurtful to themselves, than it would be for the state to prohibit men from working in the manufacture of white lead because they are apt to contract lead poisoning, or to prohibit occupation in certain parts of iron smelting works, because the lives of the men so engaged are materially shortened." Section 86.

We are also referred to statements made in some of the text-books to the effect that the

legislature may limit the hours of labor of women in manufacturing establishments. Parker & W. Public Health & Safety, § 260; 18 Am. & Eng. Encyclop. Law, p. 753. These statements appear to be based entirely upon the decision of the supreme court of Massachusetts in *Com.* v. *Hamilton Mfg. Co.* 120 Mass. 385. There it was held that an act providing that no woman over the age of eighteen years should be employed by any person, firm, or corporation in any manufacturing establishment more than ten hours in any one day was valid. But, under the constitution of Massachusetts (art. 4, § 1) the legislature has power to ordain all manner of wholesome and reasonable statutes, with or without penalties, not repugnant to the constitution, "as they shall judge to be for the good and welfare of the commonwealth, and for the governing and ordering thereof, and of the subjects of the same." The decision referred to was evidently made in view of the large discretion so vested in the legislative branch of the government; and it was said that the act might be maintained as a health or police regulation, because the legislature deemed the employment of manufacturing dangerous to health. But the Massachusetts case is not in line with the current of authority, as it assumes that the police power is practically without limitation. As has been already stated, the legislature cannot so use that power as to invade the fundamental rights of the citizen; and it is for the courts to decide whether a measure which assumes to have been passed in the interest of the public health really "relates to and is convenient and appropriate to promote the public health." *Re Jacobs* and *People* v. *Gillson*, *supra*. We said in *Lake View* v. *Rose Hill Cemetery Co.*, 70 Ill. 191, 22 Am. Rep. 71: "As a general proposition it may be stated it is the province of the law-making power to determine when the exigency exists, calling into exercise this power. What are the subjects of its exercise is clearly a judicial question." The reasoning of the opinion in the Massachusetts case cited does not seem to us to be sound. It assumes that there is no infringement upon the employer's right to contract, because he may employ as many persons or as much labor as he chooses, nor upon the employé's right to contract, because she may labor as many hours as she chooses in some other occupation than that specified in the statute. This is a begging of the question. The right to contract would be valueless if it could not be exercised with reference to the particular subject-matter in hand. If its exercise is forbidden between two persons competent to contract and concerning a lawful subject of contract, it is none the less abridged because other persons may be permitted to contract, or because the same persons may be at liberty to contract about some other matter.

We cannot more appropriately close the discussion of this branch of the case than by quoting, and adopting as our own, the following words of the New York court of appeals in *Re Jacobs*, *supra:* "Where a health law is challenged in the courts as unconstitutional on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the courts must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adapted to that end. This we have not been able to see in this law (section) and we must therefore, pronounce it unconstitutional and void. In reaching this conclusion, we have not been unmindful that the power which courts possess to condemn legislative acts which are in conflict with the supreme law should be exercised with great caution and even with reluctance. But as said by *Chancellor* Kent (1 Com. 450): 'It is only by the free exercise of this power that courts of justice are enabled to repel assaults and to protect every part of the government and every member of the community from undue and destructive innovations upon their charter rights.'"

It is furthermore contended by plaintiff in error, that the Act of 1893 is void upon the alleged ground that it contains two distinct subjects, and that both of these are expressed in the title. The two constitutional provisions, which are invoked in favor of this position, are sections 13 and 16 of article 4. Section 13 is as follows: "No act hereafter passed shall embrace more than one subject and that shall be expressed in the title. But, if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

Section 16 is as follows: The general assembly shall make no appropriation of money out of the treasury in any private law. Bills making appropriations for the pay of members and officers of the general assembly, and for the salaries of the officers of the government, shall contain no provision on any other subject."

The two subjects, alleged to be contained in the act and expressed in its title, are, first, the general subject of regulating the manufacture of clothing, wearing apparel, and other articles, including the requirements as to cleanliness, inspection, employment of minors, keeping registers of names, ages, residences, etc., appointment of inspectors, fixing their salaries, duties, terms of office, etc., and, second, the appropriation of money for the payment of the salaries of the inspectors. Section 9 of the Act provides that "the governor shall, upon the taking effect of this act, appoint a factory inspector, at a salary of fifteen hundred dollars per annum, an assistant factory inspector, at a salary of one thousand dollars per annum, and ten deputy factory inspectors, of whom five shall be women, at a salary of seven hundred and fifty dollars per annum each. The term of office of the factory inspectors shall be four years, and the assistant factory inspector and the deputy factory inspectors shall hold office during good behavior. Said inspector, assistant inspector, and deputy inspectors shall be empowered to visit and inspect, at all reasonable hours, and as often as practicable, the workshops, factories, and manufacturing establishments in this state where the manufacture of goods is carried on. And the

inspectors shall report in writing to the governor, on the fifteenth day of December, annually, the result of their inspections and investigation, together with such other information and recommendations as they may deem proper. And said inspectors shall make a special investigation into alleged abuses in any of such workshops whenever the governor shall so direct, and report the result of the same to the governor. It shall also be the duty of said inspector to enforce the provisions of this act, and to prosecute all violations of the same before any magistrate or any court of competent jurisdiction in the state."

Section 10 provides "that the following named sums, or so much thereof as may be necessary, respectively, for the purposes hereinafter named, be and are hereby appropriated.

"First. Twenty thousand dollars for the salaries of inspector, assistant inspector, and the ten deputy factory inspectors, as hereinbefore provided.

"Second. The sum of eight thousand dollars to defray traveling expenses and other necessary expenses incurred by said inspector, assistant factory inspector, or deputy inspectors while engaged in the performance of their duties, not to exceed four thousand dollars in any one year."

The general rule is that, where an act includes two distinct subjects and both are expressed in the title, the whole act must be treated as void under such a provision as section 13, because it is impossible to choose between the two subjects and hold the act valid as to one and void as to the other. Cooley, Const. Lim. 5th ed. top p. 178; Sutherland, Stat. Constr. § 103. We are inclined to think that the body of the act does embrace two subjects. The factory inspectors provided for in the act must be regarded as state officers, or officers of the government. Section 24 of article 5 of the Constitution declares that "an office is a public position, created by the constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed." The duties of the inspectors are continuing, and are prescribed by statute, and not by contract, and some portion of the functions of government are committed to their charge. They seem to come within the definition of "officers," as given in the constitution, and as laid down in the decisions of this court. *Bunn* v. *People*, 45 Ill. 397; *Wilcox* v. *People*, 90 Ill. 186; *People* v. *Morgan*, Id. 558.

The manifest intention of section 16 was to make the subject of appropriations for the pay of the members and officers of the legislature, and for the salaries of the officers of the government, a separate and distinct subject for legislative action. In a bill making appropriations for those objects every provision is unconstitutional which proposes to do anything besides making such appropriations. *Re Appropriation Bill*, 14 Fla. 284. If the Act of 1893 was strictly a general appropriation bill to pay the legislature and for the salaries of the officers of the government, everything else in it would be void. But it is not such a bill. Certainly its title does not indicate that it is such a bill. Its body contains a provision appropriating money for the payment of the factory inspector, and his or her deputy and assistants. This provision is merely subordinate and subsidiary to the main purpose of regulating the manufacture of clothing, wearing apparel, and other articles.

In order to make the act void under the constitutional prohibition contained in section 13, the two subjects must not only be contained in the body of the act, but must also be expressed in its title. We do not think that we would be justified in holding that two subjects or objects are expressed in the title to the Act of 1893. Courts always give a liberal and not a hypercritical interpretation to this restriction. All matters are properly included in the act, which are germane to the title. The constitution is obeyed, if all the provisions relate to the one subject indicated in the title, and are parts of it, or incident to it, or reasonably connected with it, or in some reasonable sense auxiliary to the object in view. It is not required that the subject of the bill shall be specifically and exactly expressed in the title, or that the title should be an index of the details of the act. Where there is doubt as to whether the subject is clearly expressed in the title, the doubt should be resolved in favor of the validity of the act. An act to incorporate a city may contain provisions for the raising of revenue for its government. An act "concerning drainage" may include assessments upon lands benefited to pay the expense. Sutherland, Stat. Constr. §§ 82, 85, 86, 88, 92–96; *Johnson* v. *People*, 88 Ill. 431.

Here, the main subject or purpose expressed in the title is the regulation of the manufacture of the articles therein named. The appointment of inspectors for the enforcement of such regulation, and the making of "an appropriation therefor," are germane to the main subject, and a part of it. They merely amplify the subject, and are incidental and auxiliary to the object contemplated by it. The title of the act not only does not mention the pay of the legislature and the salaries of the government officers, but it does not mention the salaries of the inspectors. The word "therefor" does not necessarily imply that the appropriation is for the salaries of the inspectors. *Non constat*, so far as the title expresses to the contrary, that the inspectors were not to act without salaries. The title can well be interpreted as referring to the expenses of enforcing the legislation provided for, such as traveling expenses, the expenses attendant upon gathering information, and making investigations, and reporting to the governor, and prosecuting violations of the act by employing counsel or otherwise. It does not follow, that "a specific provision for the payment of expenses, necessary, proper, incidental, or growing out of a law itself, or which may be deemed needful in carrying it or its subject into execution, would not be valid, because such a provision being matter properly connected with the subject of the law as expressed in the title, would not be prohibited by the title." *Re Revenue Law*, 14 Fla. 287.

If it were not for section 16, it might be said that the salaries of the inspectors were a necessary expense incidental to the execution of the law, and properly included in the title, though not expressly named therein. But sections 16 and 13 are in the same article of the constitution, and both use the word "subject," which evidently has the same meaning in each. The question, therefore, whether the matter of the salaries of state officers is an independent subject is not a matter of construction, because the constitution itself, by the language used in section 16, defines and sets apart appropriations for such salaries as a subject, which is distinct and separate from all others, and cannot be included in any other. The design of that section was to enable the people to see clearly what and how much compensation their servants are receiving, without being confused by a commingling of outside matters with appropriations therefor.

We are inclined to think that the second clause of section 10 of the Act, appropriating "twenty thousand dollars for the salaries of inspector, assistant inspector, and ten deputy factory inspectors, as hereinbefore provided," is a subject embraced in the act, which is not expressed in the title, and must therefore be regarded as void under the provision in the second sentence of section 18. It is true that the clause only makes an appropriation for the salaries of one class of state officers, and is not a general appropriation for the pay of the legislature and for the salaries of all the officers of the government. But it was the intention of section 16 that the salary of each of such officers, as well as of all of them collectively, should be provided for by appropriations in a separate bill, standing by itself and apart from any provision on any other subject. The mandate of the constitution, as embodied in that section, cannot be violated by passing separate bills, making separate and distinct appropriations for the salaries of particular officers of the government, or of particular classes of government officers, and embodying in such separate bills provisions on other subjects than the appropriations so made. Our conclusion is, that section 5 of the Act of 1898, and the first clause of section 10 thereof, are void and unconstitutional for the reasons here stated. These are the only sections of the Act, which have been attacked in the argument of counsel. No reason has been pointed out why they are not distinct and separable from the balance of the Act. The rule is that, where a part of a statute is unconstitutional, the remainder will not be declared to be unconstitutional also, if the two are distinct and separable so that the latter may stand, though the former becomes of no effect. *Chicago, B. & Q. R. Co.* v. *Jones*, 149 Ill. 361, 24 L. R. A. 141. We do not wish to be understood by anything herein said as holding that section five (5) would be invalid if it was limited in its terms to females who are minors.

The judgment of the Criminal Court of Cook County is reversed, and the cause is remanded to that court with directions to dismiss the prosecution.

OREGON SUPREME COURT.

WILLAMETTE IRON WORKS, *Respt.*,
v.
OREGON RAILWAY & NAVIGATION CO., *Appt.*

(26 Or. 224.)

1. **Any structure on a street which is subversive of and repugnant to its use** and efficiency as a public thoroughfare is not a legitimate street use and imposes a new servitude on the rights of abutting owners for which compensation must be made.
2. **A solid structure 30 feet wide erected in the middle of a street** 66 feet wide and curving so as to leave on one side a passageway only 8 feet wide, built as an approach to a toll bridge owned by a private corporation, not forming a part of or extension of any public highway, although authorized by the legislature and city authorities, can lawfully be made only on payment of damages to the abutting owner.
3. **An abutting proprietor is entitled to the use of the street** in front of his premises to its full width as means of ingress and egress and for light and air, and this right is as much property as the soil within the boundaries of his lot.
4. **The use of a street for other than legitimate street purposes,** which constitutes any impairment of or interference with the easements of an abutting owner, is a taking of his property within the meaning of the constitution.
5. **No portion of a public street** can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of power to alter or change the grade.
6. **Opportunity to acquire the easement of an abutting owner** by agreement or condemnation may be given before making an injunction mandatory against an unauthorized approach to a bridge which is in daily use by a large number of electric cars, wagons, and foot passengers.

(October 2, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to enjoin defendant from occupying the street in front of plaintiff's premises with a bridge approach without paying plaintiff damages therefor. *Affirmed.*

The facts are stated in the opinion.

NOTE.—As to injury of abutter's easements in street, see *note* to Selden v. Jacksonville (Fla.) 14 L. R. A. 370.

As to what use of a street or highway constitutes an additional burden, see *note* to Western Railway of Alabama v. Alabama Grand Trunk R. Co. (Ala.) 17 L. R. A. 474.

See also 43 L. R. A. 444.

Messrs. **Cox, Cotton, Teal & Minor,** and **Snow & McCamant,** for appellant:

The act of the legislature authorizing the defendant to erect a wagon-road bridge and the approaches thereto is constitutional.

California State Teleg. Co. v. *Alta Teleg. Co.* 22 Cal. 398; *Southern Pac. R. Co.* v. *Orton,* 6 Sawy. 157; *Wallace* v. *Loomis,* 97 U. S. 146, 24 L. ed. 895.

Every court approaches with hesitancy the question of declaring a law unconstitutional, and never exerts its power so to do while doubt exists.

Cook v. *Portland,* 20 Or. 582; *Cline* v. *Greenwood,* 10 Or. 241; *United States* v. *Peters,* 9 U. S. 5 Cranch, 128, 3 L. ed. 57; *Kendall* v. *Kingston,* 5 Mass. 534; *Farmers & Mechanics Bank* v. *Smith,* 3 Serg. & R. 72; *Norwich* v. *Hampshire County Comrs.* 13 Pick. 61; *Ex parte M'Collum,* 1 Cow. 564.

Any limitation upon the legislative power of the state must be strictly construed.

Sharpless v. *Philadelphia,* 21 Pa. 160, 59 Am. Dec. 759; *California State Teleg. Co.* v. *Alta Teleg. Co.* and *Southern Pac. R. Co.* v. *Orton, supra.*

The ordinance of the city of Portland regulating the use of Third street is valid.

The power of the state legislature over streets and public highways is plenary, and it may regulate their use either directly through its own legislation, or indirectly by conferring power upon municipalities to regulate their use.

Dill. Mun. Corp. §§ 656–658, 685, 688.

There is an absolute power of abandonment and vacation of streets either by the legislature or as a result of power delegated to a municipality.

Dill. Mun. Corp. § 666; *Savage* v. *Salem,* 24 L. R. A. 788, 28 Or. 381.

A city has power to build the necessary and proper bridges within its limits.

2 Dill. Mun. Corp. § 729; *Dively* v. *Cedar Falls,* 27 Iowa, 227; *Savage* v. *Salem, supra.*

The plaintiff has suffered no legal injury by the erection of the approach to defendant's bridge.

That which the state has legally authorized cannot be a public nuisance.

Savage v. *Salem, supra; Northern Transp. Co. of Ohio* v. *Chicago,* 99 U. S. 635, 25 L. ed. 336; 2 Dill. Mun. Corp. §§ 657, 697.

The right of the abutting owner to recover compensation for the use of a street by a steam railway does not depend upon a mere arbitrary distinction based upon the ownership of the fee, but it depends in all cases upon the question whether or not the use by such steam railway has so far changed the character of the street as to impose a new servitude thereon.

McQuaid v. *Portland & V. R. Co.* 18 Or. 287; *Spencer* v. *Point Pleasant & O. R. R. Co.* 23 W. Va. 407; *Wichita & C. R. Co.* v. *Smith,* 45 Kan. 264; Lewis, Em. Dom. §§ 96, 97; *Selden* v. *Jacksonville,* 14 L. R. A. 370, 28 Fla. 558.

Changes in the street made for highway purposes give no right for compensation.

Robinson v. *Great Northern R. Co.* 48 Minn. 445; *Rauenstein* v. *New York, L. & W. R. Co.* 28 L. R. A. 768, 136 N. Y. 528.

In many cities it has been considered advisable to bridge railway tracks by means of an elevated viaduct resembling in its nature, purpose, and object the bridge approach to defendant's bridge. We know of no case holding that the abutting property owner suffering damages can recover compensation therefor.

Selden v. *Jacksonville, supra; Read* v. *Camden,* 34 N. J. L. 347.

The right of the owner of property depends upon the nature of the use made of the street.

Paquet v. *Mount Tabor Street R. Co.* 18 Or. 232; *McQuaid* v. *Portland & V. R. Co.* 18 Or. 287; *Rauenstein* v. *New York, L. & W. R. Co.* and *Robinson* v. *Great Northern R. Co. supra.*

If the fair market value of the property is as much immediately after the construction of the approach as it was before, no damage has been sustained and no recovery can be had.

Springer v. *Chicago,* 12 L. R. A. 609, 135 Ill. 552; *Bohm* v. *Metropolitan Elev. R. Co.* 14 L. R. A. 344, 129 N. Y. 576.

It is true that the plaintiff has been deprived of the use of the full width of Third street in front of its premises, but such deprivation of use, even when caused by railroad tracks and embankment in a street, do not constitute legal injury.

Wichita & C. R. Co. v. *Smith,* 45 Kan. 264.

The plaintiff is not entitled to an injunction or to the abatement of the bridge.

Savage v. *Salem,* 24 L. R. A. 787, 28 Or. 381; *Paquet* v. *Mount Tabor Street R. Co.* 18 Or. 233; *McQuaid* v. *Portland & V. R. Co.* 18 Or. 237; *Peoria & R. I. R. Co.* v. *Scherts,* 84 Ill. 135; *Spencer* v. *Point Pleasant & O. R. R. Co.* 23 W. Va. 406; *Osborne* v. *Missouri Pac. R. Co.* 147 U. S. 248, 37 L. ed. 155, 37 Fed. Rep. 330; *Porter* v. *Midland R. Co.* 125 Ind. 476.

The construction of the defendant's bridge approach does not result from time to time in new injuries to the plaintiff's property, but the injury, if any, was done at one and the same time; and for an injury of this character there can be but one action of damages, in which can be recovered the entire damage suffered by the person injured.

Osborne v. *Missouri Pac. R. Co., Spencer* v. *Point Pleasant R. Co.* and *Porter* v. *Midland R. Co. supra.*

Messrs. **J. F. Watson** and **E. B. Watson** for respondent.

Bean, *Ch. J.,* delivered the opinion of the court:

This is a suit by an abutting owner to enjoin and restrain the defendant from occupying a portion of the street in front of plaintiff's property with an approach to its bridge across the Willamette river at Portland. The plaintiff's premises are situated on the west side of Third street, and are bounded on the south by G street, on the north by H street, and on the west by Fourth street, and occupying that portion of the property abutting on Third street is a two-story brick and iron building, used as a foundry and machine shops. Third street is about 66 feet wide, and runs northerly through the city to the north line of said H street. In 1887 the legislature granted to the defendant the right to construct and maintain a bridge, with proper and convenient approaches, across the Willamette

river, between the then cities of Portland and East Portland, for the purpose of travel and commerce, as a railroad, wagon road, and passenger bridge, and to charge and collect tolls and fares thereon. Laws 1887, p. 252. Subsequently the city of Portland, by ordinance, granted to defendant the right to build on Third street "a solid roadway and approach to said bridge from the north line of G street to the center line of H street, said approach to be on an ascending grade from G street and to be built as a solid construction, not exceeding 30 feet in width." In pursuance of the permission thus given by the legislature and the city of Portland, the defendant proceeded to and did construct from a point about 600 feet east of Third street a double-decked steel bridge across said river,—not, however, as a part of or extension of any public highway,—and from the upper deck thereof, which is used for wagon and passenger traffic, constructed an elevated roadway, substantially at right angles to Third street, over and across private property, to the east end of H street, where, by a curve, it was connected to an approach in Third street, as provided in the ordinance referred to. This approach is 30 feet wide, and occupies the middle of the street in front of plaintiff's property for about three fourths of the distance north from G street, and then turns to the east on a curve so that at a point opposite the north line of plaintiff's property it is about 35 feet from the west line of the street, while at the south end, and for a greater portion of the distance along the block, it is only about 20 feet from the street line and about 8 feet from the sidewalk,—a space not sufficient for wagons to pass each other. At the junction of Third and H streets, and opposite the north line of plaintiff's property, it is about 18½ feet above the street surface, and from that point descends southerly by a gradual descent, reaching the surface of the street at the intersection of Third and G streets, forming an effectual barrier to the crossing of that part of the street by vehicles. It is supported by timbers resting on the street surface, and is so constructed and timbered as to be practically a solid structure, necessarily constituting an exclusive and permanent occupation and appropriation to the use of the defendant of that portion of Third street covered by it. The decree of the court below was in favor of the plaintiff, and defendant appeals.

Counsel for defendant seeks to reverse the decree of the court below on the grounds (1) that the erection of the bridge and its approach in Third street, under legislative and municipal authority, violates no property rights of plaintiff, and consequently it is without remedy, although its property may be injured; and (2) the plaintiff's remedy, if it has any, is by an action at law to recover damages, and not by suit for an injunction.

But few questions have come before the courts in recent years involving larger pecuniary interests or of greater practical importance, or which have provoked more discussion, than those growing out of the enforcement by abutting lot owners of their right to compensation for the occupation and use of streets under legislative or municipal authority by private corporations for public use, under constitutions like ours, which provide that private property shall not be taken for public use without just compensation. It is quite generally agreed that any proper exercise of governmental power over a street in a municipality, for street purposes, which does not directly encroach upon the abutting property of an individual, though the consequences may be to impair its use, is not a taking, within the meaning of the constitution, and will not entitle the adjoining proprietor to compensation, or give him a right of action. Cooley, Const. Lim. 5th ed. 671; *Northern Transp. Co. of Ohio* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336. It is within this principle that changes of grade; the use of a street for a surface street railroad; the erection of lamps, hitching posts, telephone, telegraph, and electric light poles; the laying of sewer and water pipes; the crossing of streets over railway tracks by means of elevated viaducts,—are, when authorized by lawful authority, held *damnum absque injuria*, although the abutting owner may be seriously injured, and the value and usefulness of his property greatly impaired. This is upon the ground that individual interests in streets are subservient to those of the public, and that an adjoining owner received full compensation for such injury as might result to him or his grantees from the use of the street for proper street purposes at the time of the dedication or appropriation of the land therefor. But there is a limitation to legislative or municipal power over a street, which cannot be exceeded without invading the constitutional rights of abutting owners. An abutting proprietor is entitled to the use of the street in front of his premises, to its full width, as a means of ingress and egress, and for light and air, and this right is as much property as the soil within the boundaries of his lot; and therefore any impairment thereof or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking, within the meaning of the constitution, whether the fee of the street is in the abutting owner or not. He holds his property subject to the power of the proper legislative authority to control and regulate the use of the street as an open public highway, and hence any authorized use thereof, though a new one, gives him no cause of action. But such holding is not subject to the legislative power to divert the street from legitimate street purposes by authorizing a structure thereon which is inconsistent with its continuous use as an open, public street. Any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made. Elliott, Roads & Streets, 526; Tiedeman, Mun. Corp. 301; Lewis, Em. Dom. § 126; Booth, Street Railway Law, §§ 80, 81; 2 Dill. Mun. Corp. §§ 711, 712, 723c; *McQuaid* v. *Portland & V. R. Co.* 18 Or. 237; *Story* v. *New York Elev. R. Co.* 90 N. Y. 122, 43 Am. Rep. 146; *Lahr* v. *Metropolitan Elev.*

R. Co. 104 N. Y. 268; *Reining* v. *New York, L. & W. R. Co.* 128 N. Y. 157, 14 L. R. A. 133; *Kane* v. *New York Elev. R. Co.* 125 N. Y. 165, 11 L. R. A. 640; *Corning* v. *Lowerre*, 6 Johns. Ch. 439, 2 L. ed. 178; *Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224; *State* v. *Jersey City*, 52 N. J. L. 65. As said by Andrews, *J.*, in *Kane* v. *New York Elev. R. Co.*, *supra:* "However difficult it is to trace its origin, or to refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in a municipality, has, by virtue of proximity, special and peculiar rights, facilities, and franchises in the street, not common to citizens at large, in the nature of easements therein, constituting property, of which he cannot be deprived by the legislature or municipality, or by both combined, without compensation." And in *Story's Case*, *supra*, the rule is thus stated by Tracey, *J.*: "While the legislature may regulate the uses of the street as a street, it has, we think, no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open, public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized." 90 N. Y. 170, 43 Am. Rep. 146.

This brings us to the question, then, whether the occupation of Third street by the approach to defendant's bridge is compatible with or destructive of its use as an open public street. As already stated, this street is about 66 feet in width, and the approach complained of is practically a solid structure 80 feet wide in the middle of the street, so that no use can be made of that portion of the street occupied by it except by persons desiring to use defendant's bridge and pay toll therefor. In other words, it is in fact an appropriation of a public street to the exclusive use of a private corporation, and to the manifest injury of an abutting proprietor. The plaintiff and the public are absolutely and permanently excluded from the use of all that portion of Third street covered by the approach for general street purposes. It practically terminates the street as an open public thoroughfare at the north line of G street, in place of the north line of H street, as it is laid out and dedicated; and the only roadway in front of plaintiff's property is but a few feet wide, and quite insufficient for the proper and necessary use of such property, or for the accommodation of public travel. While the city authorities undoubtedly have power to authorize the use of the street for legitimate street purposes, we do not think the public can justly demand or require such a sacrifice of private interests, or justify such an exclusive and permanent appropriation of a street in aid of a private enterprise, although for public purposes, as is contemplated in this case. It may be conceded that the general interests of Portland and the public at large are promoted by the appropriation of the street to the purposes of an approach to defendant's bridge; but it by no means follows that the burden of such a public improvement can rightfully be cast upon this plaintiff by appropriating its property for the public benefit, without compensation. We think, therefore, that, while it is competent for the legislature or municipality to authorize the use of a street for legitimate street purposes without making compensation to abutting owners for consequential injuries to their property, they cannot legally authorize structures of the character complained of to be erected thereon for the use and convenience of a private corporation, and which absolutely and permanently exclude the public and the abutting owner from the portion of the street so occupied, without compensating the adjoining proprietor for the injury sustained.

The argument that the building of the approach was a mere change of the grade of the street, authorized by proper municipal authority, is clearly untenable. The city of Portland has undoubted plenary power to alter or change the grade of a public street by proper proceedings under its charter, but the act of the municipal authorities in granting defendant permission to occupy the street did not purport to be an exercise of such power. It was simply conferring upon the defendant, so far as the city was able, the right to the exclusive and permanent use of a portion of the public street; and, while such permission included as a consequence the construction of a solid roadway above and over the street surface, it does not follow that what was done was in exercise of the power to alter or change the grade of a street. The street grade remained the same after the approach was built as before, and this approach is no part of the street, but is foreign thereto, and as useless for general street purposes as any of the structures referred to in the cases cited. We do not think a public street, or any portion thereof, can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. The primary object of this grant of power is to enable the municipality to make the streets safe and convenient for public travel, and not to divert them from legitimate street purposes to the exclusive use of some private corporation. Conceding, therefore, that defendant occupies this street by lawful authority, and hence its structure is not a nuisance, yet it invades the legal rights of an abutting owner, and is an appropriation of the property of such owner without compensation, which is beyond the power of the legislature or municipality, or both, constitutionally, to authorize or sanction.

The defendant's counsel also claims that plaintiff's remedy is by action at law to recover damages, and not by suit in equity to enjoin and restrain the defendant from maintaining the approach complained of. He relies principally upon the case of *Osborne* v. *Missouri Pac. R. Co.*, 147 U. S. 248, 37 L. ed. 155. This was a suit by an abutting owner to enjoin the defendant from laying down its railroad track at street grade un-

der competent municipal authority, on the ground that the track would be a permanent obstruction, and the damage threatened to be done complainant was irreparable, and could not be compensated for by a recovery in an action at law. The constitution of Missouri provides that private property shall not be taken or damaged for public use without just compensation; but, while the statutes of that state contain ample provisions for the assessment of compensation for the taking of property, there is no provision therein for such assessment when the property is merely damaged. It was therefore held that as the laying down of defendant's track at the grade of the street was not an exercise of the power of eminent domain, or the taking of private property for public use, there was no proceeding authorized by law, which the railway company could avail itself of, to obtain an assessment of damages, while the complainant had an adequate remedy by action at law, and therefore the injunction should be denied, and the plaintiff remitted to his remedy at law. But in this case, as we have endeavored to show, the act sought to be restrained is a taking of private property for public use, and in such cases our statute has made adequate provision for the assessment of compensation therefor. Provision is not only made by statute for determining the compensation to be paid the owner, but its payment is made a condition precedent to the right to take the property, and it is within the power of the defendant to comply with this condition. In such case, as we understand the rule, an injunction will almost universally be granted, at least until the condition is complied with. The rule is very clearly stated by *Mr. Chief Justice* Fuller, in the case referred to, as follows: "Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition. Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive, or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ*. But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere." To the same effect is Booth, Street Railway Law, 189; Elliott, Roads & Streets, 536; Tiedeman, Mun. Corp. § 307; 2 Dill. Mun. Corp. § 723*d*; *Story* v. *New York Elev. R. Co.* 90 N. Y. 179, 43 Am. Rep. 146; *Lahr* v. *Metropolitan Elev. R. Co.* 104 N. Y. 268; *Columbus & W. R. Co.* v. *Witherow*, 82 Ala. 190; *State* v. *Berdetta*, 73 Ind. 185, 38 Am. Rep. 117.

As the structure, the maintenance of which is sought to be restrained in this case, is permanent and exclusive in its character, and, if suffered to continue as now located, will inflict a continuing and permanent injury upon the plaintiff, we think it manifest that it is entitled to restrain the continuation thereof by an injunction; but as it was constructed with the knowledge and without objection by plaintiff, on the assurance, however, of the defendant, that it was only intended as a temporary expedient and not as a permanent structure, and the fact that it has become and is one of the principal avenues across the river, and daily used by a large number of electric cars, wagons, and foot passengers, the injunction should not be made mandatory until the defendant has had a reasonable time after the mandate is filed in the court below, to be determined by that court, to acquire the plaintiff's easements in the street, by agreement or by proceedings to condemn the same, if it should be so advised. It follows that *the decree of the court below must be affirmed*, and the cause will be remanded for further proceedings in accordance with this opinion.

Rehearing denied.

MICHIGAN SUPREME COURT.

Moses R. TAYLOR, *Plff. in Err.*,
v.
Charles P. DOWNEY, Survivor, etc.

(.....Mich.....)

A hotel keeper is not liable for the theft by his night clerk from the hotel safe of money of a regular boarder who has lived in the house for some months, if ordinary care and diligence were used in the employment of the clerk.

(April 2, 1895.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of

NOTE.—*Liability of bailee for wrongful appropriation by his servant of thing bailed.*

Many bailees become such because of the relation which they bear to the public, and the measure of their liability is fixed, not so much by the law of bailment as by that which governs the capacity in which they act. Thus the business of common carriers, innkeepers, and other classes of persons requires them to have more or less custody of other people's property. But in such

See also 35 L. R. A. 850.

defendant in an action brought to hold defendant liable for the loss of money which had been placed by plaintiff in defendant's safe while plaintiff was a boarder at defendant's hotel. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Cahill & Ostrander,** for plaintiff in error:

The plaintiff was a boarder. But, as such, the proprietors of the hotel owed him the duty of protection of his property from loss or injury by their own tort or that of their servants.

Chamberlain v. *Masterson*, 26 Ala. 371; *Bird* v. *Everard*, 4 Misc. 104; *Donlin* v. *McQuade*, 61 Mich. 275; Cooley, Torts, 537; *Hofer* v. *Hodge*, 52 Mich. 372, 50 Am. Rep. 256; *Neal* v. *Wilcox*, 49 N. C. 146, 67 Am. Dec. 266; *Clary* v. *Willey*, 49 Vt. 55.

A bailee for hire is presumptively responsible for the loss of property through the fault of his servants.

This contract for the safe keeping of plaintiff's property was accessory to the main contract for board, and the plaintiff is entitled to damages for the breach of it the same as a traveler on a railroad train is for the loss of his baggage.

Cogge v. *Bernard*, 1 Smith, Lead. Cas. 8th ed. p. 416; *Needles* v. *Howard*, 1 E. D. Smith, 54.

It is surely more just that the persons who selected the night clerk and who could remove him for misconduct, and whose orders that clerk was bound to receive and obey, should suffer for the misconduct of that clerk, than that Mr. Taylor, who had not the opportunity of selection, or the power of removal and enforcing obedience to his orders, should be injured by the misconduct.

Smith, Mast. & S. 322; 1 Addison, Torts, art. 599; *Dansey* v. *Richardson*, 3 El. & Bl. 144.

Mr. **Frank S. Porter,** for defendant in error:

Hotel keepers act in a double capacity, being both innkeepers and boarding house keepers.

Jeffords v. *Crump*, 12 Phila. 500; *Manning* v. *Wells*, 9 Humph. 746, 51 Am. Dec. 689; *Vance* v. *Throckmorton*, 5 Bush, 41, 96 Am. Dec. 327; *Moore* v. *Long Beach Development Co.* 87 Cal. 483; *Lawrence* v. *Howard*, 1 Utah, 142.

The law imposes no obligation on a boarding-house keeper to take care of the property of his boarder.

Houlder v. *Soulby*, 8 C. B. N. S. 254.

cases when the true relation of carrier and shipper or innkeeper and guest exists their liability is governed by a law peculiar to those relations. Cases of that character are not collected here any further than is useful in showing the rule governing them and its modification when the relation of the parties is reduced to that of mere bailor and bailee.

In The Albany, 44 Fed. Rep. 431, the court says that the general rule is that the master is not liable for the willful acts of his servants committed without his express or implied authority unless at least they are done strictly within the scope of their employment, but there is no doubt that in the case of innkeepers, common carriers, and ship owners, they are upon the grounds of public policy liable for the embezzlement by their servants or agents.

The master of a vessel is liable for cargo embezzled by the crew. Schieffelin v. Harvey, 6 Johns. 170, 5 Am. Dec. 206.

The owner of a vessel is liable for the barratry of the master. The William Taber, 2 Ben. 329.

Where the agent of an express company stole money from a package which he had been given to deliver and the company paid the owner the amount the court said it was the duty of the company to make good this sum to the bank. The bank could have recovered against it at law. Hagerstown Bank v. Adams Exp. Co. 45 Pa. 419, 84 Am. Dec. 499.

A carrier is liable for embezzlement by his servant. King v. Shepherd, 3 Story, C. C. 349.

In the Canal Boat E. M. McChesney, 3 Ben. 150, where a portion of the oats forming the cargo of a boat were abstracted with the connivance of the master it was suggested that the boat was not liable because it was not within the scope of the master's employment to steal or be privy to the stealing of the oats. But the court said: A master is civilly liable for the lawless acts of his servant, whether the act be one of omission or commission, and whether negligent, fraudulent, or deceitful, if the act be done in the course of the servant's employment; and it makes no difference that the master did not authorise, or even know of, the act or neglect of the servant, or even that he disapproved or forbade it. The test is as to whether, at the time, the alleged servant did or did not sustain the relation of servant to the master. In the present case, the care of the oats on the boat was confided to the captain of the boat. The owner of the boat and her mortgagee directed the captain to deliver the oats at New York to the address given in the bill of lading, and directed him not to steal them on the way. He did steal them on the way. But they were entrusted to his control, and the owner and the mortgagee of the boat put it in the power of the captain to steal them on the way, and did it in the face of the absolute obligation in the bill of lading that the oats should all of them be delivered at New York, or the vessel should respond for the deficiency."

As to liability for loss of baggage by sleeping-car companies see *note* to Mann-Boudoir Car Co. v. Dupre (U. S. C. C. S. D. Miss.) 21 L. R. A. 289.

Common innkeepers without any particular contract for that purpose are answerable for all losses at their inns happening either by the acts or negligence of themselves or their servants to travelers and guests received by them. Towson v. Havre de Grace Bank, 6 Harr. & J. 47, 14 Am. Dec. 254. In that case the innkeeper was held liable for money stolen from a guest by the barkeeper of the hotel.

In Treiber v. Burrows, 27 Md. 130, it is said an innkeeper at common law is bound to take more than ordinary care of the goods, money, and baggage of his guest brought within his inn, and is responsible for loss or damage to the same by his servants, domestics, other guests or persons unknown.

If the person to whom the property is delivered appears to be in charge of the hotel the proprietor cannot deny his authority to escape liability for valuables delivered to and embezzled by him. Buckle v. Probasco, 58 Mo. App. 49.

It is the duty of an innkeeper to provide honest servants. Houser v. Tully, 63 Pa. 96, 1 Am. Rep. 390; Jeffords v. Crump, 12 Phila. 500.

In McDaniels v. Robinson, 26 Vt. 337, 62 Am. Dec. 574, it is stated that an innkeeper is responsible for acts of every one within his house.

In Gile v. Libby, 36 Barb. 70, it is stated that the innkeeper is liable if goods are stolen by his servant.

Where a pawner tendered the money to the servant of the pawnbroker and the servant said he had

The hotel keeper is liable in those cases only where he has been guilty of gross negligence. *Wiser* v. *Chesley*, 53 Mo. 547; *Johnson* v. *Reynolds*, 3 Kan. 257; Wandell, Inns, Hotels, and Boarding-Houses, p. 96; *Manning* v. *Wells* and *Jeffords* v. *Crump*, *supra*.

A bailee without reward is not responsible for goods entrusted to him which are stolen by his clerk or servant unless he has been guilty of gross negligence in employing and keeping them.

Foster v. *Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Tompkins* v. *Saltmarsh*, 14 Serg. & R. 275; *Scott* v. *National Bank of Chester Valley*, 72 Pa. 471, 13 Am. Rep. 711; *Comp* v. *Carlisle Deposit Bank*, 94 Pa. 409; *Merchants Nat. Bank of Savannah* v. *Guilmartin*, 17 L. R. A. 322, 88 Ga. 797.

A bailee for hire or recompense is responsible only for ordinary care, or such care as a prudent man takes of his own property, and where he is not chargeable with negligence he is not responsible for goods entrusted to him which are stolen or destroyed.

Schmidt v. *Blood*, 9 Wend. 268, 24 Am. Dec. 143; *Claflin* v. *Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Titsworth* v. *Winnegar*, 51 Barb. 148; *Holteclaw* v. *Duff*, 37 Mo. 392.

The defendant may, after proof of demand and refusal to deliver by plaintiff, exonerate himself by showing that the plaintiff's money was stolen, unless plaintiff, upon whom rests the burden of proof, can show that the loss occurred through the negligence of defendant.

Claflin v. *Meyer*, 75 N. Y. 260, 31 Am. Rep. 467; *Clark* v. *Spence*, 10 Watts, 335; *Mills* v. *Gilbreth*, 47 Me. 320, 74 Am. Dec. 487; *Stewart* v. *Stone*, 14 L. R. A. 215, 127 N. Y. 500; 2 Kent, Com. p. 587; *Marsh* v. *Horne*, 5 Barn. & C. 322; *Harris* v. *Packwood*, 3 Taunt. 264.

Per Curiam:

The plaintiff was a regular boarder at the defendant's hotel, where he had lived for some months. Being engaged in building, he drew money from one of the city banks for the purpose of paying his men; and, not wishing too keep it about his person, he requested the defendant's day clerk to put it in the safe, which was kept in the office of the hotel, and to give him a receipt for the amount. The clerk answered, "I will give you a drawer in the safe, that has but one key, and you can keep that." This was accepted, and after the money was expended

lost the goods, it was held that trover would lie against the master. Jones v. Hart (1699) 2 Salk. 441.

And one who hires a horse is liable to the owner if his servant takes the horse for his own purpose and while so using him injures him by negligent driving. Coupé Co. v. Mandick [1891] 2 Q. B. 413.

Where servant has no duty in respect to thing bailed.

If the master is not engaged in a business to which the bailment is incident and has not engaged his servants with a view to a possible bailment there is no ground for holding him liable for the wrongful appropriation by his servant of property of which he is a passive or gratuitous bailee and over which he has given his servant no control.

Thus in Calye's Case, 8 Coke, 32, 1 Smith, Lead. Cas. 8th ed. *132, it is said if a man is lodged upon request with another who is not an innkeeper and is robbed in the house by the servants of him who lodged him, he shall not answer for it.

Where servant's duties give him some control of thing bailed.

Most of the cases in which the question of the bailee's liability for misappropriation of the property by his servant has been considered have been those in which the bailment was received in the general course of the master's business and the servant was placed in the exact relation towards the property which his general employment required, and in which his acts would have rendered his master liable had the bailment been other than gratuitous. In such cases the tendency has been to greatly restrict the master's liability, more perhaps than such liability is restricted by the more modern decisions in other classes of cases involving the question of the master's liability for acts of his servant. See *note* to Ritchie v. Waller (Conn.) 27 L. R. A. 161.

The bailee certainly owes the duty not to steal the property himself and not to connive at its being stolen by a third person. And if, instead of standing guard himself, he places his servant on guard the analogies of the law would indicate that he should have some responsibility for the honesty of the one whom he trusts. It may be slight but some of the cases at least have held him to practically no responsibility at all.

In an early Massachusetts case it was held that to make the master liable for any act of fraud or negligence done by his servant the act must be done in the course of his employment; and if he steps outside of it to do a wrong either fraudulently or feloniously without authority the master is no more answerable than any stranger. The cases of innkeepers, common carriers and perhaps shipmasters where goods are embezzled are exceptions to the general rule founded on public policy. In case of a special deposit of gold coin the master has no authority to open the receptacle and could not lawfully communicate any authority. The chest when once placed in the bank's vault is to remain there until taken away by the owner or ordered away by the bank. It is no more the duty of the cashier than of any other officer or person to know the contents of or take any account of them. He cannot therefore be considered in any view as acting within the scope of his employment when he embezzles the contents and the bank is no more answerable for such act than they would be if he had stolen the pocket book of any person who might have laid it upon the desk while in there transacting some business with the bank. The bank is not answerable for special deposits stolen by its servants any more than if stolen by a stranger; or any more than the owner of a warehouse would be who permitted a friend to deposit a bale of goods there for safe keeping if the goods should be stolen by one of his clerks or agents. Foster v. Essex Bank, 17 Mass. 479, 9 Am. Dec. 168; Smith v. First Nat. Bank in Westfield, 99 Mass. 605, 47 Am. Dec. 59.

The act of the cashier by which he appropriates exclusively to himself a gratuitous special deposit is not an act done in the bank's business within the scope of his employment. The custody of the deposit requires no act to be done but only a mere continuance of possession until a return of the property is demanded. The cashier had nothing to do about it except to suffer it to remain in a safe place of deposit. Consequently in taking it himself, he is said to "step aside" from his employment and do an act for his personal gain regardless of the business for which he was engaged. Such act is lacking both in the rendition of and in the intention to render any services to the employer. The cashier

the plaintiff returned the key. Two or three weeks later the plaintiff drew $200 from the bank for a similar purpose, and asked the defendant's clerk if the drawer was vacant. He was told that it was not, but that he could have another which had but one key. He took the key, and locked the money in the drawer. A week or two later he found that the drawer had been forcibly opened, and the money taken, by another clerk of the defendant, who had charge of the office nights. It was the practice to leave the safe open, defendant keeping a day and a night clerk. Action being brought against the defendant to recover the amount taken, the circuit judge directed a verdict for the defendant, from which the plaintiff has appealed.

The testimony shows that the night clerk was employed by the defendant upon recommendations from other reputable proprietors of hotels. Defendant had seen him once before employing him, on an occasion of his visit to his father, who was at the time a boarder at defendant's hotel. Counsel for the plaintiff admit that the relation between the parties was that of boarding-house keeper and boarder, and that such relation differs from that of inn keeper and guest. They claim that the defendant was a bailee for hire, and therefore liable for loss of property by the bailor through fault of the bailee's servants. It is said that the defendant was in the habit of allowing boarders similar privileges to those enjoyed by transient patrons, but, if this is important, we discover no evidence to that effect. If the defendant was a bailee for hire, he owed the same care and diligence that all mutual benefit bailees are bound to exercise for the preservation of the property, viz. ordinary care, and "for nothing less than ordinary negligence, or the failure to exercise such care and diligence as persons of average prudence bestow upon their own property under like circumstances is he, while confining himself to the terms of the bailment, legally responsible." Schouler, Bailm. §§ 15, 316; *Millon* v. *Salisbury*, 18 Johns. 211; *Collins* v. *Bennett*, 46 N. Y. 490; *Chamberlin* v. *Cobb*, 82 Iowa, 161; Story, Bailm. § 398; *Smith* v. *Read*, 52 How. Pr. 14, 6 Daly, 33; *Lawrence* v. *Howard*, 1 Utah, 142; *Johnson* v. *Reynolds*, 3 Kan. 957; *Wiser* v. *Chesley*, 58 Mo. 547; *Comp* v. *Carlisle Deposit Bank*, 94 Pa. 416. Such bailee is in no sense an insurer, as an inn keeper is sometimes said to be, of the property of his guest; but he may

does not as a matter of fact act with the bank's authority and furthermore does not essay or even profess to act in its behalf. He represents nobody but himself. He throws off all allegiance to his master and takes the position of a common enemy to all concerned. He becomes the same as a stranger from without, who deprives the bank of a special deposit and the bank is not chargeable with such a loss in the absence of gross negligence, but is liable if grossly negligent. Merchants Nat. Bank of Savannah v. Guilmartin, 17 L. R. A. 322, 88 Ga. 797.

So it has been held that a bailee is not liable for his servant's willful injuries to the property bailed. Halty v. Markel (1867) 44 Ill. 225, 92 Am. Dec. 182.

But this extreme view has not obtained in all cases.

In Preston v. Prather, 137 U. S. 604, 34 L. ed. 788, affirming Prather v. Kean, 29 Fed. Rep. 496, the court in speaking of thefts by bank employés of special deposits made in the bank, said: "The doctrine of exemption from liability in such cases was at one time carried so far as to shield the bailees from the fraudulent acts of their own officers and employés although their employment embraced a supervision of the property, such acts not being deemed within the scope of their employment. And in that case the court held the bank liable for a special deposit of bonds stolen by the assistant cashier who was to the knowledge of the management speculating on the board of trade and whose accounts with the bank the directors investigated, at the same time leaving the special deposits unexamined. And that case was followed in Gray v. Merriam, 148 Ill. 179.

So in a Massachusetts case later than Foster v. Essex Bank, *supra*, in an action against a warehouseman for the value of property destroyed by fire, because its servants who were present at the fire neglected to save the goods, it appearing that the fire occurred in the night, the court said there was no liability, it being no part of the duty of the servants to save property in the night, and states that the true test of liability may be found in the question whether or not any one of defendant's servants who were present at the fire would be answerable to his employers for a neglect of duty. Aldrich v. Boston & W. R. Co. (1868) 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74.

For a special deposit the bank is not liable if the cashier without its knowledge or consent steals it or fraudulently appropriates it to his own use, provided the bank has exercised due diligence in selecting the cashier and in not keeping him in office after it knows or ought to have known that he was or has become untrustworthy. Merchants Nat. Bank of Savannah v. Guilmartin, *supra*.

A bank is liable in case of loss of a special deposit only in case of gross negligence or fraud. Foster v. Essex Bank and Smith v. First Nat. Bank in Westerfield, *supra*.

A warehouseman is not liable for the loss of goods embezzled by his store keeper or servant in the absence of gross negligence. Schmidt v. Blood, 9 Wend. 268, 24 Am. Dec. 143.

But in a later case it was held that a warehouseman is bound to exercise at least ordinary care to prevent the goods from being stolen by his servant. Jones v. Morgan, 96 N. Y. 4, 48 Am. Rep. 131.

If the bank uses ordinary care it will not be liable for the embezzlement of special deposits by its teller. Scott v. National Bank of Chester Valley, 72 Pa. 471, 13 Am. Rep. 711.

A bank is not liable for the taking of a special deposit by its president for his own purposes unless it failed to use the degree of care which the most inattentive give to their affairs. First Nat. Bank of Allentown v. Rex, 89 Pa. 308, 33 Am. Rep. 767.

In case the cashier of a bank embezzles a special deposit the bank will not be liable if it has exercised the ordinary diligence which a reasonable prudent man takes of his own property of like description. Giblin v. McMullen, L. R. 2 P. C. 317, 21 L. T. N. S. 214, 17 Week. Rep. 445, 38 L. J. P. C. 25.

In L'Herbette v. Pittsfield Nat. Bank, 162 Mass. 137, where the cashier accepted money as a deposit to be subsequently invested for the depositor and then embezzled it, the bank was held liable for his act.

If bonds are deposited with a bank as security for a loan and left there after the loan is paid the bank will be liable if they are embezzled by its cashier if it takes no precaution to ascertain their

be held liable for negligence upon his own part, or the negligence of a servant, if such negligence amounts to a want of ordinary care. If a liability is to be based upon negligence, in this case, it must be based upon a want of care in the employment of the night clerk, for it cannot be said that the clerk was negligent. On the contrary, he committed a felony by stealing the property, not only of the plaintiff, but the defendant also. It was done while in charge of the office by virtue of his employment. It was a complete and deliberate departure from his duty, and an entering upon an enterprise of his own, wholly outside of the scope of his employment. "It was an illegal act, willfully done, for which the employer cannot be required to respond." See opinion of Patterson, *J.*, in *Lyons* v. *Martin*, 8 Ad. & El. 512; *Stevens* v. *Woodward*, 50 L. J. C. P. 231; *Foster* v. *Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168; *Merchants Nat. Bank of Savannah* v. *Guilmartin*, 88 Ga. 797, 17 L. R. A. 822; *Comp* v. *Carlisle Deposit Bank*, 94 Pa. 409; *Haggerty* v. *Flint & P. M. R. Co.* 59 Mich. 866, 60 Am. Rep. 301; *Sutherland* v. *Ingalls*, 63 Mich. 620; Mechem, Agency, 740, 741. There is nothing to show that the defendant did not use ordinary care and diligence in the employment of the clerk, and we must therefore hold that no recovery can be had upon the ground of negligence.

This discussion has been based upon the assumption that the deposit was a bailment for mutual benefit. This was not conceded in the case. Counsel for the plaintiff argue, further, that the defendant "made it a part of his business to receive and take charge of the property of their boarders, and are liable for its safe-keeping," and that, while "there is no direct compensation for this service, . . . the contract for the safe-keeping was accessory to the main contract for board, and the plaintiff is entitled to damages for the breach of it, the same as a traveler upon a railroad train for the loss of his baggage." We think there is a radical difference, the contract of the railroad company amounting to an undertaking to deliver the baggage as well as the passenger. The cases cited to sustain this point are cases of inn keeper and guest. [*Coggs* v. *Bernard*], 1 Smith, Lead. Cas. 8th ed. p. 416; *Needles* v. *Howard*, 1 E. D. Smith, 54. There is not a uniformity of decision upon this question of a boarding house keeper's liability to a boarder. In *Dansey* v. *Richardson*, 3 El. & Bl. 144, a divided court affirmed the instruction that the boarding house keeper did not contract to safely keep baggage of a boarder. This was where a servant carelessly left a hall door open, permitting a thief to enter and steal the baggage, which was in the hall. In *Holder* v. *Soulby*, 8 C. B. N. S. 263, Earl, *J.*, protested against the claim that it was the duty of the keeper of a lodging house to take care

safety. Ouderkirk v. Central Nat. Bank of Troy, 119 N. Y. 263.

A district telegraph company which undertakes to protect a private house from burglary during the absence of the owner is bound to exercise reasonable care in the selection of its servants and if it fails to do so it cannot protect itself from liability for goods stolen by the servant on the ground that he is not acting within the line of his duty or the scope of his employment. Williams v. Brooklyn Dist. Teleg. Co. 12 Misc. 565.

In a case of the loss of goods of a boarder, the court says the hotel keeper employs servants to attend to the rooms and his boarders have a right to expect that he will employ those who are honest and if he fails to do so and loss is thereby occasioned without negligence on the other side he is held responsible. All bailees are liable to third persons for the acts of their agents or servants done in the course of employment. But the boarder must not be negligent. Chamberlain v. Masterson, 26 Ala. 371.

Goods not in possession of master.

Whenever the guest assumes the custody and control of his goods in such a way as to indicate that he does not trust the innkeeper and concedes to him no control, there is no implied custody of the innkeeper and he is therefore not responsible unless they should be stolen by some one of his own household whose honesty and fidelity he is presumed to guarantee. Weisenger v. Taylor, 1 Bush, 275, 89 Am. Dec. 626.

In Vance v. Throckmorton, 5 Bush, 41, 96 Am. Dec. 327, in which the property was destroyed by fire the court recognizes the rule of the Weisenger Case, that the landlord pledges the integrity of his servants.

In Peers v. Sampson, 4 Dowl. & R. 696, where a room was hired in which to store goods the key being kept by the hirer, the court held that the owner of the house was not liable for a theft of the goods by his servant on the ground that the goods had never been delivered to him for safe keeping.

If a guest on leaving a hotel leaves money with the clerk with the knowledge of the proprietor the latter will not be liable for its embezzlement by the clerk if he had no reason to suspect his fidelity as he is a mere gratuitous bailee. Whitemore v. Haroldson, 2 Lea, 312.

Where the deposit was left at owner's risk, it not appearing that the bank had knowledge of it any further than the action of the cashier in taking it bound the bank, and the cashier was a man of good repute, the bank was held not liable, although the deposit was misappropriated by the cashier. Comp v. Carlisle Deposit Bank, 94 Pa. 409.

Effect of statute.

The Missouri act relieving the innkeeper from liability excepts cases of theft by a servant of the hotel. Fisher v. Kelsey, 121 U. S. 383, 30 L. ed. 980.

In Illinois the statute relieves the innkeeper from liability under certain circumstances unless the loss occurs "by a clerk or servant" employed by the landlord in the house or inn. But in such case admissions by the servant out of the master's presence that he took the property are not admissible against the landlord. Elcox v. Hill, 98 U. S. 218, 25 L. ed. 108.

Ratification.

In United Soc. of Shakers v. Underwood, 9 Bush, 609, it was held that directors of a bank who divided among stockholders money which was obtained by the sale by bank officers of a special deposit might be held liable for the value of the deposits to the depositors.

Special contract.

In Safe Deposit Co. of Pittsburgh v. Pollock, 85 Pa. 391, 27 Am. Rep. 660, it appeared that the contract of the Safe Deposit Company required it to protect the property from any dishonesty on the part of any of the company's employés.

Although in an early English case it was held that, a bailee for hire is not liable for the loss of goods which are stolen by his own servants if he takes as good care of them as he does of his own. Finucane v. Small (1795) 1 Esp. 315, and in that case the bailment was upon a special agreement by the bailee to take care of them for a consideration.

H. P. F.

of a lodger's goods, and said that, where the proprietor had done nothing which amounts to a misfeasance, he knew of no authority or principle upon which he could be held responsible for mere absence of care. In a note to that case it is said that, "even in the case of a common inn, the inn keeper is not liable as such to persons who reside permanently at his house as boarders, nor otherwise than for actual negligence," citing *Chamberlain* v. *Masterson*, 26 Ala. 371; *Manning* v. *Wells*, 9 Humph. 748, 51 Am. Dec. 688. In *Lawrence* v. *Howard*, 1 Utah, 142, it was held that requiring lodgers to lock their rooms and deposit the key at the office was ordinary diligence. Indeed, the court went further, and held that only slight care was required, implying that there was no bailment for mutual benefit in that case. The goods were stolen from the room where the proprietor left them after the plaintiff's departure. The case of *Jeffords* v. *Crump*, 12 Phila. 500, holds that "an inn keeper is not liable for goods of a boarder, stolen from the inn, unless there be proof of gross negligence;" thus implying, as did *Lawrence* v. *Howard*, that it was a case of *depositum*. See also *Neal* v. *Wilcox*, 49 N. C. 146, 67 Am. Dec. 266. The case of *Smith* v. *Read*, 6 Daly, 33, is perhaps as strong a case in support of the plaintiff's contention as any, and this goes no further than to hold that ordinary care is due. See also *Cayle's Case*, 8 Coke, 32; Bacon, Abr. *Inns and Inn Keepers*, chap. 5; *Vance* v. *Throckmorton*, 5 Bush, 41, 96 Am. Dec. 327; *Berkshire Woollen Co.* v. *Proctor*, 7 Cush. 424; *Hancock* v. *Rand*, 94 N. Y. 1, 46 Am. Rep. 112; Bishop, Non-Cont. L. § 1171; *Johnson* v. *Reynolds*, 8 Kan. 257; *Pullman Palace Car Co.* v. *Love*, 6 L. R. A. 809, and *note*, 28 Neb. 239; *Shoecraft* v. *Bailey*, 25 Iowa, 553.

It is probable that this is the limit of the rule, viz., that boarding house keepers are liable, as bailees for mutual benefit, for the preservation of goods brought upon the premises by boarders. The nature of the liability is not changed by a deposit in the safe, though the degree of care may be increased over that required where the boarder retains the custody of valuables; but the keeper of the house is still a bailee for mutual benefit, and still owes the duty of ordinary care, which varies in degree as the responsibility is thrown upon him, or is assumed by the owner.

In this case it is contended by counsel for the defendant that this was a mere deposit; that the plaintiff drew his money from the bank where he usually kept it, and, for his own convenience, chose to make the safe his bank, which should not be said to have been contemplated by either party as a part of, or accessory to, their contract for board. It may be that there is room for such a distinction, but it is unnecessary to determine the question. The most that plaintiff's counsel can claim is that the defendant was a bailee for hire. If that be conceded, ordinary care was required. There is no proof that it was lacking.

We must therefore affirm the judgment of the Circuit Court.

The other Justices concur.

UTAH SUPREME COURT.

Alfred G. BRIM, Road Supervisor, etc., *Appt.*,
v.
Thomas W. JONES.

(.....Utah.....)

A statute which makes any person who drives a herd of horses, asses, cattle, sheep, goats, or swine over a public highway constructed on a hillside, liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway, is not unconstitutional as a denial of equal privileges, immunities, or protection of the laws, or as depriving any person of property without due process of law.

(March 16, 1895.)

APPEAL by plaintiff from a judgment of the District Court, Third District, in favor of defendant in an action brought to enforce the statutory penalty for driving cattle over highways situated on a hillside in such a way as to injure or destroy the bank's road-bed. *Reversed.*

The facts are stated in the opinion.

Messrs. **Williams, Van Cott & Sutherland,** with *Mr.* **David B. Tewkesbury,** for appellant:

The law requires courts to uphold statutes unless they are so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind of their invalidity.

Burlington C. R. & N. R. Co. v. *Dey*, 12 L. R. A. 445, 82 Iowa, 312.

A statute should not be declared unconstitutional unless very clearly so, and every reasonable intendment should be made to sustain it.

State v. *Simmons Hardware Co.* 15 L. R. A. 676, 109 Mo. 118.

And a statute should not be declared unconstitutional except in cases of plain and manifest violation of the instrument by the legislature.

Williamson v. *Williamson*, 8 Smedes & M. 715, 41 Am. Dec. 636; *Davis* v. *Helbig*, 27 Md. 452, 92 Am. Dec. 646.

The burden is on the one attacking such law to show its invalidity.

Section 2087 is not special or class legislation.

Allen v. *Pioneer Press Co.* 3 L.R. A. 532, 40 Minn. 117; Cooley, Const. Lim. 5th ed. pp. 481-483; *Barbier* v. *Connolly*, 113 U. S. 32, 28 L.

NOTE.—The above case is a novel one in respect to equal rights on highways. On the general subject of constitutional equality of rights and privileges, see *note* to Louisville Safety Vault & Trust Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579.

ed. 925; *McCandless* v. *Richmond & D. R. Co.* 18 L. R. A. 445, 38 S. C. 108; *Union Pac. R. Co.* v. *De Busk*, 3 L. R. A. 350, 12 Colo. 294; *Youngblood* v. *Birmingham Trust & Sav. Co.* 20 L. R. A. 58, 95 Ala. 521; *Gulf, C. & S. F. R. Co.* v. *Ellis* (Tex.) 21 S. W. Rep. 933; *Presby* v. *Klickitat County*, 5 Wash. 329; *Re Oberg*, 14 L. R. A. 577, 21 Or. 406; *Jensen* v. *Fricke*, 133 Ill. 175; *Hawthorn* v. *People*, 109 Ill. 311; *State* v. *Schlemmer*, 10 L. R. A. 135, 42 La. Ann. 1166; *Soon Hing* v. *Crowley*, 113 U. S. 708, 28 L. ed. 1146; *Missouri Pac. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107; *People* v. *Henshaw*, 76 Cal. 442; *Gartside* v. *St. Louis*, 43 Ill. 47.

It is customary to collect licenses over and above exactions from other persons from "cartmen, hack, cab, omnibus, stage and truck owners and drivers, and carriages and vehicles used for the transportation of passengers or merchandise."

If the legislature can authorize cities to make such exactions then it can do so itself, and in case of cities such legislation is established beyond dispute.

State v. *Neil*, 7 Ohio, pt. 1, p. 132, 28 Am. Dec. 623; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; Elliott, Roads & Streets, pp. 58, 59, 66–68 *et seq.*; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585; Sedgw. Stat. & Const. L. 2d ed. pp. 434–437.

The section in question is clearly within the general police power of the territory, and therefore valid even though it were inhibited by section 1 of the 14th Amendment.

State v. *Aubuchon*, 8 Mo. App. 325; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 29, 32 L. ed. 586; *Barbier* v. *Connolly*, 113 U. S. 31, 28 L. ed. 925; *State* v. *Yopp*, 97 N. C. 477.

The public highways are subject to the regulations that may be prescribed by the legislature or its delegated authority under the police power.

Elliott, Roads & Streets, pp. 58, 59; 2 Dill. Mun. Corp. § 656.

If the damage done by heavy coal wagons can be collected as an exceptional damage, then the damage done by drivers of sheep through public highways constructed on a hillside can also be collected.

State v. *Moore*, 104 N. C. 714; *Hawthorn* v. *People*, 109 Ill. 311; *Soon Hing* v. *Crowley*, 113 U. S. 708, 28 L. ed. 1145.

Messrs. **Richards & Richards**, for respondent:

The constitution is a limitation upon the general police power as well as other powers.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 648; *People* v. *Budd*, 5 L. R. A. 559, 117 N. Y. 1.

The act is unconstitutional because it deprives a certain class of persons of their property without due process of law and denies them the equal protection of the law.

Hurtado v. *California*, 110 U. S. 558, 28 L. ed. 246; Cooley, Const. Lim. p. 433; *Pearson* v. *Yewdall*, 95 U. S. 294, 24 L. ed. 436; *Bank of State* v. *Cooper*, 2 Yerg. 599, 24 Am. Dec. 537; Miller, Const. pp. 661–665.

This act deprives the persons to whom it applies of their property "without due process of law," because it creates an absolute liability for the damage done by their animals, whether the persons are guilty of negligence or not.

Jensen v. *Union Pac. R. Co.* and *Shaw* v. *Utah & N. R. Co.* 4 L. R. A. 724, 6 Utah, 253; *Cateril* v. *Union Pac. R. Co.* 2 Idaho, 540; *Cairo & F. R. Co.* v. *Parks*, 32 Ark. 131; *Zeigler* v. *South & North Ala. R. Co.* 58 Ala. 595; *Ohio & M. R. Co.* v. *Lackey*, 78 Ill. 55, 20 Am. Rep. 259; *Oregon R. & Nav. Co.* v. *Smalley*, 1 Wash. 206; *Bielenberg* v. *Montana Union R. Co.* 2 L. R. A. 813, 8 Mont. 271; *Birmingham Mineral R. Co.* v. *Parsons*, 27 L. R. A. 263, 100 Ala. 662; *Rio Grande Western R. Co.* v. *Chamberlin*, 4 Colo. App. 149; *Rio Grande Western R. Co.* v. *Vaughn*, 3 Colo. App. 465; *State* v. *Divine*, 98 N. C. 778; *New York City Health Department* v. *Trinity Church*, 43 N. Y. S. R. 142; *East Kingston* v. *Towle*, 48 N. H. 57, 2 Am. Rep. 174, 97 Am. Dec. 575; *Janesville* v. *Carpenter*, 8 L. R. A. 808, 77 Wis. 288; *Re Kubach, Petitioner*, 9 L. R. A. 482, 85 Cal. 274; *Savannah, F. & W. R. Co.* v. *Geiger*, 21 Fla. 669, 58 Am. Rep. 697; *McCready* v. *Sexton*, 29 Iowa, 356, 4 Am. Rep. 214; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970; *Bardwell* v. *Collins*, 9 L. R. A. 152, 44 Minn. 97; *State* v. *Ellet*, 47 Ohio St. 90.

Smith, J., delivered the opinion of the court:

The sole question raised upon the appeal in this case is whether or not section 2087, Utah Comp. Laws 1888, is valid and constitutional. The section reads as follows: "Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway." The court below decided that this section was invalid and void, and the respondent claims that it is in violation of that portion of the Fourteenth Amendment to the Constitution of the United States which provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." It is contended that this statute deprives the class of persons described in it of the equal protection of the laws, and deprives them of property without due process of law. An exhaustive argument is made in behalf of both the appellant and respondent in this case, and we have examined all the cases cited on either side. "The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which should seldom, if ever, be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incom-

patibility with each other." This was the language of Marshall, *Ch. J.*, in *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162. It is by this rule then that we must determine whether the statute in this case violates the constitution. The claim on behalf of the respondent is that the act is class legislation, and denies to drovers named in it that protection of the law which it extends to other citizens. We cannot agree with the respondent that this law is objectionable upon the ground stated. In the case of *Allen* v. *Pioneer Press Co.*, 40 Minn. 117, 3 L. R. A. 532, *Justice* Mitchell, of Minnesota, delivering the opinion of the court, says: "Laws public in their object may be confined to a particular class of persons, if they be general in their application to the class to which they apply; provided the distinction is not arbitrary, and rests upon some reason of public policy growing out of the conditions or business of such class." In Cooley, Const. Lim. 5th ed. p. 483, the author says: "If otherwise unobjectionable, all that can be required in these cases is that the laws be general in their application to the class or locality to which they apply, and they are then public in their character, and of their propriety and policy the legislature must judge." In the case of *Barbier* v. *Connolly*, 113 U. S. 32, 28 L. ed. 925, the Supreme Court of the United States used the following language: "Class legislation, discriminating some and favoring others, is prohibited; but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment." In *Gartside* v. *East St. Louis*, 43 Ill. 47, the supreme court of Illinois, speaking of an ordinance requiring certain specified teamsters who were engaged in hauling stones and coal through the city to pay a certain license, says: "From the extent and character of his business, these teams must have passed and repassed almost constantly. This, then, renders the repair of the streets more expensive and more necessary, from the fact that his vehicles seemed to be large and heavy. For the comfort and convenience of the citizens of the place, as well as persons not residing therein and traveling on its streets, it is necessary that they should be repaired and kept in good condition;" and the court upheld the ordinance for the reason stated. In the case of *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 29, 32 L. ed. 586, *Mr. Justice* Field, speaking for the Supreme Court, says: "The concluding clause of the first section of the Fourteenth Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished." And again, on pages 30 and 31, 129 U. S., and page 587, 32 L. ed., of the same opinion, the learned judge says: "The discriminations which are open to objection are those where persons engaged in the same business are subject to different privileges, under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the law."

It is not pretended but that the statute under consideration affects all drovers alike; that there is no discrimination made between persons engaged in the same line of business. The contention of respondent is that there is a discrimination made between those persons engaged in business as drovers and those engaged in other business which requires the use of the highway, as, for instance, teamsters and other travelers, in that the latter are not required to pay for any damage that they may do to highways situated on a hillside. It is easy to conceive that the business of drovers would be exceedingly injurious to highways situated upon a hillside if their herds pass over the ground upon and near the highway in our mountain country, inasmuch as they would cause rocks and other obstructions to be thrown into the highway, and would break down banks and otherwise specially injure the highways. It was no doubt for this reason that the legislature required that those persons so engaged should be specially liable for all damage that they did to the highways. Whether teamsters do like injury is not for us to decide. It is in the discretion of the legislature to regulate the use of the highways, and, if they make no distinction between different persons who use them in the same way, we see no reason for complaint.

Counsel for respondent cites numerous authorities, and among others a decision of this court, to the point that statutes requiring railroad companies unconditionally to pay for stock killed by their trains are void, and have been so held under the Fourteenth Amendment, above quoted. These cases are not in point. Railway companies are charged with a public duty to operate their trains, and are granted a public franchise for this purpose. They cannot escape the duty imposed upon them towards the public, to wit, the operation of their trains. If, then, while in the performance of this duty, and without fault, they casually destroy stock straying upon their road, it is manifestly a deprivation of such companies of their property without due process of law to require them absolutely to pay for it, because in such case the duty of operating the train and the duty of paying for the stock killed are directly in conflict. There are loose expressions in some of the cases cited which would indicate that the courts made some other distinction. We think, upon the ground stated, these cases are consistent with the view we take of the statute under consideration. But there is no public requirement that drovers shall drive their herds over highways situated on hillsides. It is purely a matter of individual choice whether they do or not. They have a right to do so, and, if they do no injury, they are liable to no one for anything. It is manifest, however, that the legislature considered that driving herds of stock of the character described over highways situated upon a hillside was calculated to damage such highways. The maxim of the law is, "*Sic utere tuo ut alienum non lædas*," the legal

meaning of which is, "So use your own property as not to injure the right of another." It is but an enforcement of this rule that is attempted by the statute in this case. The rule as was stated by *Lord* Truro in *Egerton* v. *Brownlow*, 4 H. L. Cas. 195, is applicable to the public in at least as full force as to individuals. The public own the highways, and must bear the expense of keeping them in repair.

By this statute they simply say to the drover, who is possessed of property which, if driven in a certain way, is calculated to destroy the highway, that he must so use his own property as not to destroy that of the public. There is no absolute liability for using the public highway, but it is deemed probable that a use in a particular way, with particular property, will produce a peculiar injury, and, if such injury is produced, then the person producing it is held liable. We cannot see that this unjustly discriminates against such persons. On the contrary, it seems to be reasonable, fair, and just legislation as between all of the citizens. It must be held if a case can be conceived that would justify the legislation that that case existed when it passed, and it is certainly not difficult to conceive of the injury and wrong that it was intended to prevent by this statute. We are of the opinion that the statute is valid, and that the court below, in holding it invalid, was wrong. *The judgment should be and is therefore reversed*, and the case remanded for a new trial.

King, *J.*, concurs; **Bartch**, *J.*, dissents.

Affirmed. *Jones* v. *Brim*, 165 U. S. 180, 41 L. ed. 677.

RHODE ISLAND SUPREME COURT.

Amasa M. EATON *et al.*
v.
George H. ROBINSON *et al.*

(.....R. I.....)

1. **Officers of a corporation may be compelled to account for all sums withdrawn for salaries** with interest thereon, where they have voted and paid them partly and largely for the purpose of depriving stockholders of the results of a litigation in case they are successful, although they are paid nominally and partly for services rendered to the company.
2. **Stockholders who are officers of a corporation may be compelled** upon a bill properly framed to pay directly to other stockholders their share of money which the officers have fraudulently retained as salaries.

(May 16, 1895.)

EXCEPTIONS by complainants and defendants to a master's report in a proceeding brought to compel officers of a corporation to account for salaries which they were alleged to have fraudulently taken from the corporation. *Respondents' exceptions overruled; complainants' sustained in part.*

The representatives and assignees of the holder of certain stock in the Narragansett Pier Company which had been mortgaged to secure the payment of certain promissory notes, brought a suit to declare the debt paid and to have the mortgage canceled. They succeeded in obtaining the relief sought and then filed a bill against the majority stockholders of the corporation who had been the mortgagees of the stock for an accounting charging that they had conspired to absorb the rents and profits which had accrued to the corporation by paying to themselves as its officers' salaries grossly disproportionate to the services rendered for the purpose of preventing the minority stockholders from receiving the benefit which would otherwise accrue from their redemption of the mortgaged stock.

The court handed down a rescript holding that complainants were entitled to relief and the case was referred to a master to take and report an account of sums which had been received from the corporation by the respondents. The complainants filed exceptions to the master's report in that he allowed certain sums as compensation to certain of respondents, that he allowed the sum of $134 for outlays made by respondents to his refusal to rule that no compensation should be made for their services and also to his refusal to rule that if any compensation should be allowed it should be five per cent upon the sums collected or received by the officers for the benefit of the corporation. The respondents filed exceptions to the master's finding that the sums received by the respondents were received in part for the purpose of defrauding the complainants, to his finding that the directors' vote fixing salaries was not binding, to his finding that the salaries were fixed by the board of directors, and to his refusal to allow compensation to respondents as claimed by them.

Messrs. **Walter F. Angell** and **Amasa M. Eaton**, for complainants:

Compensation to a fiduciary rests in the discretion of the court, and is not a matter of right but of grace. It will therefore be withheld whenever the conduct of the parties is such that they are not deserving of reward.

Note to *Robinson* v. *Pett*, 2 Lead. Cas. Eq. 550, 570; *Swartswalter's Account*, 4 Watts, 77; *Blake* v. *Pegram*, 109 Mass. 541; *McKnight* v.

NOTE.—The briefs in the above are believed to present the authorities on the question involved so fully as to make it undesirable to attempt any annotation. The decision is believed to be the most striking application that can be found of the rule denying compensation to fiduciaries for services tainted with fraud.

For other cases as to the right of corporate officers to compensation, see Ten Eyck v. Pontiac, O. & P. A. R. Co. (Mich.) 3 L. R. A. 878; Douglass v. Merchants Ins. Co. (N. Y.) 7 L. R. A. 832; Waterman v. Chicago & I. R. Co. (Ill.) 15 L. R. A. 418; Brown v. Republican Mountain Silver Mines (Colo.) 16 L. R. A. 426; Clark v. American Coal Co. (Iowa) 17 L. R. A. 557; Crumlish v. Central Imp. Co. (W. Va.) 28 L. R. A. 120.

See also 46 L. R. A. 384.

Walsh, 23 N. J. Eq. 136; *Moore* v. *Zabriskie*, 18 N. J. Eq. 51; *Stehman's App.* 5 Pa. 413; *Barney* v. *Saunders*, 57 U. S. 16 How. 542, 14 L. ed. 1050; *Jenkins* v. *Eldredge*, 3 Story, C. C. 325; *Re Coffin*, 10 Daly, 27; *Gilbert* v. *Sutliff*, 3 Ohio St. 129; *Warbass* v. *Armstrong*, 10 N. J. Eq. 263; *Nagle's Trust Estate*, 12 Phila. 25.

A trustee guilty of willful misconduct in the execution of his trust is not entitled to commissions for his services.

Berryhill's App. 35 Pa. 245; *Davis* v. *Memphis City R. Co.* 22 Fed. Rep. 883; *Sellers* v. *Phœnix Iron Co.* 13 Fed. Rep. 20; *Miner* v. *Belle Isle Ice Co.* 17 L. R. A. 412, 93 Mich. 97.

Although directors of a corporation are not technically trustees, since they do not hold the legal title, it is admitted law that they are within the rules governing the relation of trustees and *cestuis que trustent*, or of agent and principal. . . .

Beers v. *Bridgeport Spring Co.* 42 Conn. 17; *Holder* v. *Lafayette, B. & M. R. Co.* 71 Ill. 103, 22 Am. Rep. 89; *Cumberland Coal & Iron Co.* v. *Parish*, 42 Md. 598; *Hubbard* v. *New York, N. E. & W. Investment Co.* 14 Fed. Rep. 675; *Mallory* v. *Mallory-Wheeler Co.* 61 Conn. 131; 2 Cook, Stock & Stockholders, §§ 647, 648, and cases cited.

Lord Chancellor Hardwicke, in 1742, in *Charitable Corp.* v. *Sutton*, 2 Atk. 400, said: "I will never determine that frauds of this kind are out of the reach of courts of law or equity, for an intolerable grievance would follow from such a determination."

See also *Wallworth* v. *Holt*, 4 Myl. & C. 619.

Directors of corporations cannot recover compensation for services rendered the corporation as directors, unless upon a contract or resolution passed by the corporation, or provision therefor made in the charter or by-laws, before the rendering of such services.

Accommodation Loan & Sav. Fund Asso. v. *Stonemetz*, 29 Pa. 534; *New York & N. H. R. Co.* v. *Ketchum*, 27 Conn. 170; *Maux Ferry Gravel Road Co.* v. *Branegan*, 40 Ind. 361; *Chesney* v. *Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; *Holder* v. *Lafayette, B. & M. R. Co. supra; Lafayette, B. & M. R. Co.* v. *Cheeney*, 87 Ill. 446; *Illinois Linen Co.* v. *Hough*, 91 Ill. 63; *Santa Clara Min. Asso.* v. *Meredith*, 49 Md. 389, 33 Am. Rep. 264.

Directors of corporations cannot recover for services rendered the corporation as other officers, unless upon a contract or resolution passed by the corporation, or by a vote of the board of directors in which they take no part, or upon some provision made for such compensation, made in the charter or by-laws, all of which must be before such services are rendered.

Fraylor v. *Sonora Min. Co.* 17 Cal. 594; *Butts* v. *Wood*, 37 N. Y. 317; *Merrick* v. *Peru Coal Co.* 61 Ill. 472; *Holder* v. *Lafayette, B. & M. R. Co.*, *Lafayette, B. & M. R. Co.* v. *Cheeney*, and *Illinois Linen Co.* v. *Hough*, *supra*; *Citizens Nat. Bank* v. *Elliott*, 55 Iowa, 104, 39 Am. Dec. 167; *Kelsey* v. *Sargent*, 40 Hun, 150; 1 Morawetz. Priv. Corp. §§ 517 *et seq.*, and cases cited; 1 Beach, Priv. Corp. § 201.

Corporations are not liable on a *quantum meruit* for services rendered by officers who are stockholders.

Kilpatrick v. *Penrose Ferry Bridge Co.* 49 Pa. 118, 88 Am. Dec. 497; *American Cent. R. Co.* v. *Miles*, 52 Ill. 174; *Cheeney* v. *Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; *Holder* v. *Lafayette, B. & M. R. Co. supra; Cumberland Coal & Iron Co.* v. *Parish*, 42 Md. 598; *Citizens Nat. Bank* v. *Elliott*, *supra*; *Pew* v. *First Nat. Bank of Gloucester*, 130 Mass. 391.

If the element of fraud is added the allowance of excessive salaries is a spoliation of the company.

Ziegler v. *Hoagland*, 52 Hun, 385; *Davis* v. *Memphis City R. Co.* 22 Fed. Rep. 883; 8 Am. & Eng. Encyclop. Law, p. 647; *Jones* v. *Morrison*, 31 Minn. 140.

It is immaterial whether the salaries were fixed by the directors or the stockholders. The meetings of both were controlled by the respondents, Robinsons, or their dummies. They were the only ones present at either kind of meetings. . . .

Cook, Stock & Stockholders, §§ 657 *et seq.*, and cases cited; *Hubbard* v. *New York, N. E. & W. Investment Co.* 14 Fed. Rep. 675; *Davis* v. *Memphis City R. Co. supra*; *Mallory* v. *Mallory-Wheeler Co.* 61 Conn. 131; *Walker* v. *Beal*, 76 U. S. 9 Wall. 743, 19 L. ed. 814.

A court of equity has power, in case of fraud, abuse of trust or misappropriation of corporate funds by the majority in control, to grant relief at the instance of a single stockholder.

Miner v. *Belle Island Ice Co.* 17 L. R. A. 412, 93 Mich. 97; *Beers* v. *Bridgeport Spring Co.* 42 Conn. 17; *Jones* v. *Morrison*, 31 Minn. 140; *Ziegler* v. *Hoagland*, 52 Hun, 385; *Mallory* v. *Mallory-Wheeler Co. supra*; *Fougeray* v. *Cord*, 50 N. J. Eq. 185; *Hiscock* v. *Lacy*, 9 Misc. 578.

As the complainants have had the benefit of the use of the money of the corporation, they should now replace it with interest.

Wayne Pike Co. v. *Hammons*, 129 Ind. 368; *McCahan's App.* 7 Pa. 56; *Stearly's App.* 38 Pa. 525; *Frey* v. *Demarest*, 17 N. J. Eq. 71; *Walker* v. *Beal*, *supra*; *McKnight* v. *Walsh*, 24 N. J. Eq. 498.

Mr. **Arnold Green** for respondents.

Per Curiam:

The master has found that the salaries voted and paid to the respondents, while nominally and partly for services rendered to the company, were partly and largely for the purpose of depriving the predecessors in title of the complainants of the results of the litigation, in the event that the litigation should prove successful. Counsel for the respondents maintains that the master erred in finding the latter purpose because as he contends the respondents at the time of the fixing of the salaries could not have known that judgment in the suit at law would be taken for the full amount of the mortgage debt instead of the excess only above the value of the stock pledged, whereby the right to redeem the stock arose. The salaries, however, were not fixed till after the right to redeem the stock had been claimed and suits for the purpose had been begun. We think that the master was justified in his finding.

In so far as the fixing and payment of the salaries were induced by the purpose to deprive the complainants' predecessors in title of

their share of the rents and profits accruing to the corporation in case they should obtain the right to redeem the mortgaged stock, such action was oppressive and must be treated as fraudulent. The respondents, as officers of the corporation, stood in a fiduciary relation toward the complainants' predecessors in title as stockholders in the corporation, analogous to that of trustee and *cestui que trust* and were bound to the exercise of the utmost good faith toward them.

If they acted oppressively, we think that the master erred in allowing them compensation. *Davis* v. *Memphis City R. Co.* 22 Fed. Rep. 883; *Sellers* v. *Phœnix Iron Co.* 13 Fed. Rep. 20. *Swartzwalter's Account*, 4 Watts, 77; *Berryhill's App.* 35 Pa. 245; *Note* to *Robinson* v. *Pett*, 2 Lead. Cas. Eq. 550, 570, 600.

In the cases cited by the master in which compensation was allowed to officers of corporations, notwithstanding their maladministration, the objection that they were not entitled to compensation because of such maladministration does not appear to have been made. The master should have required the respondents to account for all sums withdrawn for salaries with interest.

We see no reason for disturbing the allowance of $134, by the master for outlays by the respondents for the benefit of the corporation.

We overrule the respondents' exceptions, and those of the complainants, except so far as consistent herewith.

After the above opinion had been handed down the question arose as to the form of the decree which should be entered. Complainants submitted a decree proposing payment directly to the complainants of their aliquot share of the amount found to be due to the corporation. The respondents submitted a decree directing payment into the treasury of the company of the amount found to be due to the corporation.

Messrs. **Amasa M. Eaton** and **Walter F. Angell** for complainants.

Mr. **Arnold Green**, for respondents:

The stockholder does not bring such a suit because his rights have been directly violated or because the cause of action is his or because he is entitled to the relief sought; he is permitted to sue in this manner simply in order to set in motion the judicial machinery of the court. The stockholder either individually or as the representative of the class may commence the suit, and may prosecute it to judgment but in every other respect the action is the ordinary one brought by the corporation; it is maintained, directly for the benefit of the corporation and the final relief when obtained belongs to the corporation and not to the stockholder plaintiff.

2 Pom. Eq. Jur. § 1095, p. 1627.

If the constating instruments have conferred on the directors the power to control and manage the corporate affairs the corporate body have no right to interfere with this management nor can a majority of the corporators require the board of directors to act in matters left to their discretion, contrary to their judgment.

2 Wood's Field, Corp. § 859; *Dana* v. *Bank of United States*, 5 Watts & S. 223; *Com.* v. *Roman Catholic Soc. Trustees of St. Mary's Church of Philadelphia*, 6 Serg. & R. 508; *Conro* v. *Port Henry Iron Co.* 12 Barb. 27; *State* v. *Bank of Louisiana*, 6 La. 745.

If a majority of the shareholders or the directors of a corporation wrongfully refuse to declare a dividend and distribute profits earned by the company any shareholder feeling aggrieved may obtain relief in a court of equity. 2 Morawetz, Priv. Corp. § 447.

Per Curiam (July 8, 1895):

The decree submitted by the complainants may be entered.

The prayer of the bill is for an accounting both with the company and the complainants and that the respondents may be decreed to pay oyer such sums as shall be found due, to the company or the complainants. This prayer is broad enough to entitle the complainants to a decree for the payment of their share of the moneys wrongfully appropriated as salaries. We think that relief in this form is appropriate to the circumstances of the case and a better form than to require payment into the treasury of the company, and thereby, perhaps, make it necessary for the complainants to resort to another bill to compel the payment of a dividend. Similar relief in a somewhat similar case was granted in *Fougeray* v. *Cord*, 50 N. J. Eq. 185.

We do not deem the objection urged by the respondents that directing payment to the complainants of their share of the sums found due to the company instead of into the treasury of the company is a sequestration of the corporate property entitled to any weight. The corporation exists for the benefit of its shareholders. No injustice is done to any one by directing a payment to the complainants of what is due to them

We see no reason for withholding costs from the complainants. The respondents against whom no relief was granted were all shareholders in the corporation and therefore, if not necessary, were at least proper parties to the bill and interested in the accounting.

AMERICAN NATIONAL BANK
v.
AMERICAN WOOD PAPER CO.

(.....R. I.....)

1. **Corporate bonds secured by mortgage** and payable to bearer are so far negotiable that the holder may maintain an action thereon in his own name.
2. **That a statute giving a title by delivery,** and a right of action to the holder, of negotiable paper in terms applied only to promissory notes will not prevent the courts from recognizing corporate bonds as negotiable.
3. **That a bond is payable ten years after date** or sooner after five years does not destroy its negotiability.
4. **A holder of corporate bonds secured by mortgage** is not given a present right of action for the principal of the bond upon default in payment of interest by the fact that the mortgage provides that upon default the holder of one third of the amount of bonds may require a sale of the property and the "bonds shall forthwith become due and payable."

(July 8, 1895.)

ACTION to recover the principal and interest of certain bonds secured by a mortgage. On demurrer upon the grounds: (1) that the bonds are not negotiable; (2) that the principal of the bonds had not yet become due and payable. *Demurrer overruled on first ground and sustained on second ground.*

The facts are stated in the opinion.

Messrs. **Arnold Green** and **James Tillinghast** for defendant in support of demurrer.

Messrs. **Comstock & Gardner** for plaintiff, *contra.*

Stiness, *J.*, delivered the opinion of the court:

The plaintiff sues to recover the principal and interest due on certain bonds and coupons issued by the defendant May 1, A. D. 1890, and payable May 1, 1900, or sooner after five years. The bonds are secured by a mortgage of all the defendant's property, in the state of Pennsylvania, given to a trustee for the bondholders, in which it is provided that, in case of default in the payment of interest for more than six months, the principal of said bonds shall be due and payable. The declaration sets out the bonds and mortgage, profert of which is made, and alleges default in payment of interest for more than six months after demand made therefor. The defendant demurs to the declaration upon several grounds; but the two grounds pressed in the argument are that the bonds are not negotiable, so as to give the plaintiff a right of action in its own name, and that the terms of the mortgage cannot be imported into the bonds so as to give a right of action for the principal thereof before maturity.

We think that the bonds must be treated as negotiable securities. While there has been some diversity of opinion upon this subject, the tendency of recent decisions, and the weight of authority and reason, seem now to be in favor of negotiability. At first, before such bonds had become common, courts naturally held that they lacked the technical and established characteristics of negotiable instruments. Thus, in *Crouch* v. *Credit Foncier of England* (1873) L. R. 8 Q. B. 374, it was held that the contract embodied in similar bonds prevented them from being promissory notes, even if they had been without a seal, and that the custom to treat them as negotiable, being of recent origin, could not attach an incident to a contract contrary to the general law. But in *Goodwin* v. *Robarts* (1875) L. R. 10 Exch. 337, the court, by Cockburn, *Ch. J.*, does not concur in thinking the latter ground conclusive. In the recent case of *Venables* v. *Baring Bros. & Co.* [1892] 3 Ch. 527, American railroad bonds, upon the evidence of an American lawyer as to their negotiability in this country, were held to have acquired in England, in the city of London, among English merchants, the character of negotiability. Notwithstanding the limitations of this decision, we think it may be taken as practically settling the rule in England. See also *Re Imperial Land Co. of Marseilles,* L. R. 11 Eq. 478.

In this country the decisions have been quite explicit. The principle on which they rest was well stated by *Mr. Justice* Grier in *Mercer County* v. *Hackett* (1868) 68 U. S. 1 Wall. 83, 17 L. ed. 548; as follows: "This species of bonds is a modern invention, intended to pass by manual delivery, and to have the qualities of negotiable paper; and their value depends mainly upon this character. Being issued by states and corporations, they are necessarily under seal. But there is nothing immoral or contrary to good policy in making them negotiable, if the necessity of commerce require that they should be so. A mere technical dogma of the courts or common law cannot prohibit the commercial world from inventing or using any species of security not known in the last century. Usages of trade and commerce are acknowledged by courts as part of the common law, although they may have been unknown to Bracton or Blackstone. And this malleability to suit the necessities and usages of the mercantile and commercial world is one of the most valuable characteristics of the common law. When a corporation covenants to pay to bearer, and gives a bond with negoti-

NOTE.—The negotiable character of bonds now so fully recognized by custom in spite of the ancient technical rule to the contrary is most interestingly shown in the above case by reason of the failure of the statute as to negotiable paper to include bonds in express terms.

As to the effect on negotiable securities of a mortgage securing them with a provision for accelerating the time of payment on default as to any part of the debt secured, see also Horn v. Bennett (Ind.) 24 L. R. A. 800.

able qualities, and by this means obtains funds for the accomplishment of the useful enterprises of the day, it cannot be allowed to evade the payment by parading some obsolete judicial decision that a bond, for some technical reason, cannot be made payable to bearer. That these securities are treated as negotiable by the commercial usages of the whole civilized world, and have received the sanction of judicial recognition, not only in this court (*White* v. *Vermont & M. R. Co.*, 62 U. S. 21 How. 575, 16 L. ed. 221), but of nearly every state in the Union, is well known and admitted." After this strong statement, it is needless to say more, except to refer to a few cases to the same effect: *Kneeland* v. *Lawrence*, 140 U. S. 209, 35 L. ed. 492; *Chicago Railway Equipment Co.* v. *Merchants Nat. Bank of Chicago*, 136 U. S. 268, 34 L. ed. 349; *De Haas* v. *Roberts*, 59 Fed. Rep. 853; *Reid* v. *Bank of Mobile*, 70 Ala. 199; *National Exch. Bank* v. *Hartford, P. & F. R. Co.* 8 R. I. 375, 5 Am. Rep. 582; 1 Randolph, Com. Paper, § 74, *note 1*, and cases cited. It is true that some states have statutes which declare bonds of this kind to be negotiable (see 2 Am. & Eng. Encyclop. Law, p. 319); and the point is taken that it is not so in this state, since Pub. Stat., chap. 142, §§ 6, 7, relate only to promissory notes. We do not think, however, that this fact prevents us from holding these bonds to be negotiable. Such statutes are declaratory and remedial, and are evidently not intended to exclude other forms of negotiable paper. Bonds of this sort are clearly within the intent of the statute to give a title by delivery and a right of action to the holder of negotiable paper, and the bonds, in effect, are promissory notes. The special provisions contained therein are not such as to deprive them of their fundamental character of a promise to pay at a certain time. These bonds are not given as collateral to a note secured by mortgage, but the mortgage is security for the bonds themselves. *Riker* v. *Sprague Mfg. Co.* 14 R. I. 402, 51 Am. Rep. 413. See *Costello* v. *Crowell*, 127 Mass. 293, 34 Am. Rep. 367, and 134 Mass. 280.

Upon the question of importing the terms of the mortgage into the contract, so as to give a present right of action for the principal, we think the objection is well taken. The bonds do not make the terms of the mortgage a part of the contract. They simply recite that they are secured by a mortgage. Turning to the mortgage, we find that, in case of default, one third of the bondholders in amount may require the trustee to sell the property; and, in the same clause, occurs the provision that the bonds shall forthwith become due and payable upon the default. We think that this is a provision only for the purposes of foreclosure by entry or sale. If one third in amount of the bondholders is required for a sale, out of the proceeds of which the principal is to be paid, it would be quite incompatible with this limitation to hold that a single bondholder could precipitate the maturity of the bonds by a suit. When one is due, all are due, and the provision implies that the large majority may think it best not to foreclose at once; and, if so, the right to give time is secured in this provision. It is a provision for a special purpose, and not intended to give a right of action upon default, independently of foreclosure proceedings. Such is the construction given to similar provisions in *Batchelder* v. *Council Grove Water Co.* 131 N. Y. 42; *White* v. *Miller*, 52 Minn. 367; *McClelland* v. *Bishop*, 42 Ohio St. 113; *Mallory* v. *West Shore Hudson River R. Co.* 3 Jones & S. 174.

Of the cases cited by the plaintiff to sustain the point that the bonds and mortgage, being connected and contemporaneous, are to be construed together, nearly all are suits for foreclosure or actions for a balance due after foreclosure. This is a very different matter. Clearly, after such an agreement, the obligation may be treated as due for the purpose of foreclosure, and the maker of the note or bond would be liable for the balance remaining due, in some form of action; but whether upon the note or the covenant we are not now called upon to say. Such a liability, however, does not give the right of action which is claimed in this case. *Venables* v. *Baring Bros. & Co.*, *supra*, was a suit to establish title. *First Nat. Bank of Sturgis* v. *Peck*, 8 Kan. 660, and *Chambers* v. *Marks*, 93 Ala. 412, are in favor of the plaintiff's claim; but we think that the weight of authority, the purpose of the provision, and the reason on which its construction depends are against it.

Our conclusion is that *the demurrer to the negotiability of the bonds must be overruled, and the demurrer to the statements of the plaintiff's present right of action must be sustained.*

INDIANA SUPREME COURT.

PENNSYLVANIA CO., *Appt.*,
v.
Martha E. McCAFFREY, Admx. of Richard McCaffrey, Deceased.

(.....Ind.....)

1. The effort of a section boss to save a hand-car in his charge from injury by a train backing towards it is not negligence as matter of law although in trying to get away after ascertaining that the car cannot be saved he falls under it and is injured, if he acts naturally and not recklessly, although by acting differently he might have escaped.

2. A railroad company which requires

NOTE.—The above decision sustaining the liability of a railroad company for an accident caused by the excessively long hours of service of its trainmen seems to be a novel one and must be regarded as an important addition to the subject of railroad law. As to the effect of disobeying rules of service as negligence, see *note* to Ford to Chicago, R. I. & P. R. Co. (Iowa) 24 L. R. A. 657.

a train crew to be on duty nineteen hours each day without time for rest or food is liable for an injury to a track-hand caused by the attempt of some of the crew to operate the train while others have temporarily left it to procure food.

3. **Requiring a train crew to be on duty nineteen hours each day without time for food** is the proximate cause of an injury to a track-hand by the trains backing on him without warning while the fireman is the only member of the crew on board the brakeman being off to operate a switch and the others in search of food.

4. **It is not negligence** for a conductor and engineer of a train to leave it to procure food after thirteen hours of consecutive service with no provision made by the company for a food supply.

5. **A railroad company is liable for injuries** to a track-hand which are caused by its attempt to operate a train with only a fireman and a brakeman.

6. **A section boss knowing the custom of a portion of a train's crew to leave** it at a certain time for food is not charged with the duty of ascertaining that they have not left it before attempting to put his car on a track which the train has passed, for fear the train may back on him without warning.

7. **A railroad employe is not bound to report** to the company facts which it already knows.

8. **A cause of action is stated** by a complaint which alleges that a railroad company moved a train without signals or guards, or any one except a fireman in charge of it back upon and injured a track-hand free from fault.

(September 20, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Clark County in favor of plaintiff in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate by defendant's servants. *Affirmed.*

The facts are stated in the opinion.

Mr. **S. Stansifer**, for appellant:

The complaint does not negative the presumption that the company discharged its duty by employing a competent crew, with all needed instructions for their guidance, in the safe and proper discharge of their duties.

Kelley v. *Wisconsin R. Co.* 21 Cent. L. J. 219; *Pennsylvania Co.* v. *Whitcomb*, 111 Ind. 212; *Hard* v. *Vermont & C. R. Co.* 32 Vt. 473; Wood, Mast. & S. 708; Wood, Railway Law, 1468.

In an action by a servant against the master for an injury caused by a fellow servant the complaint must show by proper averment of facts, either,

1. That the master had not exercised ordinary care and prudence in the employment of such fellow servant, or that he had retained him in the service after he had received notice that he was negligent in the discharge of the duties of his position; and

2. That the defendant did not know of the offending servant's negligent habits when he entered the service; or if known, or should have been known, after entering the service then an excuse must be averred for remaining in the service.

Lake Shore & M. S. R. Co. v. *Stupak*, 108 Ind. 1.

The evidence so far from showing that McCaffrey did not have knowledge of the offending habits of his fellow servants, discloses that he did in fact have knowledge, and no excuse is shown for his thereafter remaining in the service.

Iold.

If in the eyes of the law the facts and circumstances fail to make a case on any material point, it is the duty of the trial court reviewable by this court, to instruct peremptorily for the defendants or grant a new trial.

Louisville, N. A. & C. R. Co. v. *Pedigo*, 108 Ind. 481; *Pittsburgh, C. & St. L. R. Co.* v. *Spencer*, 98 Ind. 186; *Toledo & W. R. Co.* v. *Goddard*, 25 Ind. 185; *Woolery* v. *Louisville, N. A. & C. R. Co.* 107 Ind. 381, 57 Am. Rep. 114; *Conner* v. *Citizens Street R. Co.* 105 Ind. 62, 55 Am. Rep. 177; *Indianapolis, P. & C. R. Co.* v. *Bush*, 101 Ind. 582; *Pennsylvania Co.* v. *Marion*, 104 Ind. 239; *Bruker* v. *Covington*, 69 Ind. 33, 35 Am. Rep. 202; *Dodge* v. *Gaylord*, 53 Ind. 365; *Moss* v. *Witness Printing Co.* 64 Ind. 125.

It was the duty of appellee to prove by a preponderance of the evidence, as a fact in the case, that McCaffrey was without fault, and if the evidence pointed just as much in one way as the other, or in neither direction, or in other words was silent, the appellee was not entitled to a verdict.

Toledo, W. & W. R. Co. v. *Brannagan*, 75 Ind. 490; *Indiana, B. & W. R. Co.* v. *Greene*, 106 Ind. 279, 55 Am. Rep. 736.

Where an employé, after having opportunity to become acquainted with the risks of his situation, accepts them, he cannot complain if he is subsequently injured by such exposure.

Whart. Neg. § 214; *Umback* v. *Lake Shore & M. S. R. Co.* 88 Ind. 191.

A servant who sees that a fellow servant is negligent or incompetent, is bound to report the fact to the common master, and should he neglect to do so, he is barred from recovering from the master for injuries which, had he been duly diligent, he would have been protected.

Whart. Neg. § 236.

When several persons are thus employed there is necessarily incident to the service of each the risk that others may fail in their care and vigilance which are essential to his safety. In undertaking the service he assumes that risk, and if he should suffer, he cannot recover from his master.

Northern Pac. R. Co. v. *Herbert*, 116 U. S. 642, 29 L. ed. 755.

The master undertakes to exercise ordinary care to see that ordinarily suitable and safe machinery, appliances, etc., are furnished for the work required of his servants, and also that his servants are ordinarily competent for the work required of them; the servant assumes the ordinary hazards of the service, both as to machinery, appliances, etc., and the competency of his fellow servants.

Gillenwater v. *Madison & I. R. Co.* 5 Ind. 339, 61 Am. Dec. 101; *Madison & I. R. Co.* v. *Bacon*, 6 Ind. 205; *Fitzpatrick* v. *New Albany & S. R. Co.* 7 Ind. 436; *Ohio & M. R. Co.* v. *Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Wilson*

v. *Madison etc. R. Co.* 18 Ind. 226; *Slattery* v. *Toledo & W. R. Co.* 23 Ind. 81; *Sullivan* v. *Toledo, W. & W. R. Co.* 58 Ind. 26; *Gormley* v. *Ohio & M. R. Co.* 72 Ind. 31; *Robertson* v. *Terre Haute & I. R. Co.* 78 Ind. 77; *Indiana Car Co.* v. *Parker*, 100 Ind. 182; *Pittsburgh, C. & St. L. R. Co.* v. *Kirk*, 102 Ind. 400; *Capper* v. *Louisville, E. & St. L. R. Co.* 103 Ind. 305; *Pittsburgh, C. & St. L. R. Co.* v. *Adams*, 105 Ind. 151; *Indiana, B. & W. R. Co.* v. *Dailey*, 110 Ind. 75; *Krueger* v. *Louisville, N. A. & C. R. Co.* 111 Ind. 51; *Cincinnati, H. & D. R. Co.* v. *McMullen*, 117 Ind. 439; *Taylor* v. *Evansville & T. H. R. Co.* 6 L. R. A. 584, 121 Ind. 124; *Lake Shore & M. S. R. Co.* v. *Stupak*, 123 Ind. 210.

It is not enough to show that the company was negligent, but the complaint and evidence must go further and show that McCaffrey did not assume the risk of such negligence, by averring and proving at the trial that he was ignorant of the habit of the trainmen.

Billman v. *Indianapolis, C. & L. R. Co.* 76 Ind. 166, 40 Am. Rep. 230; *Wabash, St. L. & P. R. Co.* v. *Locke*, 112 Ind. 404; *Atlas Engine Works* v. *Randall*, 100 Ind. 293, 50 Am. Rep. 798.

The question is not one of contributory negligence, but of assumption of risk, notwithstanding there may be negligence on the part of the master.

Lake Shore & M. S. R. Co. v. *Stupak*, 108 Ind. 1; *Louisville, N. A. & C. R. Co.* v. *Frawley*, 110 Ind. 18; *Indiana, B. & W. R. Co.* v. *Dailey, supra; Louisville, N. A. & C. R. Co.* v. *Sandford*, 117 Ind. 265; *Rietman* v. *Stolle*, 120 Ind. 814.

On petition for rehearing.

If a servant, before or after he enters the service, discovers that the "building, premises, machines, appliances, or fellow servants in connection with which or with whom he is to labor, is unsafe or unfit in any particular, and if notwithstanding such knowledge or means of knowledge he voluntarily enters or continues in the employment without objection or complaint, he is deemed to have assumed the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him.

2 Thomp. Neg. 1008; *Indianapolis & St. L. R. Co.* v. *Watson*, 114 Ind. 20; *Lake Shore & M. S. R. Co.* v. *Stupak*, 108 Ind. 1; *Louisville, N. A. & C. R. Co.* v. *Frawley*, 110 Ind. 18; *Indiana, B. & W. R. Co.* v. *Dailey*, Id. 75; *Louisville, N. A. & C. R. Co.* v. *Sandford*, 117 Ind. 265; *Louisville, N. A. & C. R. Co.* v. *Corps*, 8 L. R. A. 636, 124 Ind. 427; Beach, Contrib. Neg. § 140; *Evansville & T. H. R. Co.* v. *Duel*, 184 Ind. 156; *Kentucky & I. Bridge Co.* v. *Eastman*, 7 Ind. App. 514.

The complaint disclosing that the train was sufficiently manned usually, it follows that there must be an averment of knowledge of the unusual.

Lake Shore & M. S. R. Co. v. *Stupak*, 123 Ind. 228.

It is not even averred that appellant negligently caused, suffered, or permitted the absence of the conductor and engineer.

Cleveland, C. C. & I. R. Co. v. *Wynant*, 100 Ind. 160; *Pittsburgh, C. & St. L. R. Co.* v. *Adams*, 105 Ind. 155; *Chicago, St. L. & P. R. Co.* v. *Bills*, 104 Ind. 13.

If the complaint can be distorted into an attempted theory of negligence because of the absence of the conductor, engineer, and fireman, then that absence was the proximate, the cause causing the accident, and it follows that the averments that the one employé on the train (the fireman) was in the rear of the train as it was moving and that there was no one in front to give warning, are mere appendages, or detached phrases, and the body of the facts pleaded, the attempted theory must control.

Louisville, N. A. & C. R. Co. v. *Schmidt*, 106 Ind. 73.

The rule that if the negligence of the master combines with the negligence of a fellow-servant, and the two contribute to the injury of another servant, the master is liable. In no manner trenches upon the assumption of risks rule.

Rogers v. *Leyden*, 127 Ind. 51.

Messrs. **A. C. Harris, J. H. Stotsenburg,** and **Evan B. Stotsenburg** for appellee.

Dailey, J., delivered the opinion of the court:

The facts in this case, as shown by the record are these: The appellant, as lessee, operates the Jeffersonville, Madison & New Albany Railway. It runs a passenger train from Louisville, *via* Jeffersonville, to New Albany, called the "Dinkey." The crew consists of a conductor, brakeman, engineer, and fireman. They go on duty at 5 A. M. each day, and, as appears by the company's card, remain on duty continuously until midnight. On April 28, 1885, the crew, consisting of Bush, conductor; Brooks, brakeman; Parr, engineer; and Eisle, fireman,—took the dinkey train to run from 5 A. M. until midnight. There were fourteen stops each way. No provision was made for the men to get their meals. The crew lived in New Albany. They could not work nineteen consecutive hours without food. The fireman's little daughter brought his meals in a pail, which he ate on the engine. It is not shown how Brooks, the brakeman, lived, as the company had him in the service on the road, so that he was not present at the trial. On the afternoon of April 28, 1885, appellee's intestate Richard McCaffrey, the section boss, was at work, with four laborers, surfacing the track in the city of New Albany. His hand-car was standing in an alley immediately north of the track, and a few squares east of the State street station, the western terminus of this line, at which passengers were received and delivered. Bush, the conductor, and Parr, the engineer, lived several squares east of the station. As the train came from Louisville to New Albany, due at 5:40 P. M., the engineer and conductor left the train, and ran to their homes, to eat their suppers, while the fireman and brakeman were left in charge of the train, to take the passengers on to the station. As soon as the train, containing three cars, pulled by McCaffrey and his men, they gathered up their tools to quit work for the day, and began to

put their hand-car on the track, to run eastwardly to the hand-car house, about one mile distant. McCaffrey resided near by there, on Fifteenth street. The Air-Line Company at that time used the Jeffersonville, Madison & Indianapolis track from New Albany into Louisville, and an east-bound train would soon pass. To allow this, it became necessary for the dinkey train to run into a switch, the east end or head of which was 190 feet east of the alley wherein McCaffrey's hand-car stood. Brooks, the brakeman, got off, and ran along to open the switch; but Eisle, the fireman, ran over the head of the switch before stopping the train. He says: "I lost the air, and ran over the switch." There was then no one of the crew on the train but the fireman. Brooks was on the ground to open the switch when he could, and the engineer and conductor were eating hasty suppers at their respective homes. McKenna, the superintendent of the Pennsylvania Company,—the officer having the operating of this train in charge,—knew that the conductor and engineer, driven by hunger, habitually left the train to get something to eat, as was done this afternoon. Parr, the engineer, testifies: "That was the only way I had to get something to eat, unless it was brought to me in a basket." A special policeman named Shay, in the employ of the company, patrolling the track in New Albany, was required to get on the train to assist the passengers off; but he had no authority to take command of the train, and did not on this occasion. The train was thus left, by permission of the company, with no one to operate it, except the fireman. No bell was rung, or other signal given of the backward movement of the train by Eisle. He could not watch, or ring the bell, as he was occupied in handling the engine. It was shown by the appellant that on previous occasions they sometimes let little boys climb on the engine and ring the bell, when the engineer was off securing something to eat, but it was not so in this instance. There was no one to stand on the rear platform, as there should have been, or otherwise to warn the decedent and his men that the train must move backward at once. Eisle reversed the engine, and put on steam, and moved back, just as McCaffrey and his men were putting the hand-car, which weighed 700 pounds, on the track. They put it on in the usual manner; that is, they carried it on the track, and placed it at right angles therewith, and then lifted it quarter round, so as to put the wheels on the rails. As they were so engaged the train backed silently down upon them. Perry Quirk, one of the section hands, tells the rest of the story in this artless way: "It was just six o'clock, and we were putting on the hand-car at the alley. We had hold of her, and were trying to put her on, and I seen the train coming up, and I said, 'Boys, we cannot make it.' We were looking towards the train, and we could see the car coming down; and I said, 'We cannot make it,' and we dropped the car, and stepped out. I hallooed. I said, 'Boys, we cannot make it.' I seen McCaffrey stepping back from the car, and the next I saw him fall. That is all." It is shown that the hand-car was shoved forward by the collision between it and the train, and the deceased was under the hand-car when the train stopped. William Wren says: "When the train struck the hand-car they had got the wheels parallel with the rails, with two wheels inside of the track, and two outside. I saw him fall, but did not see him struck. He fell across the rail, . . . and the car struck him and drug him down, but did not pass over his body. It drug him ten feet. It rather slipped upon him, and shoved him along." He was mortally hurt, and in intense pain and agony. From the injuries so received, he afterwards died. They brought a train down, and carried him into the cars to take him home. While aboard the train, Shay, the special policeman, sent two or three men into the car to obtain admissions from him. Among these was a constable named Graham, who was a bystander. Graham said, "I do not think you are badly hurt." The suffering man answered that he did not think he could live. Graham, then, in the presence of Conductor Bush, inquired of him as to who was to blame, saying: "Do you blame anybody?" To which he answered: "I don't. It was all my fault. I do not blame any of the boys at all for this." "He said he wanted to save the hand-car, to keep it from being mashed up. He was in fear of being discharged for neglecting his own duty." Parr went to see him the next morning. McCaffrey was asleep, and under the influence of morphine. After a while he roused up, and Parr, who seemed to have been there to talk to him, says that in the course of a conversation he said to McCaffrey, "I am mighty sorry for it," to which he replied, "I don't blame you at all." The widow, who was present on this occasion, denies that any such statement was made. After Bush, the conductor, had returned from supper, and talked with McCaffrey and others on the car, he sent a dispatch to the superintendent, which, on cross-examination, he admitted was substantially as follows (being an accident report filled up): "New Albany, Station, April 28th, 1885. To Superintendent: First section 27. Train northward. Engine 822. Engineer, John Parr. Conductor, C. G. Bush. Place and time, 5:40 P. M.; main track; alley between Bank and Pearl. What caused it? Putting hand-car on track, and backed up, and putting hand-car out of way; got caught between hand-car and track. Name, Richard McCaffrey. Flesh wound on right side. Two ribs on side, three cars next to engine. Nature accident: Putting car on track when train backed up; tried to get away, fell, and train pushed hand-car on him. (Signed) C. G. Bush." This statement was made just after the accident, when the transaction, as observed, was fresh in the minds of the actors and bystanders, and is the only one in the record showing clearly how McCaffrey happened to receive his injuries. It is true, Bush was not an eyewitness to what transpired. It is likewise true that it was made after Bush had seen Brooks, the brakeman, who was standing at the switch when the event happened. As the appellant

failed to bring him, as a witness, to the trial, although in its employ, running between Louisville and Indianapolis, at the time, on a passenger train, it is fair to infer that he saw the accident, and would have testified to the facts contained in the dispatch therein set forth.

On these facts, we cannot say that McCaffrey was incautious. A trusty servant, he made an effort to save the hand-car then in his care. Seeing they could not, the crew abandoned it to save their lives, when, in the language of the dispatch, he "tried to get away, fell, and the train pushed the hand-car on him." This clearly establishes that he was not guilty of negligently permitting himself to be run over. In a sudden crisis, coming on one by surprise, it is not expected that a person in the midst of such peril will exercise that deliberate judgment which knowledge and proper time for reflection afford. Moved by a high sense of duty, to serve his master, the servant may be impelled to an effort to save its property when a stranger would escape. But the most prudent and active men may accidentally fall, especially when the mind and sight are turned to an unexpected danger, and no opportunity is given for care where or how to stop. If one acts naturally in a case of sudden and instant peril put on him by another, and is injured, he is not guilty of negligence, although afterwards, out of the presence of danger, with time to reflect, and in the light of all the known facts, it may appear that another course of conduct might have led to an escape. *Knapp* v. *Sioux City & P. R. Co.* 71 Iowa, 41; Moak's Underhill Torts, pp. 283, 284; *Twomley* v. *Central Park, N. & E. R. R. Co.* 69 N. Y. 158, 25 Am. Rep. 162, and *note*.

In view of the official report made by the conductor on that fatal day, we need not disturb the judgment of the lower court on the ground that McCaffrey recklessly sacrificed his life in order to save the hand-car and keep his place. It is true, McCaffrey knew the engineer and conductor were compelled by hunger to leave the train at times, and run home, to get something to eat. But there is no proof that he knew they had left the train on this afternoon. It was running back and forth continuously from morning until night. As we understand the logic of the accomplished counsel for the appellant, it is as follows: (1) McCaffrey was a section boss, and the train crew were fellow servants. (2) The absence of the conductor and engineer was the proximate cause of McCaffrey's death. (3) That both the appellant and McCaffrey knew before the fatal day that the conductor and engineer habitually left the train at times, during the nineteen hours of constant duty, to get something to eat; that this was in violation of the rules of the company, and in disregard of their duty under the law. (4) That, having this knowledge, he was bound to abandon the service, or take upon himself the risks incident to operating a train with a deficient crew while part were at their meals. The four propositions involved in his position counsel tersely states as follows: "Moreover, the evidence, so far from showing that McCaffrey did not have knowledge of the offending habits of his fellow servants, discloses that he did, in fact, have knowledge, and no excuse is shown for his thereafter remaining in the service." We think the doctrine of fellowship between trainmen and trackmen so well settled in this state that a citation of authorities to support it is unnecessary. In this case, appellant's counsel frankly admits that his company had at least "constructive notice" that the engineer and conductor were "in the habit of leaving their trains to get their meals." It is a recognized rule of the courts that if the negligence of a master combines with negligence of a fellow servant, and the two contribute to the injury of another servant, the master is liable. *Franklin* v. *Winona & St. P. R. Co.* 37 Minn. 409; *Elmer* v. *Locke*, 135 Mass. 575; *Grand Trunk R. Co. of Canada* v. *Cummings*, 106 U. S. 700, 27 L. ed. 266; *Coppins* v. *New York Cent. & H. R. R. Co.* 122 N. Y. 557; *Whittaker* v. *Delaware & H. Canal Co.* 126 N. Y. 544; *Lake Shore & M. S. R. Co.* v. *Stupak*, 128 Ind. 222, 223; *Rogers* v. *Leyden*, 127 Ind. 52, 53.

In *Boyce* v. *Fitzpatrick*, 80 Ind. 526, it is said: "While a servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, so that he will not be carelessly and needlessly exposed to risks which might be avoided by ordinary care and precaution on the part of his employer; and where, in the absence of such care and precaution, an employé is injured, the employer is liable, although the negligence of a fellow servant contributed to the injury complained of." This principle was approved in *Louisville, N. A. & C. R. Co.* v. *Berkey*, 136 Ind. 181. In our opinion the rule is a just and salutary one, and we ought not to depart from it. Unless it be that a master has a right to require a servant to stand at his post of duty, without food or rest, for nineteen consecutive hours, every day, Sundays included, and that such conduct is not a breach of duty to the public as well as to its other servants, it follows that the appellant in this case has not performed its duty towards decedent, without which it is liable, if this negligence was the proximate cause of his death. That it was is clear. The law of nature is inexorable in its demands. The cravings of hunger must be appeased. The laws of humanity declare that every man fit to be a member of a train crew must have three meals, some rest, and eight hours' sleep, a day. The appellee well says: "Deprived of these requisites of intelligent life, a soldier becomes a coward; a workingman, a drone." Any being would lose his strength if worked a few months by the time schedule provided for this crew. Every statute and employer's rule is made in the presence of, and subject to, the laws of nature. Hunger, thirst, and sleep are imperative; and when a schedule is made of nineteen consecutive hours of service on a train, and no provision is made by the company for their supply of

food, it is understood that the employés must, of necessity, at times during the service, leave their places to get their meals. So that when the engineer and conductor left the train, after thirteen hours' service, on the day of the accident, to get their suppers, it was in obedience to this law of nature,—an overruling necessity,—and was not, therefore, negligence on their part. They were not deserters, and their conduct cannot be characterized as "offending habits." Without notice to the company, it was bound to know that these men must, and therefore did, at intervals during the nineteen hours of each day, leave the train to answer nature's strong and eager desire for food; and, so knowing, it will be held to have consented. If appellant desired to escape responsibility, it should have provided an adequate force. "It is the duty of the railway not to increase the perils of its servants by the inadequacy of the force employed in any particular work; and, in particular, trains must be manned by a sufficient number of train hands." Patterson, Railway Accident Law, § 297; *Flike* v. *Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Booth* v. *Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; Moak's Underhill, Torts, 47.

We think it clear that the appellant was guilty of a breach of duty toward the public, including McCaffrey, by operating the train with only a fireman and a brakeman, because it was its duty to have an adequate number of competent men on the train to handle it and give notice of its approach. And when, by appellant's conduct, it became necessary for its two chief employés to temporarily absent themselves, it was its duty at once to stop the train until their return, or supply their places with other competent men during their enforced and necessary absence. This legal duty is supported by several rules printed on the time card. Rule 40 provides that the whistle is to be sounded three times when a standing train is to move backward. Rule 40 provides that before starting the bell must be rung. Rule 110 reads as follows: "When a train is run backward (except when shifting and making up trains in yards), a signal man must be stationed in a conspicuous position on the rear car, so as to perceive the first sign of danger, and immediately signal to engine man." The evidence shows that all these rules were violated by the company at the time of the accident. Impliedly conceding all these facts, the appellant seeks to escape responsibility by urging that McCaffrey negligently contributed to his own death. If this were true the general verdict of the jury to the contrary should be set aside. No difference how derelict of duty the company was, if McCaffrey saw or knew the train was backing on him, and going beyond him, he was bound to exercise the caution which the law imposes on every man to take care of himself, even at the risk of losing his position. But as there is evidence in the record strongly tending to establish that he was "stepping back from the car," and "tried to get out of the way, fell, and the train pushed the handcar on him," at the time the calamity befell him, we are not prepared to say that the jury falsified the facts when they found he was not guilty of negligence contributing to the result.

Complaint is made that the court refused to give the jury the sixteenth and seventeenth instructions asked by defendant. The sixteenth states the proposition that if McCaffrey knew the engineer and conductor were in the habit of absenting themselves from the train, at times, to get necessary food, then it was McCaffrey's bounden duty to know they were on this train at that time, "and not to place, or attempt to place, the hand-car on the track if they were absent, and if he failed in this respect he was negligent." This would have imposed upon him the duty to board the train as it passed, and see if the conductor was on; and, as it is negligence to get on a moving train, he would have been compelled to have followed the train to the station, in case it did not stop long enough for him to overtake it, and make the inspection. On the same principle, he would have been required to see if the fireman was eating his supper on the engine. We are not aware of any rule casting such a burden on the section boss. In *Baltimore, O. & C. R. Co.* v. *Rowan*, 104 Ind. 88–94, this court said, "The obligation or duty of the master is not to expose the servant, while conducting his business, to perils or hazards which might have been provided against by the exercise of due care and proper diligence on the part of the master." In Patterson on Railway Accident Law, § 283, it is declared that a railway company "is bound to its servants to exercise . . . that degree of care which will tend to secure its servants' safety, to as great an extent as is compatible with the conduct of an essentially hazardous business by the use of human instrumentalities."

As to the seventeenth instruction, there was no evidence tending to show that "McCaffrey saw the backing train approaching him in time, and with opportunity to get out of the way, and failed to do so." The fact is, while trying to get out of the way he fell, and was then struck, dragged, and injured. In 2 Rice on Evidence, p. 796, it is said: "No instructions should be given which are not relevant to facts which there is evidence tending to prove."

By another instruction the appellant asked the court to charge the jury that, if McCaffrey knew the conductor and engineer were in the habit of leaving the train to get necessary food, "he was bound to report such facts to the company," or he could not recover. This contention is in the face of the fact that the company was bound to know, and did know, of this habit, and it is confessed by the learned counsel for the appellant in his ably-written brief.

Appellant complains of the rulings of the lower court on the pleadings, and contends that neither paragraph of the complaint states facts to constitute a cause of action. The complaint, it appears, was copied almost literally from the pleading set out in full in the case of *Ohio & M. R. Co.* v. *Collarn*, 73 Ind. 263, 38 Am. Rep. 134, which was held sufficient. Each paragraph of the

complaint in this action shows that McCaffrey was killed by the appellant company moving a train back on him, without signals or guards, or any one except a fireman in charge of it, and that he was free from fault. This is enough. *Howard County Comrs.* v. *Legg*, 110 Ind. 481; *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454, 27 L. ed. 605; *Atchison, T. & S. F. R. Co.* v. *Moore* (Kan.) 1 Pac. Rep. 644; Rev. Stat. 1881, § 284 (Rev. Stat. 1894, § 285); *Tennessee Coal & R. Co.* v. *Roddy*, 85 Tenn. 400; *Bolinger* v. *St. Paul & D. R. Co.* 36 Minn. 418; *Sherlock* v. *Alling*, 44 Ind. 189.

The deceased is admitted and was shown to have been a man of intelligence, strength, and integrity, of the age of forty-one years. He had been promoted, and, under the rules, was "in the line of promotion, dependent upon the faithful discharge of duty, and capacity for assuming increased responsibilities." The damages are not excessive for the loss of such a man. In our opinion the cause was fairly tried.

The judgment is affirmed.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

William TILLMAN, *Appt.*,
v.
John J. OTTER.

(....Ky.....)

1. **A person seeking to establish title to an office** against another in possession of it has the burden of proving his right thereto.
2. **The mayor cannot adjourn either of the two branches** of the general council alone under authority from the charter that if they cannot agree on an adjournment he "shall adjourn them to a day not beyond the regular time of meeting."
3. **The mayor of a city has no power to adjourn the general council** to a time beyond that at which it is directed by statute to elect a certain city official for the purpose of depriving it of power to make such election and permitting it to be done by the alternative electing body provided by the statute in case of the council's failure to elect.
4. **The majority of one branch of the general council of a city** cannot by refusing to consent to fix a time for the election of a city official which a statute requires the council to elect and by remaining away from the meeting, prevent the remaining members of the general council who constitute a majority of both branches from making a valid election.

(January 7, 1893.)

APPEAL by defendant from a judgment of the Louisville Law and Equity Court in favor of plaintiff in an action brought to recover possession of the office of sinking fund commissioner of the city of Louisville. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Humphrey & Davie,** for appellant:

As Otter is the plaintiff who brings the suit, unless he has shown that his is a valid election, his petition should have been dismissed.

Jefferson County Justices v. *Clark*, 1 T. B. Mon. 86; *Spencer County Ct. Justices* v. *Harcourt*, 4 B. Mon. 501; *Leeman* v. *Hinton*, 1 Duv. 42; *Toney* v. *Harris*, 85 Ky. 464; *People* v. *Weller*, 11 Cal. 68.

As the two boards "could not agree" upon an adjournment, the mayor at the request of the president of the board of aldermen, adjourned the board of aldermen to November 7, which was "within the lawful time for adjournment."

There being only six members of the board of aldermen in the chamber when the election was made of course there was no quorum, and could be no business.

Dill. Mun. Corp. § 292; *Morton* v. *Youngerman*, 89 Ky. 505.

Whether, therefore, the mayor's action in adjourning the board of aldermen over to November 7 was legal or illegal is immaterial.

If the council consists of two boards, the concurrence of both is essential to valid legislation, and this concurrence must be by simultaneously existing bodies.

Dill. Mun. Corp. § 288; *Beck* v. *Hanscom*, 29 N. H. 224; *Kimball* v. *Marshall*, 44 N.H. 465.

There having been no election in the month of October, the board of commissioners of the sinking fund themselves met on the 9th of November and elected the defendant Tillman as such commissioner.

Messrs. **Helm & Bruce** and **T. L. Burnett** also for appellant.

Messrs. **Ernest MacPherson** and **B. F. Buckner,** for appellee:

In lieu of the writs of *scire facias* and quo warranto, or of an information in the nature of a quo warranto, ordinary actions may be brought to prevent the usurpation of an office or franchise; and the action may be brought by either the

NOTE.—The somewhat kindred subject of the power of the governor to adjourn the legislature is presented in *Re* Legislative Adjournment (R. I.) 22 L. R. A. 716, and *note*. The briefs and opinions in the present case are believed to present quite fully the authorities on the question involved in this case. Counsel for appellee writes that in the senate of the United States several cases have been decided according to the principles adopted in this case, two of which are cited in the brief, and that the last one not mentioned there was the case of Senator Call of Florida, whose election, sustained by the senate, was made without the participation of one branch of the legislature. The counsel says that the present case is the only judicial decision on the proposition that an executive officer who attempts to adjourn two branches of a legislative body must adjourn both and not one, and also that the illegal adjournment of a legislative body leaves it still in session.

See also 38 L. R. A. 829.

commonwealth or "the person entitled" to the office.

Civil Code, §§ 480, 483, 487; *Prince* v. *Skillin*, 71 Me. 361, 36 Am. Rep. 325.

The title to an elective office is derived from the election.

Atty-Gen. v. *Barstow*, 4 Wis. 567; *People* v. *Pease*, 30 Barb. 591.

The answer denies an "election" but does not deny the facts alleged in the petition as constituting an election and the demurrer to the answer was properly sustained.

Boone, Code Pl. § 61.

The answer of appellant was further defective in not showing his own title to the office.

Richmond & L. Turnp. Road Co. v. *Rogers*, 7 Bush, 535; *Hill* v. *Barrett*, 14 B. Mon. 83; *State* v. *McDaniel*, 22 Ohio St. 354; *Note* to *State* v. *Kupferle*, 100 Am. Dec. 270; *People* v. *Thacher*, 55 N. Y. 529, 14 Am. Rep. 312; *People* v. *Hall*, 80 N. Y. 117; High, Extr. Legal Rem. § 712; *Hoglan* v. *Carpenter*, 4 Bush, 91.

As the board of councilmen adjourned on October 24, 1889, without naming any time, and the board of aldermen did not adjourn at all, both boards were, by law, in session on the following day, October 25, 1889, when appellee's first election was held. The action of the mayor was a nullity. Neither board requested his interference, and he did not attempt to adjourn both boards. The conditions authorizing his interposition never arose.

People v. *Hatch*, 33 Ill. 18, argument of Melville W. Fuller.

The rule with respect to legislation that a quorum of both branches of a legislative body must be present in order to enact a valid law can have no just application in the conduct of elections. An election is not a legislative act.

Dill. Mun. Corp. § 284; *Whiteside* v. *People*, 26 Wend. 634; *Kimball* v. *Marshall*, 44 N. H. 465; *Ex parte Humphrey*, 10 Wend. 612; *Beck* v. *Hanscom*, 29 N. H. 213; *Sudbury First Parish* v. *Stearns*, 21 Pick. 148; *Coles County* v. *Allison*, 23 Ill. 437; Senate Election Cases, 164, 505.

An election is not to be set aside for a mere irregularity or informality, which cannot be said in any manner to have affected the result of the election.

Dill. Mun. Corp. § 197, *note*.

Pryor, J., delivered the opinion of the court:

The controversy in this case is over the office of a commissioner of the sinking fund of the city of Louisville. The plaintiff, John J. Otter, who is the appellee in this court claims to have derived title to the office by an election held by the general council of the city on the 25th of October, 1889, and the defendant, William Tillman, claims his title under an election by the commissioners of the sinking fund on the 12th of November following. The provision of the act in relation to the sinking fund, authorizing the election, reads as follows: "The general council shall, in the month of October in each year, elect a commissioner of the sinking fund to fill the place of the commissioner whose term of service expires that year. In the event the council fail to elect in that month, then the election shall be made by the commissioners themselves. If a commissioner shall die, resign, or from any other cause there shall be a vacancy in the office of the commissioners of the sinking fund, the same shall be filled by the board of commissioners of the sinking fund at a regular meeting of said board." The mayor and the president of the board of aldermen are *ex officio* members, and three others, to be elected by the general council, one in each year, constitute the board, being five in all. On November 12, 1889, W. R. Ray, president of the board, Charles D. Jacob, mayor, and George M. Griffith, president of the board of aldermen, elected the defendant, Tillman, as his own successor, and ignored the action of the general council electing Otter to that office on the preceding 25th of October.

A question has been raised as to the burden of proof, and, without discussing the sufficiency of the answer, it is sufficient to say that as the plaintiff, Otter, was asserting his title to the office, it was incumbent on him to make out his case, as it is well settled that such a proceeding is like the enforcement of any other private right, when prosecuted by or in the name of the party claiming to have been injured; but when in the name of the commonwealth, alleging the usurpation of an office by one of its citizens, the burden is on the defendant to show by what authority he holds it. *State* v. *Harris*, 3 Ark. 570, 36 Am. Dec. 460; *People* v. *Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Miller* v. *English*, 21 N. J. L. 317. In this case Tillman had been in possession of the office and was again chosen by a board empowered upon a certain contingency to make the selection, and the burden was clearly on the plaintiff, Otter, to establish title in himself, although Tillman may have had no right to the office, and it also follows that, if the power of choosing a commissioner by this board was in violation of the constitution,—a question not necessary to be decided,—still the plaintiff must make out his case, as he has no right to appear for the state, and by an action in his own name show that some one is holding an office to which he is not entitled, when he (the plaintiff) has no claim to it himself.

Was the plaintiff, Otter, elected by the general council on the 25th of October, 1889? is the sole question in this case; and, if he was, then the judgment below should be affirmed. The board of councilmen held a meeting at their chamber in the city hall on the 24th of October, 1889, and a resolution was passed, all the members being present but one, for a joint session at 9 o'clock that evening, for the purpose of electing a sinking fund commissioner. The board of aldermen, holding a session in the same hall, but in a different room, refused to go in to the election, and rejected the resolution. A committee of conference was then appointed by the board of councilmen, with a resolution to the effect that an adjournment be had until the 28th of October (the same month), when a joint meeting would be held, and this was rejected by the board of aldermen. On that same evening the mayor, at the request of the president of the board of alder-

men, each one being a commissioner of the sinking fund, adjourned the board of aldermen until the 7th of November, 1889; and, if the power to adjourn this board so as to prevent this election was vested in the mayor, then no election could be held by the people or their representatives (the members of the general council) for commissioner, because the statute expressly provides that the council shall elect in the month of October, and, if they fail to elect in that month, then the commissioners of the sinking fund shall select the member. The power of the mayor to adjourn this board is claimed to exist by reason of a section of the city charter providing that, "when both boards are in session, one shall not adjourn without the concurrence of the other for a longer term than twenty-four hours. If they cannot agree on an adjournment, the mayor shall adjourn them to a day not beyond the regular time of meeting." The mayor made no attempt to adjourn the board of councilmen, and from the plain reading of the charter had no power to adjourn either body unless there had been a failure to agree on an adjournment, and then it was his duty to adjourn both bodies to a day not beyond the regular time of meeting. The adjournment made by him at the suggestion of the president of the board of aldermen was a mere nullity, and left both boards in session, with the right to meet the next day. Nor will a proper construction of the city charter, or the provisions of the law creating and regulating the sinking fund, vest the mayor with such a power as to deprive the legislative councils of the city from complying with the plain provisions of the statute authorizing that election to be held in the month of October. Those opposing the election were each and all violating a plain duty, as they must have known that an adjournment until November, if the mayor had the power to make it, was taking from the representatives of the people of the city the right to select those who were to be the custodians of large sums of money, and confide it to those who were authorized to make the selection only on the contingency of the members of the city legislature failing to do that which the law required them to do, and in regard to which there could be no mistake. The board of councilmen met the next day (the 25th of October), and six of the aldermen with them, and, eighteen councilmen and six aldermen voting for the plaintiff, he was elected commissioner, there being more than two thirds of the general council voting for him. This court is now asked to declare that election invalid because a majority of the members of the board of aldermen, with its president in the lead, had refused to discharge their duty, and purposely, as their own exhibits filed show, adjourned, or attempted to adjourn, to a period with a view of preventing an election by the general council, and in utter disregard of both public and private interests. They were, however, still in session, with six of the members ready to act with the other board. They did act, and, if the absconding members had remained they could not have prevented the election of the plaintiff, as more than two thirds of the members of the joint session and of the entire general council voted for him. It is insisted that this body—the general council acting as the mere agents of the state in the election of men to control as members of the sinking fund vast sums of money—should be regarded in the light of legislative branches of the government, with the right of a minority to resort to parliamentary rules in order to violate a statute, and prevent an election of those who are to control a corporation entirely distinct from the municipal government which gives to the general council its existence. It is conceded that the councilmen and board of aldermen are distinct the one from the other, and that in their legislation for the city the rules governing legislative bodies must ordinarily prevail; but here the general council was made the mere agent of the state to select some one to act for and control the corporation known as the "Sinking Fund." This general council was required to hold an election once in each year, in the month of October, for that purpose, and, if they had assembled in that month, and elected, by a fair majority vote, a member of the board without any resolution to that effect, this court would have held the election good as against a mere usurper; and in this light the defendant must be regarded, under the facts admitted in this case. It is not denied that on the 25th of October, 1889, the plaintiff received eighteen votes from one body, and six from the other, making twenty-four votes in all; and to hold that the plaintiff was not elected, under the circumstances, because of the violation of official duty by the majority of the board of aldermen, would be recognizing a rule that no court should be willing to adopt.

The judgment below is affirmed.

INDIANA SUPREME COURT.

James W. FRENCH, *Appt.*,
v.
STATE of Indiana, *ex rel.* Charles HARLEY.

(.....Ind.....)

1. **The general assembly may appoint to all offices existing and not otherwise provided for at the time of the adoption of the Constitution** by virtue of article 15, § 1, authorizing their choice "in such manner as now is or hereafter may be prescribed by law," and other clauses of the constitution referring to offices "the appointment to which is vested in the general assembly."

2. **A practical construction of a state constitution** for nearly forty years will be conclusive of its meaning when that would otherwise be doubtful.

3. **Associating with the governor, the auditor, treasurer, secretary of state and attorney-general as** a board for the purpose of electing prison directors is not an unconstitutional commingling of executive with administrative officers in violation of the provision separating the powers of government into three departments, the legislative, executive, and judicial, but including the administrative in the executive department.

(June 13, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for La Porte County in favor of relator in a proceeding seeking to oust defendant from the office of prison warden. *Affirmed.*

The facts are stated in the opinion.

Messrs. **G. V. Menzies** and **John R. Wilson**, for appellant:

So much of the act as undertakes to create a board with appointing power and other important executive functions, and at the same time empowers the legislature to fill this board, is unconstitutional.

The court will reject that which is unconstitutional, and enforce the remainder.

State v. *Blend*, 121 Ind. 521.

While the general assembly under section 1, article 15, of the Constitution may prescribe or ordain an office, yet it has not the power to make the appointment to the office ordained by it. The function of ordaining or declaring the law and of ordaining by law the mode of filling an office is essentially a different thing from directly appointing to the office.

Evansville v. *State*, 4 L. R. A. 93, 118 Ind. 446; *State* v. *Denny*, 4 L. R. A. 79, 118 Ind. 391; *State* v. *Denny*, 4 L. R. A. 65, 118 Ind. 449; *State* v. *Hyde*, 121 Ind. 27; *State* v. *Peelle*, 121 Ind. 495; *State* v. *Gorby*, 123 Ind. 17; *State* v. *Kennon*, 7 Ohio St. 546.

The legislature seems to have been laboring under the delusion that by creating two boards and filling the first by legislative appointment, and vesting this first board with the power to appoint the second board, that they had evaded a well-established rule. In other words, the legislature could not appoint the board of prison directors, but it could appoint the board to appoint a board of prison directors.

The powers and duties given and imposed make the board a public official one, and its members public officers by virtue of their membership.

Smith v. *Moore*, 90 Ind. 294; Mechem, Pub. Off. §§ 1, 4, 8, 11; High, Extr. Legal Rem. § 625; *United States* v. *Maurice*, 2 Brock. 96; *State* v. *Stanley*, 66 N. C. 59, 8 Am. Rep. 488; *State* v. *Kennon*, *supra*; *United States* v. *Lockwood*, 1 Pinney, 359; *Shelby* v. *Alcorn*, 36 Miss. 278, 72 Am. Dec. 169; *State* v. *Denny*, 4 L. R. A. 79, 118 Ind. 392; *State* v. *Denny*, 4 L. R. A. 65, 118 Ind. 449; *Evansville* v. *State*, 4 L. R. A. 93, 118 Ind. 426; Throop, Pub. Off. §§ 3, 8, 10.

It cannot be maintained that the legislature has not appointed the members of this new board, but has simply added a new duty to certain state officers.

The legislature cannot vest the duties of any one of these officers in a board composed of all, nor can they act in their official capacity as members of such board.

Gray v. *State*, 72 Ind. 576.

In Indiana the same person may hold more than one office. But such a holding does not fuse these offices into one,—does not consolidate them.

In these cases where there is a slight indication, by the terms of the law or in the character of the duties imposed, of a duality of office, the courts hold that there are two offices and the incumbent acts in two diverse official capacities.

People v. *Edwards*, 9 Cal. 286; *State* v. *Johnson*, 55 Mo. 80; *Lathrop* v. *Brittain*, 30 Cal. 680; *People* v. *Love*, 25 Cal. 520; *United States* v. *Ferreira*, 54 U. S. 13 How. 40, 14 L. ed. 42; *State* v. *Kennon*, 7 Ohio St. 546.

A written constitution must be interpreted and effect given to it as a paramount law of the land, clearly obligatory upon the legislature, as upon the other departments of government and upon individual citizens, according to its spirit and the intent of its framers, as indicated by its terms.

People v. *Albertson*, 55 N. Y. 50.

No one can be associated with the governor in the performance of executive duties.

Gray v. *State*, 72 Ind. 578; *Smith* v. *Myers* 109 Ind. 8, 58 Am. Rep. 375.

The functions allotted this board, and involved in naming the board, are essentially executive.

State v. *Hyde*, 121 Ind. 30; *State* v. *Denny*, 4 L. R. A. 79, 118 Ind. 392; *State* v. *Noble*, 4 L. R. A. 101, 118 Ind. 350; *State* v. *Denny*, 4 L. R. A. 65, 118 Ind. 449; *Evansville* v. *State*

NOTE.—The above case, while not overruling the former Indiana cases cited therein to the effect that appointment to office is an executive function, does at least somewhat limit the scope of those cases, and reduce the extent of the conflict between them and the decisions in some other states, among which are People v. Henderson (Wyo.) 28 L. R. A. 751, and cases cited therewith.

See also 38 L. R. A. 373; 39 L. R. A. 794; 44 L. R. A. 485.

4 L. R. A. 93, 118 Ind. 426; Pom. Const. Law, § 852; 1 Kent, Com. 310; Conklin, Executive Powers, 57, 59, 105; 2 Burgess, Political Science & Const. Law, 257; *Flournoy* v. *Jeffersonville*, 17 Ind. 174, 79 Am. Dec. 468.

The appointing power is not inherently a legislative power. If it is given to the legislature, it is exceptional, and where the language of that grant is in mandatory and imperative terms, as in article 15, section 1, then it must be exercised by the legislature. A judicial power cannot be delegated by the judiciary; a legislative power cannot be delegated by the legislature, and whenever the constitution uses language vesting a power in a department, in the absence of an express provision to the contrary, the language must be construed as mandatory.

Cooley, Const. Lim. 6th ed. 137 *et seq.*; *State* v. *Noble*, *supra*.

If it is conceded that the legislature had the right to create the office of prison director and did so create it, but failed to use legal and proper means to fill the office, then there was a vacancy, in which case it was the duty of the governor, immediately upon the taking effect of the law, in the performance of his constitutional duty of seeing that the laws are faithfully executed, to fill the vacancy.

State v. *Gorby*, 122 Ind. 28.

Mr. **W. A. Ketcham** for appellee.

Hackney, *J.*, delivered the opinion of the court:

On the 12th day of March, 1895, the governor appointed and commissioned Henry A Barnhart, Monfort D. Yontz, and Henry A. Root members of the board of prison directors for the prison North, of the state of Indiana. After taking an oath of office and executing bonds, the gentlemen named organized as such board, and on the 19th day of March, 1895, selected and appointed appellant to the position of warden of said prison. The appellant qualified, gave bond, and continued in the possession and discharge of the duties of said position, he having served in said position the two years immediately preceding said appointment. By the second section of the Act of the General Assembly of March 7, 1895, the governor, auditor, treasurer, secretary of state, and attorney-general were constituted a board for the selection of prison directors. That board, on the 12th day of March, 1895, appointed Enos H. Nebeker, Robert S. Foster, and Henry Van Voorst as members of the board of prison directors for said Northern prison; and, after qualifying and giving bonds and taking an oath of office, they organized as the board of prison directors, and on the 19th day of March, 1895, appointed the relator, Charles Harley, as warden for said prison. The relator, having qualified and given bond, demanded from the appellant the position, books, and records of such warden; and, the appellant having refused said demand, the relator brought this suit to oust the appellant from and to establish himself in said position. The sufficiency of appellee's petition and the sufficiency of appellant's answer, to which the lower court sustained the appellee's demurrer, raise the question for decision in this court.

The constitutional validity of said section 2, p. 160, Acts 1895, is challenged by the appellant. The section is as follows:

"Sec. 2. The said board of prison directors shall be elected by the governor, auditor, treasurer, secretary of state and attorney-general, who are hereby constituted a board for the purpose. The said state officers shall meet on the 12th day of March, 1895, at 10 o'clock A. M. on said day, in the office of the auditor of state, and proceed to select and appoint the members of the said board of prison directors for each of said prisons, and every four years thereafter on said day for the said purpose; and in the case of a vacancy happening at any time on either of said boards of prison directors intermediate between the said quadriennial elections it shall be the duty of the auditor of state to convene said state officers in his office, by written notice served upon each of said officers fixing a time for such meeting, at which meeting the said state officers shall fill any vacancy, in accordance with the provisions of this act. A majority of the state officers, when in session for said purpose, shall constitute a quorum, and a majority of the quorum shall have power to make any appointment upon the said boards of prison directors."

The principal contention of appellant's learned counsel is that, under the constitution (sec. 1, art. 5), "the executive powers of the state" are "vested in" the "governor;" that appointment to office is an executive function; and that the constitution does not, expressly or by implication, deny the exercise of this function to the governor. If this power was so lodged, in violation of the constitutional authority in the governor, it is insisted, and follows of necessity, that the appointment of the directors, and in turn their appointment of the relator, were invalid. The constitutional provisions upon which the issue rests, in addition to that vesting the executive power of the state in the governor, are as follows: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of the departments shall exercise any of the functions of another, except as in this constitution expressly provided." Article 3, § 1. "All officers whose appointments are not otherwise provided for in this constitution shall be chosen in such manner as now is, or hereafter may be, prescribed by law." Article 15, § 1.

In ascertaining the intention expressed in these sections, it will be necessary to examine other sections which will be set forth hereafter. Our first inquiry is directed to the question, Was it intended by the constitution to confer upon the governor all appointing power? This inquiry need not be extended to the appointment of local administrative officers, nor to judicial officers, nor to the mere agencies by which various departments—legislative, executive, and judicial—perform their separate duties and functions, since that would carry our investigations over unnecessary and undisputed

grounds. One method of answering the general inquiry is to ascertain if, by the constitution, it was intended to give the power of appointment in any instance to the legislative branch of the government. By section 18, article 5, it is provided that "when, during the recess of the general assembly, a vacancy shall happen in any office, *the appointment to which is vested in the general assembly*," etc.; clearly implying that there was some office or class of offices the appointment to which was vested in or intended should be made by the general assembly. By section 30, article 4, it is provided that "no senator or representative shall, during the term for which he may have been elected, be eligible to any office, *the election of which is vested in the general assembly*." If the word "*election*" is employed synonymously with "*appointment*," this provision implies with equal force the existence of power in the general assembly to make appointments to office. If we conclude that the italicized words in these sections were put into the constitution without purpose and without meaning, we but engage in making over that sacred instrument, and we condemn its framers for creating a mere medley of words. This we could not do if we would, for it is the function of the judiciary to interpret, to expose the meaning within the words of the constitution, and not to put meaning into the words of the constitution, nor to eliminate sentences, phrases, or words, nor to add to the terms written. We find in the constitution no other provision to which the two provisions last quoted could have been directed, excepting that found in section 1, article 15, *supra*. Without having been directed to some other provision supplying the offices to be filled by the general assembly, there is but one of two possible contingencies to be accepted,—the constitution is framed in meaningless and confused language, or the words of section 18, article 5, "the appointment to which is vested in the general assembly," and probably the same words from section 30, article 4, had reference to the "officers whose appointments are not otherwise provided for in the constitution," in section 1, article 15. It is insisted, however, that section 1, article 15, does not give the power to the general assembly to appoint, and that the language of the section "in such manner as now is, or hereafter may be, prescribed by law," simply confers the power upon the legislature to provide the manner of appointment, and not to make the appointment. The consistency of the appellant's position requires the conclusion that all power to appoint to office is in the governor; that the legislature possesses only the power to provide the manner of appointment; and that such manner is limited to a provision that the governor shall make it. It would seem to have been a remarkable conception of a constitutional convention to have written it down that the legislature shall prescribe by whom appointments shall be made, but it shall be prescribed that the governor shall make them. This conception, if written in the constitution, would be no more absurd than to have written it in part, and left it in part to what the appellant insists is a necessary implication. This remarkable theory does not relieve us of the embarrassment of finding repeatedly the expressions of the convention, in the constitution, that there are "offices the appointment to which is vested in the general assembly." Such a theory would strike these words from the constitution, or would render them barren and meaningless. We need not ascertain and define the limits and extent of the appointing power of the governor, nor is it necessary that we should take issue with the cases holding that the appointing power is naturally and properly an executive function. If the constitution has conferred upon the legislative department of the government functions which naturally and more properly belong to another, it is not for us to say that the people could not have done so, nor that the unwisdom of doing so will permit us to assign to the proper departments their proper functions, and thereby do correctly for the people that which the framers of the constitution did erroneously.

It is insisted that the former decisions of this court deny the power, under the constitution, of the general assembly to appoint to office and declare the power to appoint as existing in the governor. *Evansville* v. *State*, 118 Ind. 426, 4 L. R. A. 93; *State* v. *Hyde*, 121 Ind. 20; *State* v. *Denny*, 118 Ind. 382, 4 L. R. A. 79; *State* v. *Denny*, 118 Ind. 449, 4 L. R. A. 65; *State* v. *Peelle*, 121 Ind. 495; *State* v. *Gorby*, 122 Ind. 17. It is true that with sharp conflict of opinion these cases hold to the proposition that the power to appoint is an executive function. With this conclusion, as we have said, we have no present duty to agree or to disagree, further than to maintain that, if this conclusion is true, it could not prevent the people from making such distribution of that power as to them seemed wise or desirable. If this position is at variance with the holding of those cases, be it so. But further, as to those cases, it was said in *State* v. *Gorby*, *supra*, that the *Hyde Case* and *Peelle Case* were decided upon the question of the power to appoint officers made by the constitution elective by the people. This theory of those two cases was, as we think, correctly announced by the members of the court joining in the majority opinions in those cases. The conflict was not properly one between the executive and the legislative departments over the right to make the appointments, as it is here contended to be. In the three cases in 118 Ind. the primary question was one of local self-government, and incidentally the question of the power of the general assembly, under section 1, article 15, to appoint certain boards of city control. In considering the latter question the reasoning of the judges leads them to a construction of section 1, article 15, of the Constitution, of which we will take notice hereafter. The case of *State* v. *Gorby*, *supra*, involved the right of the legislature to appoint to an office held to be elective by the people. If the office there in question was an elective office, and had not been filled by election, as contemplated, the power of the governor to appoint, not originally, as under section

1, article 15, but to fill a vacancy, as under section 18, article 5, of the Constitution, was the real issue. The same may be said as to the other cases involving elective offices. Without suggesting as to whether the construction placed upon section 1, article 15, by those cases, was *obiter dictum*, we pass to the consideration of the effect of the construction of that section, there made, upon the present case. The first of the cases, and that most clearly stating the views of the majority of the court (*State* v. *Denny*, *supra*), after quoting section 1, article 15, proceeds: "This provision is evidently to be construed in the light of the laws in force at the time of its adoption. We think it would be impossible to ascertain its meaning in any other way. Other sections of the constitution make provision for appointments by the governor and for certain appointments by the general assembly, but there was still a large number of offices created by law for whose appointment no provision had been made. In view of this fact, section 1, article 15, was inserted, providing that such officers should be appointed in such manner as then was or should thereafter be prescribed by law. It is disclosed by an examination of the laws then in force that the manner of appointing or electing state librarian, state printer, warden of the state prison at Jeffersonville, commissioners of the insane asylum, and, perhaps, some other officers for whose appointment no provision is made in the constitution, were elected or appointed by joint ballot of the two houses of the general assembly. This, at the time of the adoption of the constitution, was the manner prescribed by law for their appointment. This section provides that they shall continue to be so appointed unless a different mode is prescribed by law." The deduction from this argument is that, as to all of those offices existing and not provided for at the time of the adoption of the constitution, the general assembly may appoint. At a very early period, and extending through Rev. Stat. 1831 (page 512) and Rev. Stat. 1838 (page 572), the official management of the state's prison was by and through a superintendent, whose duties were assumed, not by appointment as to a political trust, but by contract in the nature of a lease, under which he supplied the needs, prescribed and enforced the discipline, received the labor of the prisoners, and made and preserved for the state records of the transactions of the prison. In 1843 (Rev. Stat. 1843, p. 100), under the Constitution of 1816 (sec. 8, art. 4), providing that all offices which might be created by the general assembly should "be filled in such manner as may be directed by law," the general assembly named the offices to be filled by the vote of the two houses of the general assembly, and among them was that of prison superintendent, whose term of office was prescribed at five years. It may be observed that practically the same language as that employed in article 15, section 1, of the present Constitution was, under the former constitution, construed by the general assembly, without question from the people, to mean that the general assembly might appoint, and not that it should be prescribed by the general assembly that the governor should appoint. Later, and in 1846 (Local Laws, p. 35), the office of warden was created, and it was expressly provided that his appointment should be by the general assembly. Here we have a like construction of the appointing power as conferred by the Constitution of 1816. We find in these enactments the rule for the official control of state's prisons existing at the adoption of the present constitution, and, upon the reasoning of the case from which we last quoted, the rule adopted by the constitution; namely, through appointments by the general assembly. But it may be said that the Northern prison was not in operation before the adoption of the present constitution, and that its official control could not have been then provided by law. This is true, but the rule of control and the source of power to control were in existence, and, upon the reasoning of that case, belonged to the general assembly. It would not be a reasonable presumption that the framers of the constitution intended to separate the power of prison control so as to confer it upon the general assembly as to one prison and upon the governor as to another prison. The state's provision for the imprisonment of offenders was an institution of the state, and the two prisons are but branches of that institution, and are not different because located, for convenience, in remote parts of the state than if the last had been but an addition to the first. The control of the state's prison was a governmental function, which, by the rule of the case under consideration, was intrusted to the general assembly.

If we should err in the position that the rule for control of the prison North was in force when the constitution was adopted, and that instead it was by and through an independent office thereafter created, there is still another view of the question to be taken from the standpoint of the practical construction of the constitution. We do not sympathize with the eloquent and able appeal of the appellant's counsel against the doctrine of practical construction as the resort of cowards and a makeshift for avoiding the intention of the framers of the constitution. Upon the doctrine of practical construction and its legitimate scope, we will quote the following from the opinion in *Hovey* v. *Riley*, 119 Ind. 386, in which a majority of the court then sitting concurred: "Our own and other courts have, time and time again, adjudged that practical exposition is of controlling influence whenever there is need of interpretation. The language employed by the courts is strong, and the current of opinion is unbroken." In speaking of the effect of a practical exposition, it was said by an able court that 'it has always been regarded by the courts as equivalent to positive law.' *Bruce* v. *Schuyler*, 9 Ill. 221, 46 Am. Dec. 447. In adhering to long-continued exposition, another court said: 'We cannot shake a principle which, in practice, has so long and so extensively prevailed.' *Rogers* v. *Goodwin*, 2 Mass. 475. But it is unnecessary to quote the expressions of the courts, for harmony reigns throughout the whole scope of judi-

cial opinion upon the subject." The present case presents, as strongly as any in the state's history, a practical construction of our present constitution upon the question in review. Beginning with the session of 1855, when the first board of prison directors was created, and at the first session of the general assembly after the adoption of the constitution, when existing prison leases permitted, we find the general assembly assuming the appointing power as to officers of state's prison control. We find that in 1859 (the Constitution not yet ten years in force) the general assembly assumes and exercises the power of appointment of the state's prison directors for the Northern prison. We find that from session to session, from those periods to the session of 1893, this power was assumed and exercised by the general assembly without exception, doubt, or question of authority. The exercise by the general assembly, for nearly forty years, of this power, without question from the people, and covering periods of the bitterest political history in the annals of our state and nation, is not the only fact giving strength to the construction favoring the existence of that power. In the early periods of that assumed authority there were in the general assembly, as members thereof, David Kilgore, Walter March, Walter E. Beach, Thomas D. Walpole, Henry G. Todd, Amzi L. Wheeler, Ezekiel D. Logan, Rodolphus Schoonover, John L. Spann, Samuel J. Anthony, Jefferson Helm, John Mathes, Spencer Wiley, William F. Sherrod, George W. Moore, Hugh Miller, Isaac Kinley, Allen Hamilton, and possibly others who had also been members of the constitutional convention. Not only this fact, but the further fact that during the period of this long acquiescence in the construction of the constitution favoring the existence of the power of appointment in the general assembly sat, as governors of the state, men familiar with the constitution, its origin, and its intended reforms,—lawyers whose ability and fame are the just pride of our state, and including in the long list the names of Wright, Willard, Hammond, Lane, Morton, Baker, Hendricks, Porter, Gray, and Hovey. It is significant also that Gov. Hovey, in his numerous contests over the question of the proper lodgment of the appointing power, did not question the power of the legislature to appoint to the office of prison director, though such appointments were twice made during his service as governor. If we felt that the question as to the power of the legislature to make the appointment of prison officers, construing the constitution upon its letter and spirit, were doubtful, we should feel it our duty to submit to this practical exposition. But we do not regard it as doubtful, and are constrained to differ with the construction of section 1, article 15, as held, or as the reasons given in the cases relied upon by the appellant imply, so far as they may be deemed authority against the right of the legislature to choose officers for the control of the prison North.

The principal decision upon which those cases rest, in so far as they discuss section 1, article 15, is that in *State* v. *Kennon*, 7 Ohio St. 546. The provision of the constitution of Ohio considered in that case, and corresponding to that of this state, is as follows: "The election and appointment of all officers, and the filling of all vacancies, not otherwise provided by this constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law; *but no appointing power shall be exercised by the general assembly*, except as prescribed in this constitution and in the election of United States senators." It was there held that under this provision the general assembly had no power of appointment to a certain office created after the adoption of the constitution. This conclusion is not remarkable, when we recall the words of the constitution, above italicized, denying the right of the general assembly to appoint, and when we observe that the power to prescribe is given with that expressed limitation upon it. In this view of the case it renders very little support to the construction of our constitution urged by appellant. Under this provision, however, it has been recognized in at least two instances, by the same court, that the general assembly is empowered to designate the person, body, or functionary to make such appointments. *State* v. *Covington*, 29 Ohio St. 102; *State* v. *Smith*, 44 Ohio St. 348.

We have demonstrated very clearly, we believe, that the appointment to the office of prison director is not, by our constitution, intrusted to the governor alone. Conceding, then, for the sake of the inquiry, that the legislature's power was to prescribe the manner of appointment, and not to make the appointment, has it violated this privilege by naming the persons or functionaries to make the appointment? Having under consideration an appointive office, we do not consider to what extent the word "manner," as employed in section 1, article 15, may include a choice by the general assembly as to whether a given office may be filled by an election, and we confine our consideration of the word in its relation alone to appointive offices.

From the appellant's contention his definition of "manner" is necessarily a direction to the governor to appoint. We have suggested already the fallacy of this position. Nor do we believe that "manner" was intended to permit simply the direction of the particular mental operation in arriving at a choice, nor the qualifications of the person to be chosen, nor character of commission, nor the duration of the term, nor the duties of the person or position, nor the time nor the place of appointing. All of these, save the first, are purely legislative functions, and the first is necessarily with the person chosen, and its direction is not essential to the performance of the privilege, and is not susceptible of legislative, executive, or judicial direction. "Manner" according to the appellant's theory, means the person or functionary to make the appointment. This is so by the case of *State* v. *Denny*, *supra*, where it was said that the manner of appointment of librarian, etc., before the con-

stitution, was by the legislature, and that the same manner of appointment as to such offices is proper, since the constitution. Such is the effect, also, of the holding in *State* v. *Hyde*, 129 Ind. 296, 18 L. R. A. 79. In this we agree; not, of course, going to the extent of conceding that it means that, as to the office in question, the governor shall be that functionary. In the case of *State* v. *Hyde*, just cited, the controversy was as to the power of the governor to appoint to the office of state superintendent of oil inspection, as against the power of the state geologist to make such appointment, as given by the Act of 1891; and it involved a construction of section 1, article 15, *supra*. The judges, including *Judges* Coffey and Olds, who had concurred in the majority opinion in 118 Ind. and 121 Ind. and cases *supra*, *Judge* Elliott, who dissented in those cases, and *Judges* McBride and Miller, filling vacancies occasioned by the deaths of *Judges* Mitchell and Berkshire, after those cases were decided, all concurred in the following reasoning and conclusions by *Mr. Chief Justice* Coffey: "In this case, however, we are met squarely with the question as to whether the general assembly possesses the power to confer on the state geologist the legal right to appoint to the office involved in this suit. If it possesses such power, the judgment of the circuit court must be affirmed; otherwise it must be reversed. The solution of the question presented for decision depends upon the nature of the office and the construction to be placed upon the provision of our state constitution. The office is not an administrative state office, whose incumbent is charged with the administration of a separate department of the state government. The duties to be performed are such as pertain purely to the police. It is an office, therefore, which may be filled by appointment; and, as the appointment of the incumbent is not provided for in the constitution, the case falls clearly within the provisions of section 1, article 15. That section applies to such officers only as may be appointed, and for whose appointment no provision is made in the constitution. As the incumbent of the office in question may be appointed, and as no provision is made in the constitution for his appointment, the general assembly has the power to provide by law for the manner of his selection. It has the power to provide that such office shall be filled by popular election, or that it shall be filled by appointment. While the appointment to office is generally the exercise of an executive or administrative function, we do not think it must, of necessity, be made by the chief executive; for by the terms of section 1, article 8, of the Constitution, the executive department of the state includes the administrative. Of course, it was not the intention that any administrative state officer should perform any duty properly and necessarily belonging to the governor of the state; but it was, we think, the intention that such officers should have the power to perform such duties as should be required of them by law in the administration of the state government, where such requirement in no wise conflicted with the powers delegated to the governor alone. The appointment to office being generally the exercise of an executive or administrative function, the power must be conferred upon some executive or administrative officer; but the state geologist is an administrative state officer, elected by the people. . . . The office involved in this controversy does not belong to the class which must, of necessity, be filled by the governor, but it is an office created by statute, largely under the control of the legislature which created it, and falls within the constitutional provision which confers upon the general assembly the power to prescribe the mode or manner of selecting its incumbent."

To name the functionaries, therefore, was the privilege of the general assembly; and it only remains to inquire if, in doing so in this instance, the commingling of the executive with the administrative officers in the performance of the duty to appoint has violated any provision of the constitution. Counsel urge that the power conferred constitutes an independent office, a board of appointment, and is not an addition of duties to offices already imposed; that "no one can be associated with the governor in the performance of executive duties," quoting from *Gray* v. *State*, 72 Ind. 578. We do not question the correctness of that holding, but, as we have already shown, the duty in question, while possibly in the nature of an executive duty, cannot, under our constitution, be classed as executive duty, since, by that instrument, the duty was intrusted to the legislative department for performance by it, or, for the purposes of this question, in the manner which it might prescribe. The contention that the association with the governor of administrative state officers, in the duty charged by the law in review, infringes his prerogative, as the executive head of the state, rests upon the proposition that the power of appointment in this instance is an executive function. We should not incline to the view that, if an executive function, the duties and responsibilities attending the exercise of that function could be shared by administrative officers. But, as we have shown, that is not the case before us. Nor do we find it necessary to our conclusion that while, by constitutional permit, the appointment may be made directly by the general assembly, it must be done so; for, by the plain language of the constitution, the manner is a matter of choice by the general assembly. This choice is not embarrassed by limitations or conditions, and, to render it invalid, it must be so exercised as to confer it upon some one or number, incapable of its performance. There is no expressed inhibition of our constitution to the discharge of this duty by executive or administrative officers, or by both classes of officers. It is the constitutional theory of our form of government, as evidenced by the association of the executive and the administrative in one department of the government (section 1, article 8); by casting the duty upon the governor of seeing that the laws are enforced, by administrative officers, of course (section 15, article 5); and by the provision that "the governor shall transact

all necessary business with the officers of the government" (section 15, article 5)—that the relation of the executive and the administrative subdivisions are not to be so separated as to deny to the former all participancy in the affairs of the latter. Not only is there no expressed inhibition against the association of the governor with administrative state officers in the discharge of any duty not involving powers and privileges delegated by the constitution to either alone, or to some other department of the government; but, in our opinion, such association is proper, and within the spirit of the provisions of the constitution just referred to. Section 1, article 3, does not deny the idea of such association. It divides the powers of government into the legislative department, the executive department ("including the administrative"), and the judicial department; and it is enjoined that "no person charged with official duties under one of these departments shall exercise any of the functions of another." It will be observed that it is not forbidden that those assigned to one department shall exercise any of the functions of another within such department. While not agreeing that any matter intrusted by the constitution directly to either subdivision of the executive department may be exercised by the other, we think it entirely certain that the inhibition of the section of the constitution last referred to does not deny the exercise jointly by the members of both subdivisions of any function not so delegated to either alone, and consistent with the theory that the duty involves a function of government falling within that department. Under the old constitution, the legislature gave to the governor the duty of selecting a visitor to the state's prison. It is true that the visitor was not an officer, having a voice in the control of the prison, but he was given access to the prison, and an observation of its management, with a view to advising the executive of mismanagement, and enabling him to "see that the laws were faithfully enforced." The only official existing, at the adoption of the present constitution, having a voice in the control, and whose position was by political choice, was a warden, who was chosen by the legislature; and, at the same time, the institution was, necessarily, as it is now, one of the administrative agencies of the state, falling under the executive department of the government. Its management was not through purely executive agencies, nor were they legislative, and they were in no sense judicial. They were of the administrative agencies of the state, subject to executive authority only so far as executive duties required the laws to be enforced by the governor. Nothing exists in the present constitution to change this unity of interest in the institution, or to take it from the list of administrative agencies of the state.

This union of interest in like agencies, where the power of control is not directed by the constitution, has for many years and in many instances been the authority for associating the governor with administrative officers in the performance of governmental duties, and some of them are as follows: Commissioners of public printing: Governor, secretary, and auditor of state. Rev. Stat. 1894, § 7594. Appointment of monument commissioners (Acts 1887, p. 30): Governor, secretary, auditor, and treasurer. Regents of monument: Same officers. Acts 1895, p. 135. State board of education: Governor and various educational officers. Rev. Stat. 1894, § 5849 (Rev. Stat. 1881, § 4420). State board of health: Governor, secretary, and auditor constitute a board of appointment. Rev. Stat. 1894, § 6711. Trustees of Purdue University: Governor, agricultural and horticultural boards. Rev. Stat. 1894, § 6176. State board of tax commissioners: Governor, secretary, auditor, and two citizens. Rev. Stat. 1894, § 8535. Board of election commissioners: Governor and two electors. Rev. Stat. 1894, § 6213. State board of charities: Governor and six citizens. Rev. Stat. 1894, § 8198. Executive council for purchase of supplies and repairs of state house: Governor, secretary, and treasurer. Rev. Stat. 1894, §§ 7788, 7789. State bank examiner, appointed by auditor, with approval of governor. Rev. Stat. 1894, § 2988. Schoolbook commissioners: Governor and others, the members of state board of education. Rev. Stat. 1894, § 5852. University visiting board: Governor and other officials. Rev. Stat. 1894, § 6076 (Rev. Stat. 1881, § 4577). Canvass of election returns: Secretary, with governor. Rev. Stat. 1894, § 6282 (Rev. Stat. 1881, § 4727). Board to examine treasury: Governor, secretary, and auditor. Rev. Stat. 1894, § 7670 (Rev. Stat. 1881, § 5643). Board of audit for female reformatory: Governor, auditor, and secretary. Rev. Stat. 1894, § 8256 (Rev. Stat. 1881, § 6163). This rule of associating the executive with administrative officers in the performance of supervisory administrative duties has obtained as to the president of the United States, and in the states of Alabama, Arkansas, California, Colorado, Connecticut, Dakota, Florida, Illinois, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Mississippi, Nebraska, New Hampshire, New Jersey, Nevada, New York, North Carolina, Oregon, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, West Virginia, Washington, and Wisconsin. In the states named, the governor is a member of from one to twelve boards of the character of those of which the governor of this state is a member, as above shown. In the case of *Gray* v. *State*, *supra*, the question involved was upon a statute, enacted in 1872, making the governor, attorney-general, secretary of state, and treasurer of state jointly the agents of the state to scrutinize and pass upon the genuineness of certain bonds of the state, and to borrow money and pay off such bonds. It was held that the duty of these officers was not executive; and it was said: "The governor and other officers named in the act may well be regarded as constituting a board, organized by the legislature, for the performance of certain duties; and a mandate will lie against them to enforce the performance of the duties." The duties involved were ministerial

and quasi judicial, but related to the administrative branch of the government. The statute there involved and the conclusion of the court, quoted above, recognize the right to associate the governor with administrative officers in the performance of duties pertaining to the administrative branch of the government.

We are not required, however, to find express authority in the constitution for this association of the officers of two subdivisions of one department of the government in the discharge of duties falling within that department, and not intrusted, by the constitution, to either alone. Nor is it necessary that we should find that such association is authorized from authority of the constitution necessarily implied. It is not essential to the existence of such right that the spirit of the constitution clearly admits it. Our inquiry must be, Does it infringe any provision of the constitution? *Hedderich* v. *State*, 101 Ind. 564, 51 Am. Rep. 768; *Campbell* v. *Dwiggins*, 88 Ind. 473; *Lafayette, M. & B. R. Co.* v. *Geiger*, 34 Ind. 185; *Beauchamp* v. *State*, 6 Blackf. 299; *Wilkins* v. *State*, 113 Ind. 514. In the last of these cases it was said (113 Ind. 516): "It is established law that an act of the legislature cannot be annulled by the judiciary in any respect unless it clearly contravenes some provision of the constitution. Doubt must be resolved in favor of the validity of the statute. Since this doctrine was announced by *Chief Justice* Marshall, early in the history of our country, it has been inflexibly adhered to by all the courts." It was further said by this court in *Robinson* v. *Schenck*, 102 Ind. 307: "It devolves upon the party who assails a statute, on the ground that it violates the constitution, to show a clear violation, and to point out the provision violated. Failing in this, his attack is unavailing." In that case this court quoted with approval, from *Kneeland* v. *Milwaukee*, 15 Wis. 455, the following conclusion: "That upon a constitutional question as to which we have no doubt we cannot follow a former decision against our present conviction, for the reason that to do so would violate our oath to support the constitution." With our present conviction, that there is not even a doubt of the validity of the statute in question, we have but one duty and one privilege, and that is to uphold the law.

The judgment of the Circuit Court is affirmed.

ALABAMA SUPREME COURT.

SOUTHERN BUILDING & LOAN ASSO., *Appt.*, *v.* ANNISTON LOAN & TRUST CO. *et al.*

(101 Ala. 582.)

Forfeiture of stock in a building and loan association for failure to make required payments, if it is authorized by the contract of the parties, the rules and regulations and by-laws of the association, and the statute under which it is created, cannot be relieved against; and the mortgage given by such member may be foreclosed for the full amount of his original loan, with interest, without any abatement for the value of the stock or for payments made by him thereon.

(January 10, 1894.)

APPEAL by complainant from a decree of the Anniston City Court refusing to permit complainant to forfeit the shares of the mortgagor but requiring the amount which had been paid upon them to be credited upon the mortgage in a proceeding to foreclose it. *Reversed.*

NOTE.—*Right to apply payments made on stock in a building and loan association upon a mortgage given for a loan by the same member.*

There are few cases in which a forfeiture has been distinctly claimed, and they are not entirely harmonious. In other cases the great majority of the cases permit an application of payments towards dues upon the mortgage. Those which do not take that position because of the peculiar view taken of the workings of a loan association and not from any intention to deprive the borrower of the benefit of his payments. In the absence of any question as to contribution to losses, as to which see *note* to Wohlford v. Citizens' Bldg. Loan & Sav. Asso. (Ind.) *post*, p. —, if the stock matures the borrower has the full benefit of his payments.

For when the stock has matured, the debt of the borrower is paid, and he is entitled to a return of securities given therefor. Charles Tyrrell Loan & Bldg. Asso. v. Haley, 130 Pa. 476.

There are a few cases in which although the question has arisen it has not been necessary for the court to pass upon it.

Thus in Delaware Bldg. Asso. v. Keller, 2 W. N. C. 29, counsel offered to allow credits for the amount paid.

In People's Bldg. & Loan Asso. v. Billing (Mich.) 62 N. W. Rep. 378, the contract expressly provided for the deduction of the dues paid upon foreclosure, but the statute provided that no payment of the premium should be deducted, and the court held the provision valid.

Oak Cottage Bldg. Asso. No. 2 v. Eastman, 31 Md. 556, was a suit for redemption, and the rules of the association provided for the application of the dues paid upon the amount of the mortgage.

Associations not protected by law.

Some of the cases have been those in which the association was unincorporated or was operating in a state which had no statute providing for loan associations. In such cases the accounts have been settled under the general rules governing mortgagor and mortgagee.

If the transaction is not brought within the provisions of the acts governing loan associations, it must be governed by the rules governing other cases of mortgagor and mortgagee. Williar v. Baltimore Butcher's Loan & Annuity Asso. 45 Md. 547.

In case of an association not authorized by the legislature the courts will treat the transaction as a loan and charge the borrower with the actua.

See also 30 L. R. A. 693; 33 L. R. A. 112, 744; 34 L. R. A. 201; 44 L. R. A. 261.

The Southern Building & Loan Association, duly organized under general statutes in accordance with statutory authority adopted by-laws, providing, that the "object of this association is, to afford its shareholders safe and profitable investments;" that "all shareholders for every share named in their certificate shall be entitled to a loan of $50, if the loan fund in the treasury shall warrant it, and if there is no prior application;" that "shares must be in force six months, or six monthly installments must be paid thereon, before a shareholder will be entitled to a loan;" that "the certificate, terms and conditions of the shares of this association, and the by-laws form the contract with the shareholder; the application for a loan shall form a part of the contract with the borrower, and all contracts and securities executed by the borrower shall be construed with reference to and in accordance with the laws of Alabama;" that "persons desiring to become shareholders must make application according to the form provided for that purpose, said application forming a part and parcel of such applicant's contract with the association;" "that any person may become a shareholder by signing the required application, and paying the necessary admission fee as follows:—On ten shares, $1.00 per share; over ten and under twenty-five, 75c. per share; twenty shares, 50c. per share of $50 in cash;" that "should a shareholder whose property is mortgaged to the association desire to release the same by repayment of his indebtedness, he may, on application to the association, be allowed to do so upon giving sixty days' notice of such intention;" that if any shareholder shall neglect to pay the interest or premium on his loan, or his regular monthly installments, or other fees, for three months, or in any way fails to comply with his contract, the association may compel payment of principal and interest and premiums, fines and dues, by proceeding on his note, and foreclosing the mortgage or other security, which shall at once become due and payable, and the association may cancel and treat as forfeited, the said shareholder's shares, whether deposited as collateral security or not, and all payments made thereon shall be forfeited to the association. Time, punctuality, and strict performance on the part of all shareholders, in the payment of premiums, fines, installments, interests and loans is made the essence of the contract;" that "members in good standing may withdraw the amount paid by them in monthly installments of shares, into the loan fund, together with interest at the rate of six per cent per annum, after giving sixty days' notice in writing, and such notice to be given after two years."

Isaac Linsky, as owner of 40 shares, applied regularly for a loan of $2,000, stating, among other things, "I will also comply with all the rules and regulations of the association." He obtained the loan, and executed his note therefor, and a mortgage on real estate as security. The note specified that it was for a loan on 40 shares of stock with interest, and premium, and payable according to the by-laws, and he assigned his stock as collateral security for the loan, and for the payment of monthly installments required of him. Upon default the whole debt became, by the terms of the mortgage, due and payable, and the association was authorized to foreclose on the terms specified. Subsequently Linsky negotiated a loan with Anniston Loan & Trust Company, the complainant in the original bill, for $2,500, and, to secure the same, gave complainant a second mortgage on the real estate which he had already mortgaged to the said association. O. H. Parker, defendant in the original and complainant in the cross bill, is the assignee of Linsky for the benefit of creditors, and is invested by the deed of assignment to him, with all the rights which said Linsky had in the premises; he, as such assignee, and the Anniston Loan & Trust Company, the second mortgagee of said real estate, prior to the commencement of this suit, offered to pay to said association the amount due on its mortgage, provided it would allow a credit for

amount received and interest, and credit him with all payments made. Kupfert v. Guttenberg Bldg. Asso. 30 Pa. 465; Hughes' App. 30 Pa. 471.

In Pennsylvania an unincorporated association cannot recover on the mortgage more money than was actually advanced with legal interest. Link v. Germantown Bldg. Asso. 89 Pa. 15.

Payments not ipso facto a reduction of the mortgage.

The cases seem to agree that whatever application may ultimately be made of the payments they are not in the first instance and of necessity to be treated as a reduction of the debt.

Payments on shares are not *ipso facto* payments of so much of the mortgage debt. North America Bldg. Asso. v. Sutton, 35 Pa. 463, 78 Am. Dec. 349; Economy B dg. Asso. v. Hungerbuehler, 98 Pa. 258; Kehler v. Miller, 4 Legal Gaz. 127; Sunbury Mut. Sav. Fund & Bldg. Asso. v. Martin, 1 Luzerne Legal Reg. 147; Conrow v. Tradesmen's Sav. Fund & Loan Asso. 21 Phila. Leg. Int. 109.

If there has been no appropriation by the parties of payments on the stock to the mortgage debt, such payments cannot be lawfully set up as payments on the mortgage; they do not *ipso facto* constitute a *pro tanto* extinguishment of the mortgage. Link v. Germantown Bldg. Asso. 89 Pa. 15.

Right of third persons to require the application.

From the fact that the payments are not regarded as made *ipso facto* upon the mortgage debt the question frequently arises how far third persons can insist on the application being made.

Surety for borrower.

A surety for the sum borrowed has a right to compel the association to apply the value of the stock in reduction of its claim before making claim on him for payment. Massey v. Citizens Bldg. & Sav. Asso. of Paola, 22 Kan. 624.

If the terms of the mortgage provide that the value of the stock shall be deducted in case of a foreclosure from the total amount due in order to find the amount to be raised from the mortgaged property, sureties on the mortgage have a right to insist on such terms, although as between the borrower and the association it could not have been done. Forsyth v. Hibernia Bldg. Asso. 1 Mackey, 205.

Purchaser at sheriff's sale.

Where there has been no appropriation by an un-

the amount paid for stock, as a payment on account of said loan, which said association refused to do, claiming that said stock was forfeited to it by the failure of said Linsky to pay his monthly installments for a period of more than three months prior to the filing of said bill. On the 21st of September, 1892, the Anniston Loan & Trust Company filed this bill against said association, Isaac Linsky and O. H. Parker, as such assignee, the object of which is to redeem said lands from the mortgage of said association, by paying the amount ascertained to be remaining due thereon, and have said 40 shares of stock sold and the proceeds applied also towards the payment of said loan, and to have the premiums paid on said stock credited as a payment on said loan. Parker, as assignee, afterwards, on the 25th day of May, 1893, filed his cross-bill against the Anniston Loan & Trust Company, said association and Linsky, setting up the assignment of Linsky to him, his offer to redeem from said association by offering to pay to it the full amount of said loan, praying for an account, and that he be allowed to redeem from said mortgage by paying the amount due thereon, and also to be allowed to redeem from the mortgage to said Anniston Loan & Trust Company.

The chancellor rendered a decree establishing the right of the trust company, the junior mortgagee, to redeem from the mortgage of Linsky to said association, and the right of the complainant in the cross-bill to redeem from the mortgages of the association and the trust company, holding that the claim of said association, that its debt was not liable to the payments made by said Linsky on account of his subscriptions to the stock of said association, and that it might hold and retain the same without crediting them in the debt for which the stock was pledged was inequitable.

Messrs. **Lawrence Cooper, John M. McKleroy,** and **A. P. Agee,** for appellants:

The various insurance organizations of the country, mutual or otherwise, provide for a forfeiture, in default of payment. Regardless of the number of payments, whether one or fifty, a default being made, the member is no longer in good standing, and all rights are thereby forfeited. Having thus defaulted, an action would not lie for the recovery of the amount paid, or for the amount of the policy. *Alabama Gold L. Ins. Co.* v. *Thomas*, 74 Ala. 578.

Article 2, section 11, of by-laws, to which Linsky subscribed when he became a member, expressly stipulated that time and punctuality are the essence of the contract.

Bacon, Ben. Soc. § 354.

The failure to make punctual payment constitutes a breach for which an action would lie, while a forfeiture is the creature of chartered authority, under a specific contract, enforceable for the violation of a duty or of an obligation.

Endlich, Bldg. Asso. § 99; 8 Am. & Eng. Encyclop. Law, p. 450, § 31; *New York L. Ins. Co.* v. *Statham*, 93 U. S. 24, 23 L. ed. 789; *Holmes* v. *Smythe*, 100 Ill. 413; *Freeman* v. *Ottawa Bldg. Homestead & Sav. Asso.* 114 Ill. 182; *Smith* v. *Mariner*, 5 Wis. 551, 68 Am. Dec. 73; *Roehner* v. *Knickerbocker L. Ins. Co.* 63 N. Y. 160; *Klein* v. *New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662.

Forfeiture of stock is necessarily forfeiture of membership, and *vice versa*.

Endlich, Bldg. Asso. § 102.

The sound theory is that such stock payments do not operate a *pro tanto* extinguishment of mortgage debt.

Robertson v. *American Homestead Asso.* 10 Md. 397, 69 Am. Dec. 162.

Messrs. **Caldwell, Johnson & Acker,** and **Knox, Bowie & Pelham,** for appellees:

The advantage attempted to be secured by appellant by forfeiting and appropriating the shares of stock assigned to it as collateral security and all the payments thereon, is altogether unconscionable and inequitable.

Every mortgage is in form an absolute con-

incorporated building association or by the stockholder of payments on the stock, to his mortgage, they are not deemed *ipso facto* payments on account thereof, and a purchaser at sheriff's sale of the mortgaged premises is not entitled to have credit for the amount. Whilden v. Broomall, 1 Del. Co. Rep. 142; Diemer v. Egolf, 1 Chest. Co. Rep. 55; Greenfield's Estate, 1 Chest. Co. Rep. 356; Flynn v. Savings Fund, 37 Phila. Legal Int. 333; *Re* Treffeison, 3 Kulp, 306.

Creditors or assignees.

An assignee of mortgaged property will not be entitled to have the value of the stock applied to the payment of the mortgage debt. People's Sav. Bank & Bldg. Asso. v. Collins, 27 Conn. 142.

Dues applied to payments on stock are not credits on the mortgage on distribution of the proceeds of a sheriff's sale. Houlette's Estate, 2 Chest. Co. Rep. 511.

If the parties have not applied the payments to the debt, a stranger, such as a purchaser of the morgaged property, cannot claim such application for the purpose of reducing the lien on his land. Spring Garden Asso. v. Tradesmen's Loan Asso. 46 Pa. 493; Building Asso. v. Eshelbach, 7 Phila. 189; Springville Sav. Fund & Loan Asso. v. Raber, 11 Phila. 546; Kramer v. Springfield Sav. Fund & Loan Asso. 6 W. N. C. 267.

But in a lower court it had been held that one who purchases from the mortgagor the mortgaged premises may compel an application by the association of the value of the stock in satisfaction of the mortgage. Kelly v. Accommodation Sav. Fund & Loan Asso. 2 Phila. 237.

Second mortgagees.

In favor of second mortgagees the court has at times marshaled the securities and compelled the association to apply first to its claim the security upon which it alone had a lien.

In Red Bank Mut. Bldg. & Loan Asso. v. Patterson, 27 N. J. Eq. 223, the stock was applied to the mortgage in favor of a second mortgagee, and the same course was taken in Phillippsburg Mut. Loan & Bldg. Asso. v. Hawk, 27 N. J. Eq. 355, and Herbert v. Mechanics Bldg. & Loan Asso. of New Brunswick, 17 N. J. Eq. 497, 90 Am. Dec. 601.

So where the association having notice of a second mortgage on the land releases its lien on the stock as against the second mortgagee, the mortgage will be regarded as satisfied to the value of the

veyance with a condition that it may be terminated by a payment of the mortgage debt at maturity. But, notwithstanding this, in equity it was considered as intended only as security for the debt, and so the mortgagor's equity of redemption was recognized and enforced in equity as a just relief against the hardship resulting from an enforcement of the contract according to its terms.

4 Kent, Com. 158 *et seq.*

Forfeiture of membership on the part of the borrower does not mean a forfeiture of all the payments made by him on account of his subscription to the stock or the installments upon the loan secured from the company.

Endlich, Bldg. Asso. §§ 165, 453, 459, 460; *Robinson* v. *American Homestead Asso.* 10 Md. 397, 69 Am. Dec. 162; 2 Am. & Eng. Encyclop. Law, p. 639.

A claim on the part of the society, that the share is forfeited to it, and that no credit should be given for it, is inequitable and cannot be allowed.

Endlich, Bldg. Asso. § 459; *Massey* v. *Citizens Bldg. & Sav. Asso. of Paola*, 22 Kan. 624.

Fines may be levied to enforce punctuality on the part of the stockholder, but these to be valid, must be reasonable.

Endlich, Bldg. Asso. § 407; 2 Am. & Eng. Encyclop. Law, p. 620; *Robertson* v. *American Homestead Asso.* 10 Md. 397, 69 Am. Dec. 153.

It is unreasonable, and therefore we assume that the legislature did not intend that more than one fine should be imposed for the same delinquency.

Hagerman v. *Ohio Bldg. & Sav. Asso.* 25 Ohio. St. 186; Endlich, Bldg. Asso. § 410.

When the borrower makes default he is entitled, as a matter of right, to be credited with the value of his stock, or the aggregate amount of payments made by him on account of the stock or loan, as the case may be.

Mobile Bldg. & Loan Asso. v. *Robertson*, 65 Ala. 382; *Falls* v. *United States Sav. Loan & Bldg. Asso.* 24 L. R. A. 174, 97 Ala. 417; *Robertson* v. *American Homestead Asso. supra;* Endlich, Bldg. Asso. 453; 2 Am. & Eng. Encyclop. Law, p. 639.

Haralson, J., delivered the opinion of the court:

The main question in this case, as stated by the appellant, is the right and power of the Southern Building & Loan Association to declare forfeited the shares of a borrowing member. Or, as stated by counsel for appellant,—"The cause was submitted in the court below, upon an agreed state of facts, and the single point of dispute turns upon the question of the right of the Southern Building & Loan Association to forfeit the shares of stock held by it as collateral, and the refusal of said association to credit its mortgage with the value of the stock, or the aggregate amount of the payments made by Isaac Linsky on account of said stock or on account of said loan. There is no dispute as to what payments were made, but the Southern Building & Loan Association plants itself upon the proposition that it is entitled to recover the full amount of the original loan with interest, without any abatement for the value of the stock, or the aggregate amount of payments made by Isaac Linsky during the life of the loan. The learned court below held that this construction was inequitable and not within the contemplation of the parties at the time the contract was made, and that the junior mortgagee, and the assignee for the benefit of creditors, were entitled to redeem upon paying the amount of the mortgage loan, after deducting the value of the stock, or the aggregate amount of the payments made by said Isaac Linsky prior to making default." We thus have the issue plainly and sharply defined and the parties treat the value of the stock as merely the aggregate of all the payments which have been made upon it, thus following the rule which is laid down in the books for the ascertainment of its value. Endlich, Bldg. Asso. §§ 455, 457, and authorities there cited.

The question has given rise to some confusion in the decisions of courts. In North Carolina the transaction has been treated upon the basis of an actual loan of money, and the aggregate amount of payments upon

stock. Washington Bldg. & Loan Asso. v. Beaghen, 27 N. J. Eq. 99.

But the holder of a second mortgage on the land mortgaged to the association cannot compel the association to apply the value of the shares of stock upon the first mortgage against the objection of one to whom the borrower has pledged the shares as collateral security. Reilly v. Mayer, 12 N. J. Eq. 55.

In Harris's App., 18 W. N. C. 14, in which the borrowing member had made a second mortgage on his property, and then assigned his stock to a third person subject to the prior assignment to the association, to secure an indebtedness to him, it was held that the borrower himself might appropriate payments made on his stock in part satisfaction of the lien when foreclosure proceedings were brought, but that the second mortgagee had no such right so as to prevent the collection of the debt out of the mortgaged premises.

Associations on the terminating plan.

Where the original idea of loan associations is carried out the advanced member is not regarded as owing any debt to the association but as simply required to keep up his stipulated payments. In such cases the question of the application of the payment in reduction of the debt can scarcely be said to arise since there is no debt. At the same time each payment discharges so much of the obligation so that the advanced member has the full benefit of it.

Under the English idea of a building association a shareholder who received an advance upon his stock was deemed to receive all the benefit which he could from the association and to be in the same condition in which an unadvanced member would be who received the full value of his share at the termination of the accumulation period, and having received all the benefit, he was bound to pay his subscriptions to the termination of the society. He could not longer withdraw from it. Farmer v. Smith, 4 Hurlst. & N. 196, 28 L. J. Exch. 226, 5 Jur. N. S. 533, *note*.

When the association redeems shares, the amount advanced on them is no part of the debt which the shareholder owes the association. His only debt is the monthly dues and interest on money advanced, to be continued until the unredeemed shareholders have received the amount which the articles of the association provide for. Winchester Bldg. Asso.

stock, as partial payments on the loan by the borrower. *Overby* v. *Fayetteville Bldg. & Loan Asso.* 81 N. C. 56; *Hoskins* v. *Mechanics Bldg. & Loan Asso.* 84 N. C. 838. And the earlier Pennsylvania cases, previously to that of *North America Bldg. Asso.* v. *Sutton*, 35 Pa. 463, 78 Am. Dec. 349, maintain the same view of the question. Commenting upon these decisions, Mr. Endlich says, that the supreme court of Pennsylvania in *Sutton's Case*, *supra*, for the first time approached an understanding of the nature and dealings between the building association and its members; that under the rulings in the former cases in that court, upon the theory of partial payments, it followed that each stock payment made by the borrowing member was a *pro tanto* reduction of his mortgage debt, to be deducted with interest, from the date of payment; and he adds, "The fallacy of this doctrine is obvious, from the fact that the borrower's standing as a member is not merged in his superadded character of debtor, and that, as a member, he is not entitled to an account of profits made by the society upon his contributions, before the period of its termination (or that of the series to which his stock belongs), whilst the settlement of his liabilities as borrower is also referred to in the winding up of the mutual scheme. It has, therefore, become a well-recognized doctrine that payments of dues upon stock are not payments to the mortgage debt, and do not, *ipso facto*, work an extinguishment of so much of the mortgage. The fact that the borrower has assigned his shares to the society as collateral security for his debt makes no difference; for this is a recognition of the distinct standing of the member as a member and as a debtor." Endlich, Bldg. Asso. § 452. And it is a correct principle, as has been held, that there is no connection established between the stock held by the stockholder and the bond held by the company, such as that payments made on stock are to be treated as payments on the bond, so that one is steadily offset against the other, or the one merges in the other,—a fallacy sometimes indulged, arising from a failure to observe the separate existence of the stock on the one hand and the bond on the other,—the separate relation borne to the company on the one side, by its stockholder, and on the ether, by its borrower. The payment on the one, is not necessarily, a payment on the other. *State* v. *Hornbacker*, 42 N. J. L. 635; Endlich, Bldg. Asso. § 452. Mr. Freeman, in an extended *note* to *Robertson* v. *American Homestead Asso.*, 69 Am. Dec. 163, gives approval to the same principle, citing a long list of cases in support thereof; and the learned annotator adds, as a conclusion from the very many authorities he cites, as to the amount that the borrower ought justly to pay, when he wishes to withdraw or is in default, and his mortgage is sought to be enforced, that, "It must be remembered, that when a member obtains a loan or advance he anticipates the amount he is to receive upon the termination of the association, or of the series to which it belongs. His obligation does not look to a repayment before that time. If he desires to withdraw, or it becomes necessary to enforce his mortgage against him before that period arrives, the question is, What amount ought he equitably to pay? In ascertaining this amount the only difference between the two cases seems to be, that when he voluntarily withdraws he is entitled to receive the bonus or share of profits allowed him under the laws of the associations, and when he is in default, no such allowance is to be made him." The justness of this conclusion is vindicated on the ground that the defaulting member's action is an injury to the association arising out of a breach of his obligations, for if he continue from time to time, for purposes of his own convenience, to withhold his contributions to the common fund, when they become payable, it is clear he is thereby depriving the association of just that much money which ought to be invested for the common good; and if this be allowed till the end, it is also plain he will have derived, from his own violation of duty,

v. Gilbert, 23 Gratt. 787; Cason v. Seldner, 77 Va. 297; Fox v. Cottage Bldg. Fund Asso. 81 Va. 677.

Upon default by the borrower, equity will not state the account on the basis of the loan advanced, but will ascertain the amount of the dues, interest, and fines unpaid, and give a decree for that amount. Hagerman v. Ohio Bldg. & Sav. Asso. 25 Ohio St. 186; Risk v. Delphos Bldg. & Sav. Asso. 31 Ohio St. 516.

In a foreclosure proceeding, the amount to be made is to be found by ascertaining the probable duration of the association, and finding a principal which at interest for the proposed time would give the amount of dues and interest which would become payable during that time, and add to this the arrearages. Cincinnati German Asso. v. Flach, 1 Cin. Sup. Ct. Rep. 468.

A borrowing member of a building association has no right to receive interest on his stock payments or to have such payments applied in reduction of his indebtedness prior to the termination of the enterprise, unless such right is expressly reserved in his contract. Reeve v. Ladies Bldg. Asso. 18 L. R. A. 129, 56 Ark. 335.

If a member ceases to make his payments to a going concern, he will be liable for the amount of the dues which would accrue from the time he makes default until his stock has matured, with interest at the legal rate and all arrearages and fines. Border State Perpetual Bldg. Asso. of Baltimore v. McCarthy, 57 Md. 555.

In Building Asso. v. Leyden, 1 Week. L. Bull. 126, the court refused to uphold a provision in the mortgage providing for the deduction of dues paid upon foreclosure, holding that the borrower has all the rights of a stockholder, and that the settlement must be made on the basis of dues to be paid at the time default is made. And that ruling was followed in Building Asso. v. Egger, 5 Week. L. Bull. 752; Allemania Asso. v. Mueller, 8 Week. L. Bull. 97.

In considering the amount due the association for the purpose of taxation the court in State v. Hornbacker, 42 N. J. L. 635, says the unsoundness of the argument of the association consists in not observing the distinct and separate existence of the stock on the one hand and the bond on the other, the distinct and separate relation borne to the company on the one hand by its stockholders and on the other by its borrowers. A connection is sought to be established between the stock held by the stockholder and the bond held by

an unjust advantage, in sharing with the other members notwithstanding his defaults, an equal participation in the profits. In principle there can be no difference in the rule as to the prompt payment of premiums on a policy in a life insurance company, and the premiums and other dues on a building and loan contract, and this court, speaking of the former said, "It is too late at this day to raise any question as to the legal validity of such a contract. To one who understands anything of the principles upon which the business of life insurance is conducted, it is obvious that the punctual payment of premiums is of the very essence of the contract. The calculations of insurance actuaries fixing the rates of insurance, are based on the theory of prompt payment, so as to afford opportunity for such reinvestment as to reap the fruits of compound interest upon the company's moneyed capital. Laxity in the enforcement of punctual payments might, and no doubt would, frequently lead to ultimate, if not speedy, financial ruin. Stipulations, therefore, incorporated in insurance policies, making such payments conditions precedent to the continued liability of the insurer, are generally maintained as valid by the courts." *Alabama Gold L. Ins. Co.* v. *Thomas*, 74 Ala. 582. Forfeiture for the nonpayment of premiums is a necessary means, for insurance, or building and loan companies, of protecting themselves from embarrassment, and delinquency cannot be allowed except at the option of the companies. *New York L. Ins. Co.* v. *Statham*, 93 U. S. 24, 23 L. ed. 789; *Klein* v. *New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662. In keeping with this doctrine, Mr. Pomeroy lays it down, that a forfeiture of shares of stock in a corporation, duly incurred by the stockholders, for failure to pay the calls, or installments thereon, as provided by the charter or by-laws of the company, will not be set aside or relieved against by a court of equity. 1 Pom. Eq. Jur. §§ 457, 458; 2 Story, Eq. Jur. §§ 1325, 1326.

With these principles in view, let us inquire into the particulars of the case we have before us. This association was chartered under the provisions of the code. Part 2, title 1, chap. 4. Section 1556 confers upon building and loan associations chartered thereunder, the power, (4) "to make all needful rules and regulations and by-laws, for the transaction of its business, and the management and control of its affairs;" (6) "to compel payment and compliance with all lawful orders, by fines and forfeitures;" and (12) "to secure the payment of installments and loans, and a compliance with all the terms on which loans are purchased, by mortgages with power of sale on real estate, and the same to foreclose on default," etc. The association adopted a code of by-laws clearly within the statutory powers conferred, by which it was provided, among other things, that the certificate, terms, and conditions of the shares of the association, and the by-laws, form the contract with the shareholders; "that persons desiring to become shareholders must make application according to forms provided for that purpose, the application forming a part and parcel of the applicant's contract with the association (and in these applications there is an agreement, by the applicant, that he will comply with all the rules and regulations of the association); that all loans must be secured by note and first mortgage on real estate, the borrower to pay interest and a premium, at the rate of five per cent per annum, each, of 85 cents on each share (of $50) named in the certificate, on or before the 5th of each month, without notice, 5 cents of which shall be placed to the expense account; that members in good standing may withdraw the amount paid by them, in monthly installments of shares, into the loan fund, together with interest at the rate of 6 per cent per annum, after giving 60 days' notice in writing, such notice to be given after the expiration of two years; and that, if any shareholder shall neglect to pay the interest or premium on his loan, or his regular monthly installments, or other fees, for three months, or in any way

the company by virtue of which as payments are made on the stock they are treated as payments on the bond, so that one steadily merges in or becomes offset by the other; but while in a general way this view may seem fair because an exchange of one for the other is the result expected to happen, it is still not the view warranted by the terms of the company's constitution nor by the terms of the bond. The borrower cannot be compelled to pay the principal of the loan in cash, but may when his stock becomes paid up exchange his stock for the principal of the debt, but until so exchanged they are distinct in legal contemplation as well as in form. The stock is collateral security for and not a credit on the bond.

Under the Ohio statutes parts of the loan are not to be canceled as dues are paid on the shares but the loan is to be settled with such dues and other credits when the share is fully paid. Seibel v. Victoria Bldg. Asso. No. 2, 43 Ohio St. 371.

In the absence of a statute or by-law of the association permitting the crediting of payments on the loan, it cannot be done but the stock must be left to mature as other stock of the association does. Sweeney v. El. Paso Bldg. & Loan Asso. (Tex.) 26 S. W. Rep. 29; Blakeley v. El Paso Bldg. & Loan Asso. Id. 292.

Payments on stock should not be applied in reduction of the debt. El Paso Bldg. & Loan Asso. v. Lane, 81 Tex. 369.

Payments on stock are not made for the use of borrowed money, but through them the stockholder acquires an interest in the property of the association. International Bldg. & Loan Asso. v. Abbott, 85 Tex. 220.

In Mechanics Bldg. & Loan Asso. of New Brunswick v. Conover, 14 N. J. Eq. 219, the court said: "The claim is that the claimant is entitled to have deducted from the amount of the mortgage the premiums that he has paid on account, and to this extent the claim would, at first view, seem to be equitable and just. The member has taken a loan of $200. He is to repay it by monthly installments. He is to have, morever, the benefit of all premiums, fines, and advanced rates of interest paid by himself and all his associate members. It is very natural, therefore, for the members to suppose that when he has paid $100 in monthly installments, no more than the balance of $100 can remain due on the mortgage. But he forgets that

fails to comply with his contract, the association may compel payment of principal and interest, and premiums, fines and dues, by proceeding on his note, and foreclosing the mortgage or other security, which shall at once become due and payable, and the association may cancel and treat as forfeited the said shareholder's share, whether deposited as collateral security or not, and all payments made thereon shall be forfeited to the association; that time, punctuality and strict performance on the part of all shareholders, in the payment of premiums, fines, installments, interest and loans, is made the essence of the contract. Linsky signed his applications for the loan he received, and in them he agreed, "I will also comply with all the rules and regulations of the association." They were approved, and under them he received a loan from the association for $2,000, on the 16th of June, 1890, for which he executed and delivered his note or bond, payable six years after date, with interest thereon, and the premiums bid in his applications and payable according to the by-laws, and assigning in said note as collateral security to the association, for the sum loaned to him, and for the payment of the monthly installments required of him, his 40 shares of stock in the association. In the conclusion of the note is the provision:—"And it is stipulated, that in the event I make default in the payment of said installments, interest, premiums or fines to said association, for a period of three months, then this bond shall mature and become payable, and I hereby authorize said association to cancel my said shares, and the same shall be thereby forfeited." At the same time, he executed the mortgage, a copy of which is attached to the answer of the association, conditioned, that "If the said Isaac Linsky shall well and truly pay said sum of $2,000, as evidenced by said note, at the maturity thereof, . . . and shall also promptly [pay] on the 5th day of each month the installments due on his shares, until the amount in the loan fund to the credit of his shares, from monthly payments and profits, equals fifty dollars for each share, on which said loan is made, and shall also promptly pay the monthly interest on said loan and the premiums so bid by him monthly, and shall comply with the laws of said association, then this conveyance shall be null and void, otherwise to remain in full force and effect," subject to foreclosure as provided therein. On the 15th day of September, 1892, said Linsky having made default in the payment of the installments on his stock, interest, premium and fines, for more than three months, and never having filed an application for the withdrawal of his shares of stock, after he had been paying thereon, two years or at any other time, the association, by resolution duly adopted, declared the said forty shares of stock of said Linsky forfeited to the remaining stockholders of said association, and the same was passed to the credit of the loan fund of the association.

From what has been said, it appears, then, that the association was duly organized, under a charter obtained under the general law of the state for that purpose; that the statute under which it was organized authorized it to make all needful by-laws for the transaction of its business, and to compel payment and compliance with the by-laws which provided for the forfeiture of the stock of its shareholders, if they failed for three months to pay the stipulated contributions to the association, as provided by the by-laws and the contract of the borrower; that Linsky agreed to abide by these rules and regulations, and agreed that they should be a part of his contract of loan; that he executed his note and mortgage, and agreed therein, that if he failed to comply with the terms of his contract, his stock should be forfeited to the association; that he did make default; and that the association, in accordance with its by-laws, declared his stock forfeited. The policy of the law favored the forfeiture, the statute authorized it, the rules of the association and contract of the parties provided for it, and the association declared it, in accordance with the terms of the contract and by-laws.

the payments are made, not upon his mortgage debt, but into a general fund, the benefits of which are to be shared by every member of the association. And while he may reap great profits from premiums, fines, and high rates of interest, he incurs the hazards of losses from dishonest officers, defaulting members, and ill-secured loans, so that he may actually repay the whole amount loaned, with a high rate of interest, and yet be a debtor to the association. The debt is in fact never discharged until it is either actually paid according to the terms of the mortgage or until the accumulation shall be sufficient to redeem every mortgage given by a shareholder, and cancel every share of members who have taken no loan at its par value. The undertaking of the members to repay the loan is absolute, and he must perform his engagement. He can only redeem his mortgage by paying its full amount. He can have no credit for the value of his shares until the scheme closes, and there are funds sufficient to divide the full amount of the shares among all the shareholders according to the terms of the scheme." And that case was affirmed on this point in Herbert v. Mechanics Bldg. & Loan Asso. of New Brunswick, 17 N. J. Eq. 497, 90 Am. Dec. 601.

In Robertson v. American Homestead Asso., 10 Md. 397, 65 Am. Dec. 145, the court in promulgating a rule to ascertain the amount which the association would be entitled to on selling the mortgaged lands in foreclosure proceedings states that from the sum of the items which were to be paid the amount already paid must be deducted. And that rule was subsequently applied in McCahan v. Columbian Bldg. Asso. of East Baltimore, No. 2, 40 Md. 226.

In Mosley v. Baker, 6 Hare, 87, 12 Jur. 551, 17 L. J. Ch. 257, affirmed in 1 Hall & T. 301, 3 De G. M. & G. 1082, 18 L. J. Ch. 457, 13 Jur. 817, which was a bill to redeem from the mortgage, it was held that permission to redeem should be granted only upon payment of all future subscriptions upon the shares until the dissolution of the society, the probable duration of which was to be ascertained by calculation, and the future payments to be treated as if immediately due.

Upon construction of the rule of the society in that case the court in Smith v. Pilkington, 1 De G. F. & J. 120, 4 Jur. N. S. 58, 29 N. J. Ch. 227, held that when a member comes to redeem his mortgage the account is to be taken, not of what is then due, but of the sums originally secured by the mortgage.

We find thus erected, against our declaring this forfeiture unconscionable and inequitable, as we are asked to do in this bill, a barrier so high, we are unable to surmount it. The appellant is entitled to the full amount of its said loan, principal and interest, according to the terms of the contract, from the time said Linsky ceased to pay the same thereon, without any abatement for the value of the stock forfeited; and if the same is not promptly paid, in redemption of its said mortgage by the complainant in the cross-bill, or by the complainant in the original bill,—the complainant having submitted itself to the authority of the court to that end,—it is entitled to a decree of foreclosure of its said mortgage, and to a sale of the real property therein described, for the payment of its said debt and interest. The complainant in the cross-bill is entitled to redeem the mortgages of the appellant, and of the Anniston Loan & Trust Company, by paying the amounts that may be ascertained to be due thereon, respectively, within a short time to be specified by the court; and, in default of such redemption by him, then, the complainant in the original bill, the Anniston Loan & Trust Company, is entitled to redeem the mortgage of the defendant,— the Southern Building & Loan Association—by paying the full amount due thereon, principal and interest, without abatement for alleged payments thereon, and in that case, the decree of the court foreclosing its own mortgage, and that of said association, so redeemed by it, and to a sale of the real estate in said mortgages mentioned, for the payment of its own debt and that of said association which it has paid.

The decree of the court below is reversed and the cause remanded for further proceedings in conformity with the above directions.

SOUTH CAROLINA SUPREME COURT.

George Lamb BUIST, Receiver, etc., of Assistance Building & Loan Association, *Respt.*,

v.

Daniel BRYAN, *Appt.*

(.....S. C.....)

(April 16, 1895.)

1. The appointment of a receiver for a building and loan association terminates the contract of a shareholder who is also a borrower and has given a mortgage to secure the loan so that he is not liable for the monthly dues accruing after such appointment.

2. The monthly payments for subscriptions to the shares of a building and loan association which have been pledged as collateral security for a loan secured by mortgage, in which interest and dues are consolidated, should be applied upon the mortgage in determining whether that has been paid when the association is in the hands of a receiver.

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Charleston County in favor of plaintiff in an action brought to foreclose a mortgage. *Reversed.*

The complaint in the action was as follows:

"The plaintiff, George Lamb Buist, as receiver of Assistance Building and Loan Association, a body corporate under the laws of said state, complaining of the above-named defendant, Daniel Bryan, alleges: (1) That heretofore, to wit, on or about the 9th day of September, 1892, in a certain cause depending in the court of common pleas for Charleston county, said state, entitled 'E. M. Moreland *v.* Assistance Building and Loan Association,' the plaintiff, George Lamb Buist, was duly appointed receiver of the said Assistance Building and Loan Association, and by said court authorized and empowered

and then credit is to be given to the mortgagor for the proper proportion of the profits and for the payments which he may have made in respect to the monthly subscriptions.

In Georgia the rules of the society provide that to redeem a mortgage the mortgagor must pay such an amount as will at the rate at which funds are selling at the time, produce the same monthly interest as the stockholder had been paying, and the court held that upon foreclosure the society was entitled to retain an equal amount. Richards v. Bibb County Loan Asso. 24 Ga. 196.

A member may prevent the company from throwing the funds of the series to which he belongs into the common funds of the association, and may compel their application to the payment of his loan. Sullivan v. Jackson Bldg. & Loan Asso. 70 Miss. 94.

Under that conception of an association if the advance is returned the stock is released from the lien of the association and the owner thereafter has all the rights of other members of the association.

When the society has foreclosed its mortgage and made the amount out of the mortgaged premises, the mortgagor's stock is released from the pledge, and he holds it as though he had never gotten any advance on it. Ocmulgee Bldg. & Loan Asso. v. Thomson, 52 Ga. 427.

Where there is a provision for the crediting of payments of dues upon the borrower's giving notice of withdrawal, he cannot have such credit upon foreclosure of his mortgage because he will receive the benefit of his installments upon the winding up of the association in the increased value of his shares. People's Bldg. & Loan Asso. of Harrison v. Furey, 47 N. J. Eq. 410.

Rule under changed conception of loan association.

Where the old rule was observed the advanced member received on foreclosure the benefit of his payments by having to pay simply the dues that were yet to accrue under his contract.

Thus it is made to seem that the scheme of the English societies contemplates the allowance of payments already made. Matterson v. Elderfield, L. R. 4 Ch. 207, 20 L. T. N. S. 503, 17 Week. Rep. 422.

In the earlier Pennsylvania cases in which the associations were operating without the protection of a statute the advance was treated as a mere loan

See also 34 L. R. A. 201.

to take charge of all and singular the assets of said corporation, and to bring all actions of any kind and description necessary for winding up the affairs of said association, and protecting the interests of the stockholders thereof; that the said George Lamb Buist duly entered upon the discharge of his duty as such receiver, having qualified as required by said order, and ever since has been, and is now, the duly appointed receiver of said Assistance Building and Loan Association. (2) That the said Assistance Building and Loan Association is a corporation organized under the laws of this state, and was at the times hereinafter mentioned such, doing business at Charleston, in said state. (3) That heretofore, to wit, on or about the 7th day of November, A. D. 1883, the defendant, Daniel Bryan, duly made, executed, and delivered his bond or obligation in writing under seal, in the full and just sum of twenty-eight hundred dollars, wherein and whereby it was recited that whereas the above-bound Daniel Bryan having bid in an advance stock of fourteen hundred dollars on seven (7) shares of the said association held by the said Daniel Bryan as a stockholder therein, and, as collateral security, has assigned to the said association the said shares, and has received for such advances in cash the sum of eight hundred and forty dollars, and that it is contemplated that the said association shall wind up when the funds and assets of the same have so accumulated as to enable each stockholder and member thereof, upon a fair division, to be paid or receive two hundred dollars of property or assets on each and every share held by him or her; the said bond being conditioned that 'if the said Daniel Bryan, his heirs, executors, or administrators, shall and do well and truly pay or cause to be paid unto the above-named Assistance Building and Loan Association the monthly sum of fourteen dollars, of which the sum of seven dollars per month is for subscriptions to the said shares, and the sum of seven dollars per month is for interest on the said sum actually paid over to said Daniel Bryan, to be paid before the seventh of each and every month until the said association shall wind up and determine, and upon such winding up or determination shall transfer and surrender the said seven (7) shares to the said association, in satisfaction of the advance aforesaid, and shall stand to and abide by the constitution, rules, and regulations of said association, then the above obligation to be void and of none effect, or else to remain in full force and virtue: Provided, that this contract shall not be construed in any manner to provide for more than the highest rate of interest allowed by law for the use of any sum actually obtained from said association.' (4) That on the 7th day of November, 1888, to secure the performance of the conditions of said bond or obligation, the defendant, Daniel Bryan, duly made, executed, and delivered to the said Assistance Building and Loan Association his deed, and thereby conveyed, by way of mortgage, to the said Assistance Building and Loan Association, its successors and assigns, the following lands and tenements, in the county of Charleston and state aforesaid, to wit: 'All that lot, piece, or parcel of land situate, lying, and being on the north side of Lee street, one door east of Meeting street, in Ward No. 7 [now No. 9] of the city of Charleston and state aforesaid, measuring and containing in front on Lee street forty (40) feet, and in depth fifty (50) feet, abutting and bounding north on lands of ———, east on lands now or late of John W. O'Brien, south on Lee street, and west on lands of the said Eugenia O. Robinson, which said lot of land is part of the lot marked No. 68 of Hume's plat, dated 12th December, 1872, of the Blake lands, and conveyed to me by Eugenia O. Robinson by deed dated 7th October, 1881; recorded in Book K, No. 18, page 147, R. M. C. Office for Charleston county.' (5) That on the ——— day of ———, 188–, the said mortgage was delivered to the register of mesne conveyances of said county, to be by him entered on record, and was on said date recorded in Book Q. No. 18,

and the account was made up accordingly as shown by the authorities cited *supra*. These decisions have had more or less effect in giving the transaction the character of a loan in that state. And in other states also it has been given that effect and the account stated on that basis.

All payments made under the constitution and laws of the building association must be regarded as payments on account of loans made to the stockholders. Building Asso. v. Timmins, 3 Phila. 209.

The borrower is entitled to apply his stock as a credit on his mortgage. Building Asso. v. Rood, 2 Kulp, 246.

The mortgagor may direct the payments to be applied upon the mortgage. Building Asso. v. Taylor, 13 W. N. C. 13.

In Tilley v. American Bldg. & Loan Asso., 52 Fed. Rep. 618, which was a bill to cancel the mortgage, the court directed the interest paid to be deducted and the mortgage foreclosed for the balance.

A mortgagee may apply the value of his stock in reduction of the claim of the association upon the assets arising from the sale of real estate under a security given to the association. Early's App. 89 Pa. 411.

The association is only entitled to the amount loaned with interest from which is to be deducted the sums paid as dues. Hanner v. Greensboro Bldg. & Loan Asso. 78 N. C. 188.

In Clarksville Bldg. & Loan Asso. v. Stephens, 28 N. J. Eq. 351, the court in foreclosure proceedings appropriated the stock payments which had been made to the satisfaction of the indebtedness to the association.

In Hekelnkaemper v. German Bldg. & Sav. Asso. of Atchison, 22 Kan. 549, the lower court ignored the premium bid and gave judgment for the actual amount of the loan without allowing the amounts that had been paid, and the supreme court held that there was no error of which the borrower could complain.

When a member not in default seeks to redeem his mortgage, the amount to be discharged is the principal sum loaned. Toward payment of this the mortgagor may properly apply the gross amount of all sums paid as monthly dues, computing the same as the amount may be at the time of the adjustment. But upon such sums no interest can be claimed, nor can they be required to be applied as of the time when received. They are not payments originally required nor stipulated to

page 270. (6) That the said Daniel Bryan has failed to pay the monthly installments due, respectively, as follows, to wit: On the 7th day of May, 1892, known as the one hundred and fifth installment; and installment due on the 7th day of June, 1892, known as the one hundred and sixth installment; and the installment due on the 7th of July, 1892, known as the one hundred and seventh installment; and the installment due on the 7th day of August, 1892, known as the one hundred and eighth installment; and the installment due on the 7th day of September, 1892, known as the one hundred and ninth installment. And that each and all of said monthly dues or installments have been due for more than the space of three months. And that the said Daniel Bryan has neglected and refused to pay the same, whereby the condition of said bond has been broken, and this plaintiff, suing as receiver of said Assistance Building and Loan Association, is entitled to have a forcelosure of said mortgage decreed by this honorable court, and judgment and execution for any deficiency. Wherefore the plaintiff demands judgment: First. That the liability of the said defendant, Daniel Bryan, under and by virtue of the said bond or obligation, be determined by this honorable court, and the amount thereof fixed and ascertained. Second. That upon the liability of the defendant therein being so determined and ascertained, that a foreclosure of the said mortgage be decreed, and that the property therein described be sold, and the proceeds applied—First, to the payment of the costs and expenses of these proceedings; next, to the payment of any taxes which may be liens on the said premises; and then to the payment of whatever sum of money may then be due upon the said bond and mortgage so held by this plaintiff. Third. That the defendant, Daniel Bryan, may be adjudged to pay any deficiency which may exist after applying all of such sales moneys as hereinbefore prayed for, and that the plaintiff have leave to enter judgment and issue execution against the said defendant, Daniel Bryan, therefor. Fourth. That the defendant, Daniel Bryan, and all persons claiming under him subsequent to the commencement of this action, may be barred and foreclosed of all equity of redemption or other interest in the said mortgaged premises. Fifth. That the plaintiff may have such other and further relief as the nature of his case may demand and to this honorable court seem meet."

Defendant answered, alleging a defalcation by the treasurer, insolvency of the association and concealment by the directors, and stating that a suit was pending by the plaintiff herein against the directors of the insolvent association, to replace the funds lost through their negligence and mismanagement, and that the bringing of the present suit before the determination of the suit against such directors was premature. Plaintiff demurred to the above allegations of the answer.

Upon the hearing defendant interposed an oral demurrer to the complaint, upon the ground that it did not state facts constituting a cause of action. This demurrer was overruled, and an order entered sustaining plaintiff's demurrer as to the above allegations of the answer, and overruling it as to the rest. Defendant appealed, and filed the following exceptions: "(1) Because the complaint herein did not state facts sufficient to constitute a cause of action, and the circuit judge erred in overruling defendant's demurrer interposed upon that ground. (2) Because, in overruling the demurrer to the complaint his honor in effect ruled that a receiver of an insolvent building and loan association which has run the period of its natural life can sue the borrowing members of said association for further payments, notwithstanding the fact that the association has ceased to be in operation, and no equivalent collections are made from the nonborrowing members of said association. (3) Because to allow the collections sued for in the complaint is to authorize the collection of an extortionate and usurious rate of interest. (4) Because his honor erred in sustaining the

be made as payments toward any loan. Barker v. Bigelow, 15 Gray, 130.

It is impossible for the society to say that the installments as received from time to time are not ascribed as payments to the advance. Brownlie v. Russell, 8 App. Cas. 235, 48 L. T. N. S. 881, 47 J. P. 757.

In estimating the amount due by a deceased borrowing member of an association, he should be credited with the withdrawal value and not the estimated value of the shares. Hensel v. International Bldg. & Loan Asso. (Tex.) 20 S. W. Rep. 116.

But a borrower cannot at the same time treat his payments as payments on stock and payments on loans, although his payments on stock, if persevered in and if the association is successfully wound up, may ultimately pay off his mortgage. He cannot make his payments perform a double office at one and the same time. He cannot pay two debts with the same money, and if when he is sued for the loan he chooses to abandon the stock and insist upon the payments which he has made upon it being applied to his loan, he has a right to do so. Up to that time what he has paid upon the stock must be taken to have been paid upon stock and nothing else. Now that he has determined to abandon his stock and apply it to the mortgage, he cannot claim that the payments on stock were at that time really payments on the mortgage just as if he had never owned any stock. The effect of that would be to say that a borrowing member may own stock without paying anything for it. He has no right to claim that the dues paid upon the stock shall be credited to him against the mortgage as of the date when these payments were made, precisely as if he had never owned any stock and had never incurred any obligation for the unpaid installments due upon it. Hazel Loan & Bldg. Asso. v. Groesbeck, 17 Phila. 242.

Right to a credit of profits.

Under the original scheme of such associations the advanced member was not entitled to share in the profits of the enterprise except so far as they operated to bring the stock to maturity before the estimated time. So that if he defaulted or sought to redeem before that time profits were not taken into his account. But where the association had appropriated a certain part of the profits for the benefit of withdrawing members a member seeking to redeem his mortgage was regarded as in the po-

demurrer to the answer, so far as it applies to the allegations in the twelfth and thirteenth paragraphs of said answer. (The allegations set out above.)

Messrs. **Fitzsimons & Moffett** and **R. G. O'Neale**, for appellant:

The complaint does not state a cause of action because it seeks to liquidate the affairs of an insolvent corporation by continuing its operation under its charter and by-laws, and by extending the liability of one class of stockholders and limiting that of another.

Re Assigned Estate of Nat. Sav. Loan & Bldg. Asso. 9 W. N. C. 79; Endlich, Bldg. Asso. § 485; *Low Street Bldg. Asso. No. 6* v. *Zucker*, 48 Md. 448; *Windsor* v. *Bandel*, 40 Md. 172.

The complaint does not state a cause of action, because the allegations show payment in full, principal and interest, of the amount borrowed.

To enforce the collections sued for would be in violation of the statute against usury.

Hardin v. *Trimmier*, 27 S. C. 110; *Carolina Sav. Bank* v. *Parrott*, 30 S. C. 61.

All payments made, by whatever name called, must be credited on the bond.

Mechanics & Farmers Bldg. & Loan Asso. v. *Dorsey*, 15 S. C. 468; *Columbia Bldg. & Loan Asso.* v. *Bollinger*, 12 Rich. Eq. 124, 78 Am. Dec. 468; *Thompson* v. *Gillison*, 28 S. C. 542.

The so-called "stock payments" are nothing more than partial payments upon the loan made to the borrower.

Rowland v. *Old Dominion Bldg & Loan Asso.* 115 N. C. 825; *Overby* v. *Fayetteville Bldg. & Loan Asso.* 81 N. C. 56; *Mills* v. *Salisbury Bldg. & Loan Asso.* 75 N. C. 292; *North America Bldg. Asso.* v. *Sutton*, 35 Pa. 463, 78 Am. Dec. 349; *Hoskins* v. *Mechanics Bldg. & Loan Asso.* 84 N. C. 838; Endlich, Bldg. Asso. § 496, *note 2*, § 501, p. 502; *Low Street Bldg. Asso. No. 6* v. *Zucker*, *supra*; *Peters' Bldg. Asso. No. 5 of Baltimore* v. *Jaecksch*, 51 Md. 198.

Mr. **H. E. Young**, also for appellants:

The borrowing member of the association is to be charged only with the amount he has actually received with legal interest and credited with all his payments upon stock and interest upon the principle of partial payments.

Cook v. *Kent*, 105 Mass. 254; *Bowker* v. *Mill River Loan Fund Asso.* 7 Allen, 100; *Windsor* v. *Bandel*, 40 Md. 172; *Low Street Bldg. Asso. No. 6* v. *Zucker*, 48 Md. 448; *Peters' Bldg. Asso. No. 5 of Baltimore* v. *Jaecksch*, 51 Md. 198; 1 Endlich. Bldg. Asso. § 498; *City Loan & Bldg. Asso. of Augusta* v. *Goodrich*, 48 Ga. 445; *Goodrich* v. *City Loan & Bldg. Asso. of Augusta*, 54 Ga. 98; *Thomson* v. *Ocmulgee Bldg. & Loan Asso.* 56 Ga. 350; *Cason* v. *Seldner*, 77 Va. 293; *Brownlie* v. *Russell*, 8 App. Cas. 248; *Tosh* v. *North British Bldg. Soc. & Liquidator*, 11 App. Cas. 496.

He cannot be made responsible for any losses unless there is a special rule of the association making him liable for them.

Rosenberg v. *Northumberland Bldg. Soc.* L. R. 22 Q. B. Div. 375; *Wilson* v. *Miles Platting Bldg. Soc.* Id. 381, *note*; *Bradbury* v. *Wild* [1895] 1 Ch. 383; 1 Endlich, Bldg. Asso. § 496, *note 1*.

Messrs. **Mordecai & Gadsen** and **B. H. Rutledge**, for respondent:

The borrower must return to the association the sum he has actually received, with interest from the time he received it, and must be credited with such sums as he has paid in excess of the interest but not credited with dues paid on his stock, nor with fines. The net balance thus found due is his debt to the association.

Strohen v. *Franklin Sav. Fund & Loan Asso.* 115 Pa. 273; *Rogers* v. *Hargo*, 92 Tenn. 35; *Rowland* v. *Old Dominion Bldg. & Loan Asso.* 115 N. C. 825; *Towle* v. *American Bldg. Loan & Invest. Asso.* 61 Fed. Rep. 446.

Gary, J., delivered the opinion of the court:

This is an appeal from an order of the circuit judge overruling a demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

dition of a withdrawing member and given the benefit of this appropriation.

The borrower is no longer entitled to share in the profits of the association. White v. Mechanics Bldg. Fund Asso. 22 Gratt. 233.

In Bowker v. Mill River Loan Fund Asso., 7 Allen, 100, it was held that the relation of a borrower to the association was simply that of debtor having no interest as a member, or share in its profits.

A borrower does not when he withdraws money on his shares retain his original stock with a right to participate in the profits of the business. Instead of conforming to the regulations and contributing as others are required to do, he puts an end to his relation and ceases to have any interest in its affairs, and by his voluntary act is a stockholder no longer. Overby v. Fayetteville Bldg. & Loan Asso. 81 N. C. 56.

A defaulting borrower is entitled to a credit of the amount actually paid on his mortgage, but not for any share of the profits, which had he continued to the end he might have been entitled to. Watkins v. Workingmen's Bldg. & Loan Asso. 97 Pa. 514; Building Asso. v. Morgan, 2 Kulp, 19.

In Falls v. United States Sav. Loan & Bldg. Asso., 24 L. R. A. 174, 97 Ala. 417, the court in determining the question of whether or not the contract was usurious found that the borrower was not a member of the association because not entitled to a share of the profits and then held that his payments upon his shares each year amounted to a reduction of his indebtedness and that since the rate of interest remained the same, the contract was usurious.

In a suit to redeem the plaintiff should be credited as a present debt with all subscriptions to redemption money which would become payable by him, assuming the association to continue for the whole of the calculated period, and should receive credit for the amount of bonus payable to withdrawing members at the date of notice. Fleming v. Self, 3 De G. M. & G. 997, 1 Jur. N. S. 25, 24 L. J. Ch. 29.

A member who wishes to redeem his mortgage may have a credit for bonus which has been declared by the directors. Archer v. Harrison, 7 De G. M. & G. 404, 3 Jur. N. S. 194, 29 L. J. Ch. 227, 4 Jur. N. S. 58.

And in one case it was held that upon foreclosure the borrower is entitled to profits. Ingoldby v. Riley, 23 L. T. N. S. 55.

And in one case it was held that a borrower can-

The complaint and the exceptions Nos. 1, 2, and 3 will accompany the report of the case.

The appellant contends that the complaint shows upon its face that the mortgage has been paid. In considering this question, this court must determine whether the monthly payments for subscriptions to the shares of stock should have been applied upon the mortgage. The authorities upon this question are by no means harmonious. The question has not directly been decided in this state, though there are authorities bearing upon this point. The authorities in our state have, however, decided two questions: (1) That the money advanced was a loan; (2) that where the mortgage is to secure the monthly payments of interest and dues, and the contract is declared to be usurious, the borrower is entitled to a credit, not only for the amount paid as interest, but also for the amount paid for subscription on the shares of stock, in ascertaining the amount due on the mortgage. In the case of *Columbia Bldg. & Loan Asso.* v. *Bollinger*, 12 Rich. Eq. 126, 78 Am. Dec. 463, it appears that in December, 1854, Bollinger, who was a member of the association and holder of 10 shares of the capital stock, bid off $2,000 of the funds of the corporation at the premium of 35 per cent. The contract, in the beginning, allowed a discount of $700 on an advance of $1,300, which was called a purchase of $2,000 of the funds of the corporation. This sum of $2,000 and interest of 6 per cent was to be repaid, in sums of $10, at the end of each month succeeding the 14th of December, 1854, the date of the bond and mortgage. These were the provisions of the bond. Before the second Monday of December, 1854, the defendant had made 32 monthly payments, amounting to $320. After the execution of the bond and mortgage, the monthly payments required by the condition thereof were duly made until November, 1856. This constituted a further sum paid of $460. The actual payments on the loan or advance amounted to $1,480. Bollinger set up the plea of usury, which was sustained. *Chief Justice* O'Neal, delivering the opinion of the court, after reciting the provision of the usury law then of force, concludes as follows: "Under this provision, the corporation will be entitled to recover the sum actually loaned, deducting the payments made. The result will be that $1,300 will be the principal, on which payments to the amount of $1,480 have been made; so the corporation has been overpaid $180. The consequence is that complainant's bill must be dismissed." It will thus be seen that, in determining the amount due under the mortgage, the association was required to deduct, not only the amount of the dues paid after the execution of the mortgage, but also the amount of those paid before the execution of the mortgage.

In the case of *Mechanics' & Farmers' Bldg. & Loan Asso.* v. *Dorsey*, 15 S. C. 462, it appears that in 1878 the defendant obtained a loan of $1,000 from the said company, and, to secure this loan, gave his bond, with mortgage of real estate, conditioned to pay to the association monthly the sum of $17.25, itemized as follows: $5 for monthly subscription on his share; $.75 for interest on the sum advanced to him, at the rate of 6 per cent per annum; and $7.25 for the monthly premium which he contracted to give for the loan,—in all, $17.25. He obtained this sum at public sale, agreeing to give a premium of $1.45, which premium was to be paid monthly, and amounted to $7.25 for five shares. For this amount, and for the monthly interest, as, also, the monthly subscription, on his five shares, he gave the bond and mortgage above mentioned; the monthly payments, as therein stated, being in the aggregate $17.25. The defendant failed to meet his bond, and suit was commenced to foreclose the mortgage. The defendant pleaded usury. The following appears in the decree of the circuit judge, which was affirmed on appeal to the supreme court: "It is the opinion of this court that the interest paid to the association plaintiff by the defendant, John Dorsey, should be credited upon the dues that should legally have been

not be a withdrawing stockholder so long as his stock is held in pledge by the association. Wadlinger v. Washington German Bldg. & Loan Asso. 153 Pa. 622.

Forfeiture.

Some of the associations for the purpose of enforcing a compliance with the shareholder's contract provide for a forfeiture of his stock in case of default. Since the member gives no security to the association for the performance of his contract some such provision as this appears to be necessary. When, however, the member has his share of the effects of the association advanced to him he gives security for the payment of his future dues and the necessity no longer exists to resort to forfeiture to protect the association. All the association can ask is that the member shall carry out his contract, and if his security is ample there is no occasion for forfeiture and there would seem to be nothing to justify it.

The cases of SOUTHERN BLDG. & LOAN ASSO. v. ANNISTON LOAN & T. CO. and RANDALL v. NATIONAL BLDG. LOAN & PROTECTIVE UNION OF MINNEAPOLIS (Neb.) well represent the argument on the different sides of the question. In the former the court says: "The policy of the law favored the forfeiture, the statute authorized it, the rules of the association and contract of the parties provided for it and the association declared it in accordance with the terms of the contract and by-laws. We find thus erected against declaring this forfeiture unconscionable and inequitable . . . a barrier so nigh we are unable to surmount it."

In RANDALL v. NATIONAL BLDG. LOAN & PROTECTIVE UNION OF MINNEAPOLIS, *supra*, the articles of the association provided for the forfeiture of stock in case of the nonpayment of dues, but the court says: "We agree that equity will not ordinarily relieve against such forfeitures, and this rule probably extends so far that if the borrower had not been a borrower and her stock had been forfeited for delinquincy in assessments, she might not have the aid of a court to recover for past payments; but the principle does not extend so far as to induce a court to enable a lender to recover the face of the debt where payments have been made under an agreement that on certain conditions they may be forfeited."

The court then continues: "If A. lend to B. $1000 payable in installments of $10 each—B. agreeing, that, if he fail to pay any installment when it comes

collected by the plaintiff, to wit, $5.83 per month, which is the interest, monthly, on $1,000, at the rate of seven per cent per annum. The amount in interest, installments, and premium paid into the association plaintiff from January, 1878, to November, 1879, by the defendant, John Dorsey, was $174.75. The amount to which the association was entitled from the same date to November, 1879, at 7 per cent per annum, was $134.09, leaving a balance of $40.66 in favor of John Dorsey. It is therefore ordered, adjudged, and decreed (1) that the complaint be dismissed with costs; (2) that the balance of $40.66 be placed to the credit of the defendant, John Dorsey, on the books of the association plaintiff, who shall apply the same, at the rate of $5.83 monthly, to the satisfaction of the defendant's dues, until the said amount of $40.66 shall have been exhausted." The complaint in that case alleged that the defendant, at the time the action was brought, to wit, September, 1879, was in arrears nine months of subscription, interest, and premium, and that the principal sum was therefore due also. *Chief Justice* Simpson, delivering the opinion of the court in that case, says: "We regard the question here as settled by the case of *Columbia Bldg. & Loan Asso.* v. *Bollinger*, 12 Rich. Eq. 124, 78 Am. Dec. 463, in which a very learned and able opinion of the distinguished chancellor on the circuit, *Chancellor* Carroll, was overruled by the supreme court. That case and this are almost identical. The charters of the two companies were nearly the same; the by-laws almost exactly alike. A stockholder in that company, as in this, borrowed in advance a certain sum of money, which he expected would ultimately be his. He borrowed at public bidding, as in this. He contracted as here, by bond and mortgage, to pay the monthly interest. The premium, instead of being paid monthly, was deducted at the time of the contract. This was paid in cash, instead of by monthly installments. This is the only difference between the cases. Is this a difference in principle? We do not so understand it. The court in that case held the contract usurious; *Judge* O'Neal, with that strong conviction which characterized all of his opinions, declaring 'that there was no doubt about it;' and, but for the earnest and able decree of *Chancellor* Carroll, he would not have thought it necessary even to look into the authorities on the subject. The argument of *Chancellor* Carroll and the opinion of the supreme court overruling it present the two opposing views on this subject. The decree of *Chancellor* Carroll is based upon two prominent grounds: First. That the dealing of the parties was a transaction between partners, and in reference to partnership funds, and was not a loan. He cited *Silver* v. *Barnes*, 6 Bing. N. C. 180, and several English authorities. Second. That the money advanced to Bollinger was but that which he (Bollinger) would get when the corporation wound up, and if he was willing to deduct $300,—the premium,—because he was getting the money in advance, there was nothing illegal in this. In that case, as has already been stated, the premium was deducted at the time the contract was made, instead of being contracted to be paid in monthly installments, as the interest was to be paid. The chancellor thought that in this respect it was like a party agreeing to take less for a debt than the amount actually due, and, having executed the contract, he could not afterwards dispute or repudiate it. These positions, which are the only ones that can be taken with any plausibility in support of such a contract, after full consideration by the supreme court, were overruled, and the contract of Bollinger was declared usurious. We are bound by this decision." In the case of *Thompson* v. *Gillison*, 28 S. C. 542, the monthly stock payments were calculated as payments on the bond, divesting the question of usury.

The authorities establish the following propositions: (1) That the appointment of a receiver terminates the contract with the mortgagor as originally contemplated. (2)

due, all payments shall be forfeited—and B. pays ninety-nine of such installments and fails to pay the one hundredth, would any court in Christendom permit A. to recover the $1000? It is just such penalties that courts of equity have always relieved against."

The courts are thus far quite evenly divided upon the question.

A borrowing member of a loan association who has forfeited his stock for nonpayment of dues cannot refuse to pay his mortgage because the valid stock outstanding has reached maturity. Having forfeited his stock he has none to set off against his indebtedness on the mortgage, and that being an asset of the association it is entitled to collect it to the full amount. Hatfield v. Huntington City Bldg. Loan & Sav. Asso. 122 Ind. 149.

If the scheme contemplates that the loan should be paid by the stock when it reaches its par value the borrower is not entitled to have money paid on the stock applied on a loan before that time, and if his stock is forfeited to the association for the nonpayment of dues according to the rules of the association, he is entitled to no relief. Freeman v. Ottawa Bldg. Homestead & Sav. Asso. 114 Ill. 182.

If a voluntary association forfeits the stock and proceeds to enforce the mortgage, the court will treat the transaction as a loan, and the account will be made up by charging against the member what he borrowed, with interest and allowing in reduction the amounts which he has paid as dues. Bechtold v. Brehm, 26 Pa. 269.

A forfeiture of the stock will not be enforced and if the amount of the loan is obtained from a foreclosure of the mortgage, the mortgagor is still a stockholder in the association, with all the rights which his stock will give him in the winding up of its affairs. Rowland v. Old Dominion Bldg. & Loan Asso. 115 N. C. 825.

Under the Minnesota statutes, stock cannot be forfeited absolutely to the company, but it must be sold and the claim of the association satisfied and the balance returned to the member. Henkel v. Pioneer Sav. & Loan Asso. (Minn.) 63 N. W. Rep. 243.

In American Homestead Co. v. Linigan, 46 La. Ann. 1118, counsel for the association permitted a credit of the value of the stock, although a forfeiture was at first claimed.

Insolvency or abandonment of scheme.

When the scheme is for any reason abandoned so

That the mortgagor, who is also a shareholder, is not liable for monthly dues accruing after the appointment of a receiver. (3) That upon the determination of his contract with the association, as originally contemplated, the mortgagor is entitled as credits on his mortgage both for the amounts paid as interest, and also as dues on his shares of stock. (4) That, where the amounts paid by the mortgagor as interest and dues aggregate a sum equal to the amount the mortgage was given to secure, a complaint for foreclosure of the mortgage will not be sustained. (5) That if the association goes into the hands of a receiver before the interest on the amount actually advanced, at the rate specified in the contract, and for the length of time the contract was in full force and effect, equals the amount of the premium, then the amount due under the mortgage is to be ascertained by calculating interest on the amount actually advanced, at the rate agreed upon, for the length of time the contract remained of force as originally entered into, and deducting from such amount all payments of interest and dues; the amount paid as interest and dues not to bear interest. In such a contract as this the interest would be calculated at the rate of 10 per cent per annum. (6) The assignment and transfer of the shares of stock by the mortgagor as collateral security for the loan, and consolidating the interest and dues in the mortgage, show that the amount paid monthly, consisting of interest and dues, is to be regarded as what is called "redemption money," and raises an implied agreement that such payment shall be credited on the mortgage.

In support of our positions on these questions, we cite the following authorities: Thompson, Bldg. Asso. chap. 8, §§ 30, 42, 50; Id. chap. 12, §§ 5, 13; Endlich, Bldg. Asso. §§ 333, 373, 496, 498, 502; 2 Am. & Eng. Encyclop. Law. pp. 629, 642; *Randall* v. *National Bldg. Loan & Protective Union of Minneapolis*, 42 Neb. 809, *post*, 133; *Brownlie* v. *Russell*, 8 App. Cas. 248. The leading authorities sustaining a contrary rule as to payments are *Strohen* v. *Franklin Sav. Fund & Loan Asso.* 115 Pa. 273; *Rogers* v. *Hargo*, 92 Tenn. 35; *Towle* v. *American Bldg. Loan & Invest. Soc.* 61 Fed. Rep. 446.

The complaint shows upon its face that the payments made by the defendant exceed the amount due under the mortgage. We decide nothing as to the demurrer to the answer. This action of foreclosure cannot therefore be sustained.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and the complaint dismissed.

Rehearing denied.

NEBRASKA SUPREME COURT.

Fannie M. RANDALL *et al.*
v.
NATIONAL BUILDING, LOAN & PROTECTIVE UNION of Minneapolis, *Appt.*

(42 Neb. 809.)

***1. A member of a building and loan association, who was also a borrower, brought an action, before the maturity of the stock or loan, to redeem** from the mortgage given to secure the loan, on the ground of fraud in procuring it. She prayed that the mortgage be canceled on her payment of the amount found by the court to be due. The association brought its action to foreclose the mortgage because of delinquency in interest. The note provided that any such delinquency rendered the whole debt due. The court consolidated the two cases, and

*Headnotes by IRVINE, C.

that the advanced member cannot have the benefit which he expected from it the tendency is to relieve him from his obligation and adjust his account on another basis.

Where it is necessary to appoint a receiver to wind up the association because of insolvency, the court should call in all outstanding loans not giving credit for the amounts paid on the stock, and then distribute the proceeds among all the stockholders. Towle v. American Bldg. Loan & Investment Soc. 61 Fed. Rep. 446.

If the association becomes insolvent, the borrower should be required to repay the amount borrowed with interest, and will then be entitled to share equally with other members in the distribution of the assets. Strohen v. Franklin Sav. Fund & Loan Asso. 115 Pa. 273.

Upon insolvency of an association the borrower should be charged with the amount loaned with interest and credited with interest and premiums paid, and his stock permitted to stand for a dividend with that of other members of the association. Rogers v. Hargo, 92 Tenn. 35.

When the scheme of the loan association cannot be carried out because of the insolvency of the association, the contract should be treated as re-

29 L. R. A.

scinded, the loans collected with interest and the borrowing members relegated to their position as stockholders to receive their *pro rata* shares of the assets which are collected for distribution. State Sav. & Loan Asso. v. Carroll, 4 Pa. Dist. Rep. 6.

If the association ceases to do business the rule will be to charge each stockholder with his receipts and interest on them from the time he obtained them, and credit him with his payments and interest from the date each is made and divide the assets according to the result, subject to such equitable modification as to expenses, losses, etc., as may appear equitable from the proof at the trial. City Loan & Bldg. Asso. of Augusta v. Goodrich, 48 Ga. 448.

If the association has rendered impossible the objects for which it was originated by proceeding to dissolve, the borrower cannot be held to his agreement, and his account will be stated in the usual way by casting interest on the amount borrowed and allowing credit for all payments made by him to the association. Waverly Mut. & Permanent Land, Loan & Bldg. Asso. of Baltimore County v. Buck, 64 Md. 338; Cook v. Kent, 105 Mass. 254.

If the association is prematurely dissolved, the

See also 34 L. R. A. 201.

made a general finding for the plaintiff in the first suit, but ascertained the amount due on the mortgage, and decreed a foreclosure and sale. The association appealed. *Held*, that inasmuch as both parties sought the same relief, and the appellant obtained all the relief it sought, except as to the amount found due, the other issues were immaterial to the appeal.

2. **The plan of a building association** was that its members should make certain payments periodically upon the stock, and for other purposes; that the stock should mature at a fixed time. Its loans also matured at a fixed time. A member made a number of payments upon the stock, and also certain payments of interest and premium. She then ceased to pay. The association declared her stock forfeited, and instituted an action to foreclose the mortgage securing the loan. *Held*, that the payments upon the stock should, in an accounting of the amount due on the mortgage, be treated as payments *pro tanto* on the loan.

3. **The fact that the contract of membership provided strictly for the forfeiture of stock** in case any payment was not made when due, did not change the above rule. In an action to enforce the mortgage a court of equity will, under such circumstances, relieve against such forfeiture, to the extent of treating the payments made upon the stock as payments upon the loan.

†4. **The fact that opinions are prepared by the commissioner of this court** is no indication that such cases have not been examined by the judges. All questions of law, and, so far as practicable, questions of fact, are considered by each of the judges and commissioners, and opinions are invariably submitted for examination and criticism by the entire membership of the court.

5. **Stock payments**, by a borrowing member of a building and loan association, are not *ipso facto* credits upon his indebtedness, so as to reduce *pro tanto* the amount due on his mortgage.

6. **But a borrower may elect to have payments** on account of stock applied upon his indebtedness to the association.

7. **An agreement whereby the stock of a borrowing member** of a building and loan association, pledged as collateral security for his loan, is to be forfeited upon default of interest, without allowing credit on account of payments previously made on such stock, is unconscionable, and will not be enforced by the courts of this state, although recognized as valid in the association's own state.

(November 20, 1894.)

APPEAL by defendant from a decree of the District Court for Hall County in favor of plaintiff in a suit brought to cancel a mortgage with which was consolidated a suit by a defendant for the foreclosure of the mortgage. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **W. A. Prince** and **George D. Emery** for appellant.

Mr. **M. Randall** for appellees.

Irvine, *C.*, filed the following opinion:

The defendant was a Minnesota corporation,

†Rehearing headnotes by POST, *J.*

mortgagors should be charged the amount borrowed with interest, deducting from time to time the payments of the dues and interest that have been paid. Windsor v. Bandel, 40 Md. 172; Hampstead Bldg. Asso. No. 11 of Baltimore v. King, 58 Md. 279.

If the association becomes insolvent, the liability of the mortgagor is only to pay the amount received with interest, deducting therefrom the sums which have from time to time been paid. Low Street Bldg. Asso. No. 6 v. Zucker, 48 Md. 452.

If the association should cease active operations under its constitution before the proper time for it to terminate from the time of such suspension, the right to demand the weekly dues as such will cease; and if the amount paid in before that time be not sufficient to cover the original amount advanced on the shares redeemed and all accrued interest thereon, the member will then only be liable for the balance of that amount with interest until paid. But if the amount paid in at the time of the suspension or when the association ceases to operate be equal to or more than the amount advanced on the redeemed shares and the accrued interest thereon and there are no arrearages of dues and fines at that time, in such case the member will be entitled to have the mortgage released. Peters Bldg. Asso. No. 5 of Baltimore v. Jaeksch, 51 Md. 198.

After the association has become insolvent, one of its officers cannot apply stock held by him in satisfaction of his mortgage to the association, in its possession, or which it has assigned to a third person as security for a debt owing to him by it. Quein v. Smith, 108 Pa. 331.

But if in accordance with the rules of the association payments from non-borrowing members might be stopped at any time upon the election of the members of those shares, such election will not change the rights or duties of the borrowing members. Hekelnkaemper v. German Bldg. & Sav. Asso. of Atchison, 22 Kan. 549.

Change of rules.

A resolution of the association that the value of all stock borrowed on should be allowed to such holders as wished to redeem, cannot be rescinded to the prejudice of a member who had made application to withdraw, and has refrained from paying his monthly dues in the belief that his application has been accepted. Eyre v. Building Asso. 17 Phila. Leg. Int. 148.

Right of third person to resist application.

A borrower who has assigned his stock for a valuable consideration to a third person will not be allowed to set off its value against his debt in a suit to foreclose so as to destroy its value in the hands of the assignee. Schober v. Accommodation Sav. Fund & Loan Asso. 35 Pa. 223.

Attaching creditors of the mortgagor may acquire such an interest in stock as to prevent its application to the payment of the debt at the demand of persons holding a junior lien on the real estate. Central Bldg. Asso. v. Schmitt, 12 W. N. C. 239.

If after the assignment of stock as collateral for a loan, a second loan is taken out, and the same stock is assigned as collateral, the borrower cannot after a judgment on the first loan apply the value of the stock towards its satisfaction. Philadelphia Mercantile Loan Asso. v. Moore, 47 Pa. 238.

Effect of special agreement.

Stock payments will not be credited on the debt if the parties have agreed that the stock is to be kept alive. Kelly v. Perseverance Bldg. Asso. 39 Pa. 148.

If the association takes an assignment of stock to apply in satisfaction of the debt, it must allow the amount which has been paid upon it. Philanthropic Bldg. Asso. v. McKnight, 35 Pa. 470.

H. P. F.

in the nature of a building and loan association. The plaintiff became a member of the association, and procured a loan therefrom, executing her note and mortgage—the latter on property on Grand Island—to secure the loan. This was in September, 1889. In 1891 she brought her suit—her husband joining therein—in the district court of Hall county, charging that she was induced by fraud to procure the loan; pleading a tender to the association of all remaining due on the mortgage; asking an acccounting of the amount justly due, and that the mortgage be canceled upon her payment into court of the amount so found. Soon after the defendant commenced suit in the same court to foreclose the mortgage. The two actions were consolidated. The court found generally for the plaintiffs in the first action, ascertaining the amount due on the mortgage as $703.06, and ordered that unless this amount should be paid in a time fixed the mortgaged premises be sold to satisfy the debt. The defendant appeals.

A portion of the argument related to the propriety of the court's finding for the plaintiffs, and the petition and proofs are attacked as insufficient to authorize the relief prayed. We cannot see how these questions are material, in the present condition of the case. The plaintiffs asked that they be permitted to pay the amount due. The defendant asked that they be required to pay the amount due. While the decree finds generally for the plaintiffs, it orders a sale of the property if the amount due is not paid within a time certain. The defendant, therefore, obtained all the relief it sought, unless the court erred in ascertaining the amount of recovery. We think this question is the only one for determination, under this condition of the record. The contract of membership in the association required the member to make certain periodical payments as assessments on the stock subscribed; certain payments to the expense fund, and certain other payments, or rather somewhat uncertain payments, to be made as called for, for the purpose of satisfying the stock of its deceased members. The contract of loan required the borrower to pay, in monthly installments, interest on the loan at the rate of 5 per cent per annum, and a "premium" of 5 per cent per annum. In ascertaining the amount due on the mortgage, the court applied the payments made upon the stock of the plaintiff as partial payments of the principal debt. The defendant claims that this was erroneous, that the loan and membership were by virtue of separate contracts, that they must be treated as distinct, that under the rules of the association the stock payments had become forfeited by delinquency in subsequent payments, and that the defendant was entitled to recover the face of the loan together with all unpaid premiums and interest. It must be here remarked that the court allowed no interest from the commencement of the action to the rendition of the decree. This was correct, provided the court properly assessed the amount of recovery, because the amount so found was less than the tender made before action was brought, which was refused by the association.

In order to determine the principal question, it will be necessary to state more particularly some of the features of this particular association. In the first place, its plan was that its stock and loans should both mature at a time certain. There was no general provision for a surrender and withdrawal from the membership, but the right to withdraw before the maturity of the stock was confined to the representatives of deceased members who might, at their option, remain in the association or withdraw. To meet payments on account of such withdrawals, the withdrawal assessments before mentioned were made. The contract of membership provided in different places, very rigidly, that in case any member failed to pay, by the time it was due, any of the various assessments, his membership should be forfeited, and all sums theretofore paid should be forfeited to the association, without right to recover or accounting therefor. The note and mortgage provided that any failure to pay any installment of the interest or premium when due should mature the whole debt. Mrs. Randall subscribed for thirteen shares of stock in September, 1889. Her note and mortgage were dated October 1, 1889, and are for $1,000. The stock was planned to mature in five years. The note was payable fifty-nine months after date. An initiation fee, with certain other charges, and all assessments, interest, and premium, were paid until and including February, 1891, when Mrs. Randall ceased to pay, and soon after brought suit. In July, 1891, and before the suit to foreclose was commenced, the association passed a resolution declaring Mrs. Randall's stock, and the payments thereon, forfeited. Under these circumstances, is Mrs. Randall entitled to have her stock payments credited upon the loan?

In the first place, it must be remembered that this association is a foreign corporation, and is not entitled to the protection which our statutes (Comp. Stat. chap. 16, §§ 145 *et seq.*) afford or attempt to afford to such corporations in this state. The events were prior to the amendment of the law referred to, in 1891, and the association has not attempted to comply with the provisions of the amendatory law in regard to foreign corporations. The validity or nature of that legislation is not, therefore, presented for consideration in this case. The cases are very numerous, relating to the respective rights of such associations and their members. A review of them would be tedious, and not very useful. A very clear statement of the result of the cases may be found in the note to *Robertson* v. *American Homestead Asso.*, 69 Am. Dec. 145. The law is there stated with abundant citations that when a member of an association becomes a borrower the transaction has been considered as so much in the nature of a loan that subsequent payments made by the member upon his stock are partial payments upon his debt; but other cases (and we think the greater weight of the modern cases) decide that payments of dues are not, *ipso facto*, payments upon the mortgage debt, and do not operate of themselves to extinguish it *pro tanto;* still the borrower has a right to so apply them, and the association may, in case of default, make such application. A proper regard for the nature of the contract, we

think, leads to the conclusion that during the currency of the debt and membership the accounts arising out of each should be kept separate, and that stock payments do not, as they are made, operate as payments on the debt; but it must not be forgotten that the object of the stock payments is ultimately to satisfy the stock, and that in the case of a borrower such payments operate ultimately to satisfy the debt. While a borrower may ultimately, if the association works successfully, become entitled to other returns upon his stock until the debt is satisfied, all payments made by him are finally applied to that purpose. We are aware that there always seems to be an effort made to obscure this relationship, and to give the transaction a different form; but whatever may be the devices of actuaries to make it appear that payments are investments simply in a profitable stock, and that the loan, in some mysterious manner, pays itself, the fact is that it is paid from the stock assessments, and that, in the contemplation of both parties, the stock assessments are to be applied sooner or later for that purpose. The right of either party to so apply them, in an organization of this character, during the currency of both loan and membership, is not here to be decided; but the association has terminated Mrs. Randall's membership by its resolution of forfeiture, and has matured the loan by its election to foreclose. This proceeding is therefore not one to determine the rights of a continuing membership, but this is a proceeding, after membership determined and the loan matured, to adjust the correlative rights and duties of the parties. In such case we think it very clear that the stock payments must be applied to the purpose for which they were principally intended, to wit, as payments on the debt. In case of associations whose shares have an uncertain maturity, elaborate calculations have sometimes to be made in order to determine the present value of the shares; but in this case, where the maturity is certain, and the plaintiff renounces all claim to profits, the face of the payments indicates the proper credits. To avoid this application of the payments, the defendant urges the forfeiture clauses of its contract. We agree with the defendant that equity will not ordinarily relieve against such forfeitures, and this rule probably extends so far that, if Mrs. Randall had not been a borrower, and her stock had been forfeited for deliquency in assessments, she might not have the affirmative aid of a court to recover for past payments; but this principle does not extend so far as to induce a court to lend its affirmative aid to enable a lender to recover the face of the debt where payments have been made under an agreement that, on certain conditions, they may be forfeited. It is more than probable that the effect of this forfeiture would be to deprive Mrs. Randall of the right to participate in any profits which have arisen on her stock; and, when given this effect, we think the contract of the parties has been enforced. If A. lend B. $1,000, payable in installments of $10 each,—B. agreeing that, if he fail to pay any installment when it comes due, all payments shall be forfeited,—and B. pay 99 of such installments, and fail to pay the one hundredth, would any court in Christendom permit A. to recover the $1,000? It is just such penalties that courts of equity have always relieved against. The treatment of penal bonds, as well as the whole doctrine of mortgages, is based upon a principle of relieving against such forfeitures, or rather refusing to assist them, and the principle which has thus prevailed in such cases for centuries is precisely applicable here. We think, therefore, that the district court proceeded properly in making the computation. In *Lincoln Bldg. & Ass. Asso.* v. *Graham*, 7 Neb. 173, it is evident this court adopted a similar view in making the computation.

The plaintiffs state in their brief that they took a cross-appeal. Aside from this statement, the record bears no evidence of such fact. This is not very material, however, because the plaintiffs state that their cross-appeal is based upon the failure of the district court to find in their favor on their plea of usury. We cannot find, on a close examination of the record, that the plaintiffs anywhere plead usury in the transaction. The decree of the district court is therefore, in all things, affirmed.

Affirmed.

Harrison, J., did not sit.

A petition for rehearing was subsequently granted in response to which on February 19, 1895, **Post, J.**, delivered the following opinion:

It is evident from the brief submitted by counsel for the appellant, that they are not familiar with the method of transacting business in this court. The fact that the opinion heretofore filed (42 Neb. 809), was not prepared by a member of the court must not be taken as an indication that the conclusion therein announced represents the views of the commissioners only. On the contrary, every question of law, and, so far as practicable, every issue of fact, is examined by all the court, both judges and commissioners; and, in accordance with our invariable rule, opinions, whether prepared by judges or commissioners, are submitted for examination and criticism by the entire membership of the court. This observation is suggested, not alone by the courteous remarks of counsel for appellant, but also by the fact that our practice, which is conceded to be an innovation upon the rule in other jurisdictions, is apparently not understood by members of the profession in our sister states. But to return to the case at bar. Not only is the judgment heretofore announced that of the court, but it is in accordance with our unanimous conclusion at the time this cause was argued and submitted.

2. A re-examination of the subject, in the light of able briefs, has tended to confirm the views stated on the former occasion. It may be conceded that the liability of a member of a building and loan association on his stock and on his loan, if he be a borrower, are entirely different, and that payments on the former are not necessarily credits on the latter. It does not follow, however, that a failure to pay interest or dues in accordance with his agreement or the by-laws of the association will in every instance *per se* amount to a forfeiture of his stock, so as to authorize a con-

fiscation of the amount paid thereon. We adopt as sound the doctrine announced in the text of Thompson on Building Associations (page 97), viz.: "If the borrower is in default, having violated the rules, he has forfeited his right to any interest profit; but he has not thereby forfeited his stock, and can apply that as a credit if he chooses." We are inclined, also, to agree with the view recently expressed by the supreme court of North Carolina in *Rowland* v. *Old Dominion Bldg. & Loan Asso.*, 115 N. C. 825, that an agreement whereby the stock of a member of a building association, held as collateral security for a loan made to the pledgeor, is to be forfeited upon default of payment of dues or interest, without allowing credit on account of payments previously made on such stock, is unconscionable, and should not be enforced by the courts of this state, although recognized as valid in the association's own state. We have not overlooked the recent case of *Southern Bldg. & Loan Asso.* v. *Anniston Loan & T. Co.* 101 Ala. 582, *ante*, 120, which certainly sustains the proposition contended for by the appellant herein. But that decision appears to rest upon the authority of *North America Bldg. Asso.* v. *Sutton*, 85 Pa. 463, overruling, as it is said, cases in that state asserting a different doctrine. However, that assumption is, we think, due to a misconception of the effect of the case last cited. According to the earlier Pennsylvania cases stock payments by a borrowing member were regarded as credits on his mortgage, reducing *pro tanto* the amount of his indebtedness to the association; and although that doctrine has been modified by *North America Bldg. Asso.* v. *Sutton*, *supra*, to the extent that payments by a borrower on account of his stock are no longer *ipso facto* credits on his mortgage, they may be still so applied at his election, as is evident from the following quotation from the case mentioned: "What was there said [referring to prior decisions of that court] is not to be regarded as laying down the rule that payment of the dues on stock *ipso facto* works an extinguishment of so much of the mortgage. The debtor may so apply it, but the payment itself is not an application of the money to the reduction of the mortgage. . . . The debtor is not compelled to give up his stock whenever suit is brought on his bond or mortgage. Such would, however, be the necessity of the case, if the law applied, against his consent, the installment paid by him upon his stock to the discharge of his indebtedness for money borrowed." See also *Watkins* v. *Workingmen's Bldg. & Loan Asso.* 97 Pa. 514; *Economy Bldg. Asso.* v. *Hungerbuehler*, 98 Pa. 258. The Alabama case is not, it seems, sanctioned either by the weight of authority or the sounder reasoning, as is demonstrated by the opinion of our Brother Irvine, above referred to.

The motion for a rehearing is accordingly denied.

Harrison, J., not sitting.

UNION PACIFIC R. CO., *Plff. in Err.*,
v.
Lars ERICKSON.

(41 Neb. L.)

*1. **The plaintiff was a section man employed by the defendant.** He was engaged in repairing the roadway, and stepped away from the track to permit a fast passenger train to pass. He stood about 12 feet from the track. As the train passed him, a large piece of coal fell from the tender, struck the ground, and, being shattered, a fragment rebounded, and struck the plaintiff, injuring him. The evidence showed that it required the full capacity of the tender to store enough coal to supply the engine during its run, and that the tender had been loaded to its full capacity from a chute without any precautions as to the safe disposition of the coal in the tender; that it was the fireman's duty to place in safety any coal found in a dangerous position. *Held*, that, under these facts, it was proper to submit the case to the jury as to whether the company had been negligent in loading the coal.

2. **While the facts justifying an inference of negligence must be established** by the evidence, and their existence must not be left to the conjecture of a jury, and while, ordinarily, negligence cannot be presumed merely from the happening of an accident, still facts may be established by circumstances, and the same facts which prove the accident may be circumstances from which the facts justifying an inference of negligence may be found to exist.

3. **In such a case evidence tending to show that it was practicable** to place railings about the top of the tenders to safely increase their capacity, and that this tender was not provided with such a railing,—*Held*, to be admissible.

4. **Employment in the service of a common master is not alone sufficient to constitute two men fellow servants** within the rule exempting the master from liability to one for injuries caused by the negligence of the other. To make the rule applicable, there must be some consociation in the same department of duty or line of employment.

(June 5, 1894.)

ERROR to the District Court for Dodge County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of defendant's servant. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **J. M. Thurston, W. R. Kelly,** and **E. P. Smith,** for plaintiff in error:

The plaintiff has entirely failed to prove any actionable negligence on the part of the defendant's employés in any respect stated in the petition, or to account for the falling or bursting of the piece of coal mentioned therein.

Mere proof of the injury, or of the immediate accident, is insufficient to establish negligence, and negligence is not to be inferred.

*Headnotes by IRVINE, C.

NOTE.—Upon the subject of who are fellow servants within the rule that the master is not liable for injury to one by another, see *note* to Dixon v. Chicago & A. R. Co. (Mo.) 18 L. R. A. 792.

Patterson, Railway Accident Law, § 373, and *note; Grossenbach* v. *Milwaukee*, 65 Wis. 35, 56 Am. Rep. 614; *Baker* v. *Madison*, 56 Wis. 380; *Brown* v. *Kendall*, 6 Cush. 292; *Rockwood* v. *Wilson*, 11 Cush. 221; *Nitro Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Burlington & M. R. R. Co.* v. *Wendt*, 12 Neb. 76; *Stevenson* v. *Chicago & A. R. Co.* 18 Fed. Rep. 498; *Morrison* v. *Phillips & C. Constr. Co.* 44 Wis. 410, 28 Am. Rep. 599; *Ladd* v. *New Bedford R. Co.* 119 Mass. 412, 20 Am. Rep. 331; *Steffen* v. *Chicago & N. W. R. Co.* 46 Wis. 259; *Wood* v. *Chicago, M. & St. P. R. Co.* 51 Wis. 196; *De Vau* v. *Pennsylvania & N. Y. Canal & R. Co.* 130 N. Y. 632; *Sorenson* v. *Menasha Paper & Pulp Co.* 56 Wis. 338; *Schultz* v. *Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881.

The court erred in allowing the plaintiff, on cross-examination of the engineer, Myers, to show that after the date of the accident railings were put around the top of the locomotive tenders belonging to the company.

Lang v. *Sanger*, 76 Wis. 71; *Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202, 36 L. ed. 405; *McClary* v. *Sioux City & P. R. Co.* 3 Neb. 44, 19 Am. Rep. 631; *Pickett* v. *Crook*, 20 Wis. 358.

Plaintiff does not say he knew the way the tender was usually loaded when it daily passed him while he was working on the right of way, but when he could have known this by observation the law presumes that he did know it. *Belm* v. *Armour*, 58 Wis. 1.

An act from which injurious consequences would not reasonably be expected or apprehended by persons of common prudence is not an act of negligence.

Wood v. *Chicago, M. & St. P. R. Co.* 51 Wis. 201; *McKee* v. *Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, 83 Iowa, 616; *Loftus* v. *Union Ferry Co. of Brooklyn*, 84 N. Y. 459, 38 Am. Rep. 533; *Sjogren* v. *Hall*, 58 Mich. 274; *Richards* v. *Rough*, 53 Mich. 212; *Atchison, T. & S. F. R. Co.* v. *Howard*, 4 U. S. App. 202, 49 Fed. Rep. 206; *Meyer* v. *Midland Pac. R. Co.* 2 Neb. 339; *Chicago & A. R. Co.* v. *Kelly*, 127 Ill. 637; *St. Louis & S. F. R. Co.* v. *Weaver*, 35 Kan. 412, 57 Am. Rep. 176.

If the plaintiff is right in his assumption that this injury arose from a defect in the construction of the tender, or in its management, obvious to himself, or which with ordinary care he might have known, then by continuing in his employment without demurrer he assumed such risk and hazard.

Chicago, R. I. & P. R. Co. v. *Lonergan*, 118 Ill. 41; *Schultz* v. *Chicago & N. W. R. Co.* 67 Wis. 620, 58 Am. Rep. 881; 14 Am. & Eng. Encyclop. Law, p. 842; Wood, Mast. & S. 845; *Minty* v. *Union Pac. R. Co.* 4 L. R. A. 409, 2 Idaho, 437.

The falling of coal sometimes from a moving or passing train was a danger incident to his employment, and his familiarity therewith must be considered as conclusively proven.

Wood, Mast. & S. §§ 326 *et seq.*; 3 Wood, Railway Law, 1452 *et seq.*; 2 Thomp. Neg. 1008; Patterson, Railway Accident Law, 342 *et seq.*; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003; *Herbert* v. *Northern Pac. R. Co.* 3 Dak. 38; *Northern Pac. R. Co.* v. *Herbert*, 116 U. S. 642, 29 L. ed. 755; *Bunt* v. *Sierra Butte Gold Min. Co.* 138 U. S. 483, 34 L. ed. 1031; *Howland* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 230; *De Forest* v. *Jewett*, 88 N. Y. 264; *Hughes* v. *Winona & St. P. R. Co.* 31 Minn. 137; *Fraker* v. *St. Paul, M. & M. R. Co.* 32 Minn. 54; *Dowell* v. *Burlington, C. R. & N. R. Co.* 63 Iowa, 629; *Chicago & N. W. R. Co.* v. *Donahue*, 75 Ill. 106; *Sweeney* v. *Central Pac. R. Co.* 57 Cal. 15; *Chicago, R. I. & P. R. Co.* v. *Lonergan*, 118 Ill. 41; *Kansas Pac. R. Co.* v. *Peavey*, 34 Kan. 472; *Schultz* v. *Chicago & N. W. R. Co.* 67 Wis. 616, 58 Am. Rep. 881; 14 Am. & Eng. Encyclop. Law, p. 842; *Ladd* v. *New Bedford R. Co.* 119 Mass. 412, 20 Am. Rep. 331; *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114; *Barton's Hill Coal Co.* v. *Reid*, 3 Macq. H. L. Cas. 266.

Had the negligence been shown to exist, and to have been that of the engineer or fireman then they were fellow servants with the plaintiff, engaged in the same general business, and under the same employers; and for that reason no recovery can be had.

Farwell v. *Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339; *Murray* v. *South Carolina R. Co.* 1 McMull. L. 385, 36 Am. Dec. 268; 24 Am. Law Rev. p. 190; *Louisville & N. R. Co.* v. *Collins*, 2 Duv. 114, 87 Am. Dec. 486; *Wright* v. *New York Cent. R. Co.* 25 N. Y. 562; *St. Louis, A. & T. R. Co.* v. *Triplett*, 11 L. R. A. 778, 54 Ark. 289; Cooley, Torts, 541–544; *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 195, 30 L. ed. 1117; 1 Addison, Torts, 565; 3 Wood, Railway Law, § 388; 2 Thomp. Neg. 1026; Beach, Contrib. Neg. 388, § 115; 2 Rorer, Railroads, 829; Pierce, Railroads, p. 361; 1 Redfield, Railroads, 5th ed. 543; Wood, Mast. & S. 321, § 455; Fraser, Mast. & S. 210; McKinney, Fellow Servants, § 75; Pollock, Torts, 85; 1 Smith, Mast. & S. 208–238; *Coon* v. *Syracuse & U. R. Co.* 5 N. Y. 492; *Brodeur* v. *Valley Falls Co.* 16 R. I. 448; *Union Pac. R. Co.* v. *Fort*, 84 U. S. 17 Wall. 553, 21 L. ed. 739; *Waller* v. *South-Eastern R. Co.* 2 Hurlst. & C. 109; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003; *Holden* v. *Fitchburg R. Co.* 129 Mass. 268, 37 Am. Rep. 343; *Whaalan* v. *Mad River & L. E. R. Co.* 8 Ohio St. 249; *Foster* v. *Minnesota Cent. R. Co.* 14 Minn. 360; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377, 28 L. ed. 787; *Pittsburg, Ft. W. & C. R. Co.* v. *Devinney*, 17 Ohio St. 198; *Kumler* v. *Junction R. Co.* 33 Ohio St. 150; *St. Louis & S. F. R. Co.* v. *Weaver*, 35 Kan. 428, 57 Am. Rep. 176; *Mealman* v. *Union Pac. R. Co.* 37 Fed. Rep. 189.

The rule as announced in *Farwell* v. *Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339, was recognized in —

Hough v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Van Wickle* v. *Manhattan R. Co.* 23 Blatchf. 422; *Rohback* v. *Pacific Railroad*, 43 Mo. 187.

The rule was also recognized in—

Armour v. *Hahn*, 111 U. S. 313, 28 L. ed. 442; *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003; *Howard* v. *Denver & R. G. R. Co.* 26 Fed. Rep. 837; *Clifford* v. *Old Colony R. Co.* 141 Mass. 564; *Keys* v. *Pennsylvania Co.* (Pa.) 1 Cent. Rep. 893; *Collins* v. *St. Paul & S. C. R. Co.* 30 Minn. 31; *Whaalan* v. *Mad River & L. E. R. Co.* 8 Ohio St. 249; *Gormley* v. *Ohio & M. R. Co.* 72 Ind.

31; *Pennsylvania R. Co.* v. *Wachter*, 60 Md. 395; *Houston & T. C. R. Co.* v. *Rider*, 62 Tex. 267; *Boldt* v. *New York Cent. R. Co.* 18 N. Y. 432; *Blake* v. *Maine Cent. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Coon* v. *Syracuse & U. R. Co.* 5 N. Y. 492; *Capper* v. *Louisville, E. & St. L. R. Co.* 103 Ind. 305; *Henry* v. *Staten Island R. Co.* 81 N. Y. 373; *Russell* v. *Hudson River R. Co.* 17 N. Y. 134; *Howland* v. *Milwaukee, L. S. & W. R. Co.* 54 Wis. 226; *Heine* v. *Chicago & N. W. R. Co.* 58 Wis. 525; *Cooper* v. *Milwaukee & P. du Ch. R. Co.* 23 Wis. 668; *Roberts* v. *Chicago, St. P. M. & O. R. Co.* 38 Minn. 218; *Brown* v. *Minneapolis & St. L. R. Co.* 31 Minn. 553; *Toner* v. *Chicago, M. & St. P. R. Co.* 69 Wis. 188; *Brown* v. *Central Pac. R. Co.* (Cal.) 7 Pac. Rep. 447; *Besel* v. *New York Cent. & H. R. R. Co.* 70 N. Y. 171; *Vattes* v. *Ohio & M. R. Co.* 85 Ill. 500; *Harvey* v. *New York Cent. & H. R. R. Co.* 88 N. Y. 481; *Holden* v. *Fitchburg R. Co.* 129 Mass. 268, 37 Am. Rep. 343; *King* v. *Boston & W. R. Corp.* 9 Cush. 112; *Van Wickle* v. *Manhattan R. Co.* 32 Fed. Rep. 278; *Gillshannon* v. *Stony Brook R. Corp.* 10 Cush. 228; *International & G. N. R. Co.* v. *Ryan*, 82 Tex. 565; *Elliot* v. *Chicago, M. & St. P. R. Co.* 3 L. R. A. 368, 5 Dak. 523.

There is and can be no question of vice-principal in this case, as no one having any control or direction over the plaintiff was guilty of or contributed to the act which caused the injury.

McAndrews v. *Burns*, 39 N. J. L. 117; *Mealman* v. *Union Pac. R. Co.* 37 Fed. Rep. 189; *Nashville & D. R. Co.* v. *Jones*, 9 Heisk. 27; *Louisville, C. & L. R. Co.* v. *Caven*, 9 Bush, 659; *Louisville & N. R. Co.* v. *Collins*, 2 Duv. 114, 87 Am. Dec. 486; *Louisville & N. R. Co.* v. *Robinson*, 4 Bush, 507; *Murray* v. *South Carolina R. Co.* 1 McMull. L. 385, 36 Am. Dec. 268; *Waller* v. *South Eastern R. Co.* 2 Hurlst. & C. 102.

On petition for rehearing.

The existing rule of the common law as to a fellow servant is not an exception to the general rule as to the master's liability to the public, but it is a rule in itself and applicable to a different relation.

Pollock, Jurisp. p. 117; *Hays* v. *Millar*, 77 Pa. 238, 18 Am. Rep. 445.

There is no liability on the part of the company in the case at bar, because there was no neglect of any of the personal duties of the master, or of any duty which by reason of the relation was due from it to its servant.

Baltimore & O. R. Co. v. *Baugh*, 149 U. S. 385, 37 L. ed. 780; *Baulec* v. *New York & H. R. Co.* 59 N. Y. 356, 17 Am. Rep. 325; *Dow* v. *Kansas Pac. R. Co.* 8 Kan. 642; *Morgan* v. *Vale of Neath R. Co.* 5 Best & S. 736.

The old rule laid down in the *Farwell Case*, *supra*, has been declared to be intact by the decision of the Supreme Court of the United States in *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772. See also *Northern Pac. R. Co.* v. *Hambly*, 154 U. S. 349, 38 L. ed. 1009; *Howard* v. *Denver & R. G. R. Co.* 26 Fed. Rep. 837; *Schlereth* v. *Missouri Pac. R. Co.* (Mo.) 19 S. W. Rep. 1184.

The injury to the plaintiff was not, within the authorities, the result of actionable negligence upon the part of the defendant. It was too remote and disconnected for any such act to constitute a cause of action in plaintiff's favor against the defendant.

Atkinson v. *Goodrich Transp. Co.* 60 Wis. 141, 50 Am. Rep. 352; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; Hutchinson, Carr. 2d ed. § 809; *Baltimore & O. R. Co.* v. *Trainor*, 33 Md. 542; *Davies* v. *Mann*, 10 Mees. & W. 546.

Messrs. **Frick & Dolezal**, for defendant in error:

Servants engaged in different departments are not fellow servants.

Chicago & N. W. R. Co. v. *Moranda*, 93 Ill. 302, 34 Am. Rep. 168; *Chicago & A. R. Co.* v. *Kelly*, 127 Ill. 637; *Indianapolis & St. L. R. Co.* v. *Morgenstern*, 106 Ill. 216; *Richmond & D. R. Co.* v. *Norment*, 84 Va. 167; *Moon* v. *Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401; *Baltimore & O. R. Co.* v. *McKenzie*, 81 Va. 71; *St. Louis & S. F. R. Co.* v. *Weaver*, 35 Kan. 412, 57 Am. Rep. 176; *East Tennessee, V. & G. R. Co.* v. *DeArmond*, 86 Tenn. 78; *Krogg* v. *Atlanta & W. P. Railroad*, 77 Ga. 102; *King* v. *Ohio & M. R. Co.* 14 Fed. Rep. 277; *Garrahy* v. *Kansas City, St. J. & C. B. R. Co.* 25 Fed. Rep. 258; *O'Donnell* v. *Allegheny Valley R. Co.* 59 Pa. 239, 98 Am. Dec. 336; *Ryan* v. *Chicago & N. W. R. Co.* 60 Ill. 171, 14 Am. Rep. 32; *Lewis* v. *St. Louis & I. M. R. Co.* 59 Mo. 495, 21 Am. Rep. 385; *Darrigan* v. *New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep 590; *Vautrain* v. *St. Louis, I. M. & S. R. Co.* 8 Mo. App. 588; *Hall* v. *Missouri Pac. R. Co.* 74 Mo. 298; *Hardy* v. *Minneapolis & St. L. R. Co.* 36 Fed. Rep. 657; *Louisville & N. R. Co.* v. *Brooks*, 88 Ky. 129; *Louisville, C. & L. R. Co.* v. *Caven*, 9 Bush, 559.

Irvine, *C.*, filed the following opinion:

Erickson was employed by the railway company as a section hand, and was engaged in his work repairing the road-bed of the railroad near Fremont, when a fast passenger train approached, and he stepped aside to let it pass. As the train passed him, a large piece of coal fell from the tender of the locomotive, struck the ground near him, and broke into smaller pieces, one of which flew towards him, striking him, and causing a fracture of the leg. He brought this action against the railroad company alleging as negligence that the piece of coal had been negligently allowed to fall from the tender while the train was running at a high rate of speed; that the coal had been negligently loaded and negligently permitted to remain on the tender in a position rendering it liable to fall and to be cast off by the motion of the train. The railway company answered, among other things denying any negligence upon its part, and alleging contributory negligence on the part of Erickson. There was a verdict and judgment for Erickson for $1,625.

Probably, to follow the order of discussion in the brief of the railway company will disclose the features of the case as well as possible. The first point made is that the evidence did not disclose any negligence on the part of the railway company or its employés. The rule of negligence has been so frequently announced by this court that it is

hardly necessary to restate it. Questions of negligence and contributory negligence are for the jury where, from the facts proved, different minds may reasonably draw different conclusions. The evidence here tends to show that Erickson, when he saw the train approaching, stepped aside until he was about 12 feet from the track, and that in so doing he pursued the course customarily resorted to by section men. There is no doubt that a large lump of coal did fall from the tender as the train passed him; that it struck the ground near the track, and, breaking into pieces, one portion thereof rebounded and struck him, causing the injury. It is quite clearly established that the lump of coal was no larger than would conveniently go into the firebox of the engine, and it may be assumed that it was proper to have a lump of such size upon the tender. The train was bound east. The run of the engine was from Grand Island to Council Bluffs, a distance of over 150 miles. Coal was loaded upon the tender at Grand Island. There was no coaling station for passenger trains between the two points. The tender of this engine would hold from ten to eleven tons, and it required that amount of coal to supply the engine during its run. The coal was loaded from a chute at Grand Island, and, according to the fireman, the tender was loaded at this time, as usual, before the engineer and fireman mounted the engine. As he states, "I found it in all ways thrown in, just as they pulled the chute down." It lay "in all shapes, upside down, every way dropped in there." From this and from all the evidence it is quite clear that in order to make the run, it was necessary to completely fill the tender; that, in order to do so, the coal was dropped in from a chute without any precautions as to its safe disposition, but the fireman testifies that it was his duty to "wet the coal down;" that for that purpose he mounted the tender before the engine started, and, if he saw any coal liable to fall from the tender, it was his duty to put it in a place of safety. According to this witness, about six tons of coal remained in the tender at the time of the accident. The train was a through train, and stopped at only a few stations. We think that this evidence fairly made a case to submit to the jury under the rule as above stated. The principal contention on the part of the railroad company is that negligence in loading the coal could not be inferred from the fact that the lump fell from the tender. There is not doubt of the general principle that negligence cannot be inferred merely from the fact that an accident happened, and it is also true that, while negligence is an inference to be drawn from the facts proved, facts warranting that inference must be proved, and the jury cannot be left to conjecture the existence of facts which might ground the inference of negligence. But facts may be established by circumstances as well as by direct testimony, and the same facts which prove the accident may, in some cases, be circumstances which establish the facts justifying an inference of negligence. So in this case. Neither fireman nor engineer saw the coal fall. It was certainly not dislodged from a place of safety by any act of theirs at the time. Erickson and the section boss did see it fall as the train passed. It is not merely a conjecture, it is a plain inference, from the fact that it fell under the circumstances, that it had been so placed upon the tender that it was in a position from which it was liable to be dislodged by the motion of the train. All the evidence shows that it was necessary to heap the coal upon the tender in order to enable it to carry sufficient to make the run. The fireman's evidence shows that no precautions were taken in loading to load it safely, and that he was charged with the duty to inspect the loading, and change the position of the pieces where they were unsafe. The method of loading accounts for the lumps being in a position of unstable equilibrium, and, unless we disregard the laws of physics, we must say that it had been left in such a position or it would not have fallen. In this connection we are cited to the case of *Schultz* v. *Chicago, & N. W. R. Co.*, 67 Wis. 616, 58 Am. Rep. 881, a case arising out of a similar accident. Portions of that decision are open to criticism, but upon the question of negligence we do not think that the conclusion was wrong, or even that it conflicted with that we reach. All that the court there held was that the facts established did not make out a case of negligence in law. The court did not say that a jury would not be justified in finding negligence from such facts. We would say the same,—that the court should not, under such facts, instruct the jury either that there was or was not negligence. This was an inference for the jury to draw.

As to contributory negligence, we can see no room for doubt. Erickson was necessarily near the track. He had never seen coal fall from tenders. He did not observe how this tender was loaded, and he was certainly far enough away to be secure from any ordinary danger to be apprehended from a passing train properly loaded.

Our attention is here directed to an assignment of error in regard to the admission of evidence to the effect that, subsequently to this accident, railings were put around the tops of tenders belonging to the company. If testimony had been directly admitted to show that fact, a question, to say the least, serious, would be presented, but the record hardly supports the assignment of error in that regard. We quote all relating to the subject: "The Union Pacific Company . . . or arrangements can be made by which there is a kind of railing around the top of the tenders, isn't there? *A.* Well, I should answer that there could be arrangements made. *Q.* Would not you answer that they have got such railing around the top of the tenders? *A.* They have at this time, but we did not then." These questions and answers were objected to. They occur in the cross-examination of the engineer, who was called by the company. They were followed by some questions, without objections, as to the purposes for which those railings were placed upon the tenders. Such evidence tended to show that they were to increase the capacity of the tender. When the questions objected

to are examined, it will be found that there was no inquiry in regard to subsequent acts of the company. The first question merely asked if it was practicable to use a railing. The second asked whether the company had not such railings around the tenders, without specifying the time. The statement that they had been placed there since the accident was the engineer's answer, and from his use of pronouns it is not clear whether he meant that all tenders had been so provided since the accident or whether he meant to say simply that his engine did not have one at that time. We do not think this testimony is open to the objection urged. The feature objected to was really introduced by the company itself upon redirect examination, as follows: "Now, with regard to this railing that Mr. Frick has spoke about, were such railings used at the time of that tender at that time, that you knew of? *A.* No, sir. *Q.* Do you know of any other passenger engine at that time? *A.* I don't remember, but I think they was putting them on. I would not say positively." The peculiar construction both of these questions and their answers still leaves the same doubt as to the meaning of the evidence. But when we consider the evidence as to the capacity of this tender, and the amount of coal required, together with the evidence just referred to, it would seem that the railings were found necessary to prevent overloading, and that the company then realized this fact. This much was certainly material, and tending to establish the negligence complained of.

The next contention is that, if the accident resulted in the manner claimed by the plaintiff, it was a matter obvious to him, and that, continuing in the employment, he submitted to the hazard thereof. But, as already stated, he never knew such an accident to happen; moreover, he knew nothing about the manner of loading the tenders. These were matters wholly foreign to that portion of the company's work in which he was engaged, and this argument will accord with the further argument made, that the company could not be held liable unless it had been informed by the previous occurrence of similar accidents that this manner of loading the tenders was dangerous. Neither argument is well founded. The former for the reason that Erickson did not know, was not bound to know, and was not in a position to know, the danger. The latter for the reason, if for no other, that it must occur to every one of ordinary judgment that the natural and probable consequence of an insecure load of coal upon the tender of an engine running at a high rate of speed might be the falling of coal therefrom, and consequent injury to persons at stations, and workmen necessarily engaged near the track. It would not require the actual happening of such event to apprise one of the danger.

The next proposition is that Erickson was a fellow servant of whoever was guilty of negligence, and that the company is therefore not liable. Upon this subject elaborate briefs have been filed upon either side, reviewing nearly all the American authorities. We shall not here undertake such a review. We are aware of the hopeless conflict existing. In fact, a study of the question must convince any one that shortly after the introduction of railways the law entered upon a slow but marked period of transition upon the subject of fellow servants. No definite result has yet been reached. Probably the leading case both in America and in England applying the doctrine of fellow servants to all the employés of a common master is that of *Farwell* v. *Boston & W. R. Corp.*, 4 Met. 49, 38 Am. Dec. 339. All the cases holding that broad doctrine seem to be based directly or indirectly upon the authority or the reasoning of *Chief Justice* Shaw in that case. It was decided in 1842 before the railway system of the country was developed, before the existence of other large corporations employing vast numbers of men engaged in the pursuit of one general object, but performing different functions, and engaged in many distinct departments. This state of affairs was then just arising, and the vast change of conditions in the relations of master and servant was then only beginning to appear. The extent of that change, and the consequences of applying old rules to new conditions could not then be foreseen. In that case, as in all others upon the subject, the reasons for the rule exempting masters from liability to servants for injuries produced by the negligence of their fellow servants are stated as two-fold: First, that such injuries must be presumed to be within the contemplation of the parties when they made their contract; and, secondly, that public policy requires the enforcement of such a rule, upon the theory that, by enforcing it, each servant is made closely observant of the acts of his fellow servants, and that the scrutiny of one another naturally tends to efficiency and care. The first reason given, where the rule is sought to be applied without discrimination to all servants of a common master, has already been completely set aside and disregarded, even by those courts in America most inclined to conservatism upon the subject. It is everywhere conceded—First that, inasmuch as a corporation can only act through agents, and all agents are servants, the logical application of the rule would discharge a corporation entirely from liability to its servants; and this gives rise to a corollary that where the negligence is that of a vice-principal, whose acts must be taken as those of the master, the rule does not apply. The recognition of this exception was necessary to preserve another rule, that, while a servant assumes the dangers incident to his employment, he does not assume dangers caused by the negligence of his master. There is as much reason for holding that a servant in entering an employment contracts with a view to possible negligence of the master, as to hold that he contracts with a view to possible negligence of the man who works beside him and upon the same footing. To illustrate by reference to railways, which probably afford as great a variety of grades in employment as any occupation, can it be logically said that a section man in the matters within the scope of his employment is less liable to err than a

conductor, superintendent, or general manager with reference to his own duties? To the writer's mind, when the first distinction was drawn between grades of servants, the force of the general rule, so far as it was based upon contract, was destroyed.

As to the second reason,—that founded upon public policy,—there is much force in the observation of *Mr. Justice* Field in *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377, 28 L. ed. 787: "It may be doubted whether the exemption has the effect thus claimed for it. We have never known parties more willing to subject themselves to dangers of life and limb because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury. The dread of personal injury has always proved sufficient to bring into exercise the vigilance and activity of the servant." Still, we concede that there may be some force to the rule so far as grounded upon public policy, and confined to servants who are, in the language of the supreme court of Illinois, "consociated by means of their daily duties, or co-operating in the same department of duty and in the same line of employment." *Chicago & N. W. R. Co.* v. *Moranda*, 93 Ill. 302, 34 Am. Rep. 168. Beyond this line we can see no force in it. When the authorities are examined, it is found that they range themselves in two general classes,—those following the opinion of *Chief Justice* Shaw, and those distinguishing between grades of employment and employés in distinct departments of service. The principal objection urged to the latter class is that, by adopting such distinction, the courts overthrow a general rule of easy application, and adopt one not susceptible of precise application, and uncertain in its results. Possibly this objection is well taken. If so, we can only say that it accords with the general spirit of the common law. Perhaps the main distinction between the civil law and the common law is that the civil law is based upon well-defined logical rules readily susceptible of ascertainment, while the common law is founded upon broader general principles, to be applied to the diversity of human affairs in such a manner as to favor individual liberty and to conform themselves to changed conditions. When the law of fellow servants was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous; they were all engaged in the pursuit of a simple and common undertaking. Now things have changed. Large enterprises are conducted by persons or corporations employing vast numbers of servants, divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions. We are not prepared in this case to propose any set rule for always determining when two employés are fellow servants within the meaning of the rule, and when they are not, nor are we required for present purposes so to do. Erickson was a section man. He was employed, with several others, to keep the road-bed and the track in repair The fireman was employed to fire the engine, and perform certain duties in connection with the operation of trains. Some one was employed at Grand Island to load the tenders with coal. With either the fireman or this third person Erickson had nothing in common except that he drew his pay from a common source, and that, in a broad sense, they were all carrying out parts of a vast transportation business. Erickson had no control over either of the others, no opportunity of judging of their competency, no supervision of their specific acts, and only by adopting the broadest rule as announced by *Mr. Justice* Shaw could we hold them to be fellow servants. This rule we are not prepared to adopt. We hold, on the contrary, that employment in the service of a common master is not alone sufficient to constitute two men fellow servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other, and that to make the rule applicable there must be some consociation in the same department of duty or line of employment. For the purposes of this case we are content to follow the opinion of *Mr. Justice* Miller in *Garrahy* v. *Kansas City, St. J. & C. B. R. Co.*, 25 Fed. Rep. 258, where in the light of quite recent decisions and of the mature judgment of the Supreme Court of the United States in *Chicago, M. & St. P. R. Co.* v. *Ross*, *supra*, he held that persons occupying such relations were not fellow servants within the meaning of the rule.

The other errors discussed in the briefs relate to the giving and refusal of instructions. If we are right in the conclusions reached on the branches of the case already discussed, there was no error in the instructions, as those given and refused, so far as they are complained of, simply relate to those questions

Judgment affirmed.

Rehearing denied.

COLORADO SUPREME COURT.

Albert H. JONES, *Plff. in Err.*,
v.
ASPEN HARDWARE CO.

(.....Colo.....)

1. **Neither a de jure nor a de facto corporation can exist** where the articles are not filed in the office of the secretary of state and the fee therefor paid as required by Sess. Laws 1887, p. 406, which expressly prohibits the exercise of any corporate powers until this is done.

2. **Members of a company which fails in an attempt to acquire corporate existence** must be given the advantages as well as the liabilities of a partnership.

(May 20, 1895.)

ERROR to the District Court for Pitkin County to review a judgment in favor of plaintiff in an action brought to recover possession of certain goods which had been taken by a United States marshal under attachment against one A. B. Eads. *Reversed.*

Statement by **Hayt**, *Ch. J.*:

The Aspen Hardware Company instituted this suit in the court below for the purpose of recovering a stock of goods seized by the United States marshal under a writ of attachment issued out of the circuit court of the United States at the suit of Joseph A. Thatcher, plaintiff, against one A. B. Eads. The only question in the case has reference to the corporate capacity of defendant in error, it not having filed, prior to the attachment levy, its certificate of incorporation with the secretary of state, as required by statute. Sess. Laws 1887, p. 406. In the district court judgment was entered in favor of the company. The statute reads as follows: "Every corporation, joint-stock company or association, incorporated by or under any general or special law of this state, or by or under any general or special law of any foreign state or kingdom, or of any state or territory of the United States beyond the limits of this state, having capital stock divided into shares, shall pay to the secretary of state for the use of the state, a fee of ten dollars, in case the capital stock which said corporation, joint-stock company, or association is authorized to have, does not exceed one hundred thousand dollars; but, in case the capital stock thereof is in excess of one hundred thousand dollars, the secretary of state shall collect the further sum of ten (10) cents on each and every thousand dollars of such excess, and a like fee of ten cents on each thousand of the amount of each subsequent increase of stock. The said fee shall be due and payable upon the filing of the certificate of incorporation, articles of association, or charter of said corporation, joint-stock company or association, in the office of the secretary of state; and no such corporation, joint-stock company or association shall have or exercise any corporate powers or be permitted to do any business in this state until the said fee shall have been paid; and the secretary of state shall not file any certificate of incorporation, articles of association, charter or certificate, of the increase of capital stock, or certify or give any certificate to any such corporation, joint-stock company, or association, until said fee shall have been paid to him. But this act shall not apply to corporations not for pecuniary profit, or corporations organized for religious, educational, or benevolent purposes." Acts 1887, p. 406, § 1.

Messrs. **Butler & McKinley** and **Wilson & Salmon**, for plaintiff in error:

The defendant can question the corporate existence and capacity of plaintiff.

A party "dealing with a corporation is not estopped to deny its legal existence where there is a failure to comply with an express condition precedent, requiring certain acts to be done before the corporation can be considered in existence or its transaction possessing validity.

Humphreys v. *Mooney*, 5 Colo. 282; *Abbott* v. *Omaha Smelting & Ref. Co.* 4 Neb. 416; *Mokelumne Hill Canal & Min. Co.* v. *Woodbury*, 14 Cal. 427, 73 Am. Dec. 658; *Bates* v. *Wilson*, 14 Colo. 166; *Buffalo & A. R. Co.* v. *Cary*, 26 N. Y. 77.

There must be a colorable, legal, corporate existence, to give life as a corporation *de facto*.

Whatever is germane to the subject-matter expressed in the title or naturally related to or connected therewith is within the requirement that an act of the legislature shall embrace but one subject, which shall be clearly expressed in the title.

Golden Canal Co. v. *Bright*, 8 Colo. 144; *Clare* v. *People*, 9 Colo. 126; *People* v. *Goddard*, 8 Colo. 437; *People* v. *Scott*, 9 Colo. 432; *Dallas* v. *Redman*, 10 Colo. 297; *Edwards* v. *Denver & R. G. R. Co.* 18 Colo. 59.

The law requires some things of parties who may have the legal right to incorporate, and these prerequisites must be complied with before the corporation can be organized legally. Unless it be so organized, and in strict accordance with the law authorizing its creation or formation, it cannot exercise the function of a corporation.

Empire Mills v. *Alston Grocery Co.* (Tex.) 12 L. R. A. 366.

Messrs. **W. W. Cooley** and **H. W. Clark** for defendant in error.

Hayt, *Ch. J.*, delivered the opinion of the court:

In November, A. D. 1889, Shepard & Bowles, as copartners, were doing a general hardware business in the city of Aspen, and during that month made a sale of their business, stock in trade, good-will, etc., to A. B. Eads, the consideration for this transfer

NOTE.—The present case seems to be a novel one in respect to the rights or privileges as partners of the members of an attempted corporation. As to their liabilities as partners, see *note* to Rutherford v. Hill (Or.) 17 L. R. A. 549.

being certain real estate and the assumption of certain indebtedness of the firm of Shepard & Bowles. Eads being unable to comply with the terms of the agreement, a new arrangement was made between the parties, and an organization known as the Aspen Hardware Company was formed by Bowles, Eads, and one Kettler. The articles of incorporation provided that the affairs of the company should be managed by a board of three directors, naming Bowles, Eads, and Kettler as such directors for the first year. It was the evident intention of the parties that the company should be duly and legally incorporated, and to this end they caused to be executed articles of incorporation on the 16th day of November, 1889, in due form, and immediately filed the same with the clerk and recorder of Pitkin county. For some reason, not explained by the evidence, the articles were not filed in the office of the secretary of state until after the levy of the writ of attachment hereinafter referred to, and not until the day upon which this suit in replevin was instituted, but whether before or after the commencement of this action does not clearly appear from the evidence. After the articles were filed with the county clerk, the board of directors held a meeting, elected officers, caused capital stock to be issued, etc., Eads being present and participating in this meeting, at which Bowles was elected president, Eads vice-president, and Kettler secretary and treasurer. Thereupon, Eads, for a valuable consideration, sold and transferred the property to the new organization, and Mr. Bowles from that time forward conducted the business for the Aspen Hardware Company, selling goods and purchasing new goods in the corporate name. Eads, soon after the sale, left the town of Aspen, and did not return, nor personally take part in the business at that point, but continued as a director and vice-president of the company, and retained a portion of his stock, although he had sold a part of it prior to the levy of the writ of attachment. The business was thus continued until July 31, 1890, when a suit was commenced by Thatcher, plaintiff, against A. B. Eads, and the property in question levied upon as the property of the defendant in that suit, and this action of replevin was immediately instituted to recover possession of the property, or its value.

The controversy in this case is narrowed to the single question of the capacity of defendant in error to take title to the property in controversy as a corporation at the time of the attempted transfer by Eads, it not having at that time filed its articles of incorporation with the secretary of state, or paid the fee for such filing, as provided by the Statute of 1887. Sess. Laws 1887, p. 406. This is the first time the effect of this statute has been before this court for consideration, although in *Edwards* v. *Denver & R. G. R. Co.*, 13 Colo. 59, the constitutionality of a somewhat similar act was under review. That act was attacked upon several grounds, among which was that it was void because the subject was not clearly expressed in the title, the title being "An act to provide for the formation of corporations;" and it was held that this title was sufficient to cover legislation requiring a fee to be paid for filing the certificate of incorporation, under the principle that the same was germane to the general subject expressed in the title, and that legislation fixing the amount of such fee, time of payment, etc., was not obnoxious to the constitutional provision with reference to titles. The Act of 1887, now under consideration, is entitled "An act to fix the fees to be collected by the secretary of state for incorporation and certain other privileges." The body of the act, however, relates entirely to the fee to be charged and collected for filing certificates of incorporation, articles of association, charters, or increase of capital stock of joint-stock companies, and in addition thereto, provides that no such corporation, joint-stock company, or association "shall have or exercise any corporate powers or be permitted to do any business in this state, until the said fee shall have been paid. . . ." This provision is so closely allied to the general subject, which is the fixing of fees for filing certificates of incorporation, etc., that under the uniform rule of decisions in this state it must be held to be a proper matter for legislation under the title selected. *Golden Canal Co.* v. *Bright*, 8 Colo. 144; *People* v. *Goddard*, 8 Colo. 432; *People* v. *Scott*, 9 Colo. 423; *Dallas* v. *Redman*, 10 Colo. 297; *Edwards* v. *Denver & R. G. R. Co. supra; Re Pratt*, 19 Colo. 188.

In this case the Aspen Hardware Company claims title to the property in dispute in its corporate capacity, and not as a copartnership. It is admitted that the fee for filing the certificate of incorporation with the secretary of state was not paid prior to the levy of the writ of attachment, and that the certificate was not filed in the office of the secretary of state until about the time of the bringing of the present action, the evidence leaving the exact time uncertain. It is to be remembered that in this case the corporation is the party plaintiff, and it may be stated as a general rule that when a company relies on its corporate capacity it assumes the burden of establishing such capacity. The language of the act is plain and unambiguous. It reads, "No such corporation . . . shall have or exercise any corporate powers. . . ." The taking of title to property was certainly the exercise of a corporate power, and as such prohibited by the express terms of the statute. This is not controverted by counsel for appellee, but it is contended that Eads, having assisted in the organization of the corporation, and having sold to it the hardware stock, is estopped from denying the corporate existence of the company, and that the attaching creditor took the property subject to the same estoppel. The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence. The rule is stated as follows by Morawetz on Private Corporations (sec. 750), it having been first announced in the case of *Brouwer* v. *Appleby*, 1 Sandf. 158: "A defendant who has contracted with a corporation *de facto* is never permitted to allege any defect in its organization as affecting its capacity to con-

tract or sue, but that all such objections, if valid, are only available on behalf of the sovereign power of the state." It is also well settled that to constitute a *de facto* corporation there must be either a charter or a law authorizing the creation of such a corporation, with an attempt in good faith to comply with its terms, and also a user or attempt to exercise corporate powers under it. *Duggan* v. *Colorado Mortg. & Investment Co.* 11 Colo. 113; *Bates* v. *Wilson*, 14 Colo. 140. A *de facto* corporation can never be recognized in violation of a positive law. This principle, which seems to be supported by all the authorities, is thus stated by Morawetz on Private Corporations (sec. 758): "If the formation of a corporate association is not only prohibited by this general rule of the common law, but is also in violation of some principle of morality or public policy, or a positive statutory prohibition, the parties forming such association will not be legally bound by their agreement of membership, and the courts will not recognize the association, either as among its members or against third parties." To recognize the defendant as a *de facto* corporation, would, as we have seen, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power.

One object of this statute is to restrict the organization of "wild-cat" corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the over-capitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate power, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act. The taking of title to the property in controversy being the exercise of a corporate power, and, as such, forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company as a corporation cannot be upheld. Having failed to comply with the statute, the Aspen Hardware Company, at the time of the transfer, was neither a *de jure* nor a *de facto* corporation, but simply a voluntary association of individuals in the nature of a copartnership.

There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisites to the exercise of such powers. "In respect to the former, any material omission will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question. In respect to the latter, the incorporation is responsible only to the government in a direct proceeding to forfeit the charter." *Abbott* v. *Omaha Smelting & Ref. Co.* 4 Neb. 416. The omission in this case is of acts of the former class, and consequently there was no corporation *in esse* at the time of the levy of the writ, while the evidence leaves it in doubt if this omission had been supplied prior to the institution of the present action. But although it could not at the time exercise any corporate power, this did not prevent the Aspen Hardware Company from taking title to the property as a copartnership. In other words, under the conceded facts, the company was not at the time a corporation, but this will not preclude it from maintaining the action as a copartnership. The plaintiff sues as the Aspen Hardware Company, and the facts alleged show that such company was a copartnership, and not a corporation. There is nothing in the name of the association to conflict with this as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. Cook, Stock & Stockholders, § 238; *Chaffe* v. *Ludeling*, 27 La. Ann. 607. This principle has been applied in many cases where parties have set up the defense of individual nonliability by reason of having directed an incorporation to be had, but where none in fact was consummated. Cook, Stock & Stockholders, §§ 233, 234; *Abbott* v. *Omaha Smelting & Ref. Co. supra; Empire Mills* v. *Alston Grocery Co.* (Tex.) 12 L. R. A. 366. The law having cast this liability upon the members of the association, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a copartnership. The cause will accordingly be reversed and remanded, with directions to the district court to allow the parties to amend their pleadings as they may be advised.

Reversed.

PENNSYLVANIA SUPREME COURT.

A. M. CARPENTER'S APPEAL.

(.....Pa.....)

One killing his ancestor for an estate which would naturally come to him under the statutes of descent and distribution may take it under a constitution prohibiting attainders working corruption of blood and forfeiture of estate and statutes providing no penalty for murder except death by hanging.

(July 18, 1895.)

APPEAL by one of the collateral heirs of James Carpenter, deceased, from a decree of the Orphan's Court for Juniata County confirming the report of an auditor distributing

NOTE.—For the authorities upon the question how far statutes will be regarded as having abrogated the maxim that one cannot profit by his own wrong, see *note* to Shellenberger v. Ransom (Neb.) 25 L. R. A. 564.

See also 31 L. R. A. 67; 44 L. R. A. 305.

the decedent's estate which allowed it to go to a descendant who had murdered deceased for the purpose of securing the estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. Howard Neely** and **W. U. Hensel,** for appellant:

The widow and heir could not inherit, and any transfer of their inheritance to their counsel or other transfer carries nothing with it, but the estate is to be inherited by Carpenter's collateral relatives.

The time-honored legal principles and maxims, the authority of the courts of England, the judicial decisions of the courts of the state of New York, the wisdom of the Supreme Court of the United States, and the better-considered judgment of the highest court in Nebraska, support the claim of the collateral relatives.

A man can take no advantage of his own wrong, nor will he be allowed to found any claim upon his own iniquity.

Broom, Legal Maxims, p. 297.

Of the rules of reason, the first to be considered in the interpretation and construction of statute laws "are the very principles and sound conclusions of foreign learning, taken out of the heart and, as it were, the very bowels of theology, grammar, logic; also of philosophy, physics, politics, economics, ethics; for, although in our annals and books of reports these are not mentioned nor spoken of in the same terms, yet the things which you shall find there are of such sort, for the sparks of all sciences are covered in the ashes of the law."

Finch, Common Law, 1759, chap. 3.

Conscience is a universal judge, holding its assizes at every man's door, sitting in judgment upon every act and every omission, partaking of a moral quality, to condemn or to approve.

Dill. Laws & Jurisp. Lecture 1, p. 4.

In *Mutual L. Ins. Co. of New York* v. *Armstrong,* 117 U. S. 591, 29 L. ed. 997, it was held that proof that the assignee of a policy of life insurance caused the death of the assured by felonious means is sufficient to defeat a recovery on the policy.

In *Riggs* v. *Palmer,* 5 L. R. A. 340, 115 N. Y. 506, the majority of the court of appeals of that state followed this principle and declared a doctrine that rules the distribution here.

If the beneficiary attempts the life of the testator he cannot take under the testament.

2 Cushing, Civil Law, ed. 1850, 78, 84; Pothier, Succession, chap. 1, § 2, art. 4; 4 Toullier, Droit Civil Francais, 114, 134; 4 Duranton, 111; 3 Marcade, 42; Code Napoleon, art. 727; 1 Domat, Civil Law, pt. 2, title 1, §§ 3, 2551, 2552.

It will not be construed, no matter what the language, that the legislature intended to allow a public mischief or wrong.

Smith v. *People,* 47 N. Y. 330; Code Civ. Proc. 866; *Anderson* v. *Appleton,* 2 L. R. A. 175, 112 N. Y. 104; Broom, Legal Maxims, 1920; Finch, Common Law, 75,76; Noy, Maxims, 9th ed. 2; Doctor and Student, 18th ed. 15, 16.

General terms should be so limited in their application as not to lead to injustice, oppression, or to absurd consequence.

Endlich, Interpretation of statutes, §§ 258, 267; *Perry County* v. *Jefferson County,* 94 Ill. 214; *Smith* v. *People, supra; Com.* v. *Kimball,* 24 Pick. 370, 35 Am. Dec. 326.

In *McKinnon* v. *Lundy,* 24 Ont. Rep. 133, it was held by the high court of justice for Ontario, chancery division, that by his felonious act in killing his wife, the husband absolutely precluded and debarred himself from obtaining any benefit under her will or out of her estate, and his grantee, his brother, could stand in no better position than himself.

Cleaver v. *Mutual Reserve Fund L. Ass.* [1892] 1 Q. B. 147.

McKinnon v. *Lundy, supra,* was reversed by the higher court, wholly on the ground that in that case the conviction having been of manslaughter only, the element of intent or motive upon which we here rely, was necessarily absent.

McKinnon v. *Lundy,* 21 Ont. App. Rep. 560.

This court has declared that statutory rights just as broad as those given by the intestate laws may be forfeited.

Strouse v. *Becker,* 88 Pa. 190, 80 Am. Dec. 474; *Huey's App.* 29 Pa. 219; *Freeman* v. *Smith,* 30 Pa. 265; *Emerson* v. *Smith,* 51 Pa. 90, 88 Am. Dec. 566; *Gilleland* v. *Rhoads,* 34 Pa. 187; *Imhoff's App.* 119 Pa. 355; *Hatch* v. *Mutual L. Ins. Co.* 120 Mass. 550, 21 Am. Rep. 541.

The statutory provision that "every" deed and conveyance which shall not be recorded in a certain period after execution shall be deemed fraudulent and void as against any subsequent purchaser or mortgagee, for valuable consideration without notice, protects only bona fide purchasers and mortgagees for a valuable consideration without notice.

Union Canal Co. v. *Young,* 1 Whart. 410; *Hoffman* v. *Strohecker,* 7 Watts, 86, 32 Am. Dec. 740; *Jaques* v. *Weeks,* 7 Watts, 261.

In cases in which fraud is the fact out of which the cause of action arises, the commencement of the statutory term will be postponed until the discovery of this fact.

Mitchell v. *Buffington,* 10 W. N. C. 361; *Jones* v. *Conoway,* 4 Yeates, 109; *Ferris* v. *Henderson,* 12 Pa. 49, 51 Am. Dec. 580; *Pennock* v. *Freeman,* 1 Watts, 401; *Notes* to *Shellenberger* v. *Ransom* (Neb.) 25 L. R. A. 564; *Lewey* v. *H. C. Fricke Coke Co.* 28 L. R. A. 283, 166 Pa. 536.

The Act of June 13, 1836, section 16, Pub. Laws, 546, empowering any two justices of the peace of a county to issue orders of removal to remove a pauper from one district to another, though couched in the most general terms, is interpreted to prevent justices who reside in the removing township from issuing such order, because, to permit this would contravene the principle of the law that no man can be a judge in his own case.

Upper Dublin v. *Germantown,* 2 U. S. 2 Dall. 213, 1 L. ed. 353; *Washington Overseers* v. *Beaver Overseers,* 3 Watts & S. 548, *McVeytown* v. *Union Twp.* 5 Watts & S. 434.

An act which provided that a mayor should not be, by reason of his office, ineligible as a town councillor or alderman would make him ineligible when he acted in the judicial capacity of returning officers at the election; for it would not be a just construction of the language used, or legitimate inference from it, that the legislature had intended to repeal by

a mere side wind the principle of the law that a man cannot be a judge in his own case.

Queen v. *Owens*, 2 El. & El. 86; *Queen* v. *Tewkesbury*, L. R. 3 Q. B. 639; *Reg.* v. *Milledge*, L. R. 4 Q. B. Div. 332; *Queen* v. *Coaks*, 3 El. & Bl. 249.

So, when an act gave to "all" persons of full age and sound mind the right to dispose of their real estate, as well by last will and testament in writing as otherwise, by an act executed in his or her lifetime, it was held not to extend to married women on the ground that it was "not the design of the legislature" to alter the relation between husband and wife, or the legal effect of that relation by mere implication from language not expressing such intention.

Osgood v. *Breed*, 12 Mass. 530; *Wilbur* v. *Crane*, 13 Pick. 284.

A charitable provision for the support of "maimed" soldiers would not extend to soldiers who had been maimed in the service of a foreign state, or in punishment for a crime.

Duke, Charitable Uses, 134.

Nor does an act imposing penalty for cutting timber extend to the case of a co-tenant.

Wheeler v. *Carpenter*, 107 Pa. 271.

An act rendering parties in interest competent to testify on their behalf will not affect the established rule that an indorser of a negotiable instrument shall not be a witness to invalidate the instrument to which he is a party.

John v. *Pardee*, 109 Pa. 545.

Where an act declared that no "interest or policy of law" should exclude a party or person from being a witness in any civil proceeding, it was held that a married woman was not thereby made a competent witness to bastardize her issue.

Tioga County v. *South Creek Twp.* 75 Pa. 433; Endlich, Interpretation of Statutes, §§ 127, 128 *et seq.*

It has been said that acts of congress are to be construed by the rules of the common law.

Rice v. *Minnesota & N. W. R. Co.* 66 U. S. 1 Black, 358, 17 L. ed. 147; *Jones* v. *Dexter*, 8 Fla. 276. See also, *Scaife* v. *Stovall*, 67 Ala. 237; *Howe* v. *Peckham*, 6 How. Pr. 229; Endlich, Interpretation of Statutes, § 127; Sutherland, Stat. Constr. §§ 139, 290; Bishop, Written Law, § 142.

A fundamental principle of the common law will not be repealed by a statute which is simply prescribing a rule of action upon an entirely different subject, with reference to which the principle may have only occasional and accidental application, when the statute does not notice the general principle and there is nothing in the subject to suggest the question of the applicability to it of such principle.

Notes to *Shellenberger* v. *Ransom* (Neb.) 25 L. R. A. 564.

Refusing to presume the repeal of a fundamental principle of the common law by a statute upon a subject which requires no notice to be taken of such principle is vastly different from engrafting an exception upon a statute.

Ibid.

A statute which made in unqualified terms an act criminal or penal would be understood as not applying where the act was excusable or justifiable on grounds generally recognized by law.

Endlich, Interpretation of Statutes, § 129; 1 Bishop, New Crim. L. §§ 291*b*, 304, pp. 165, 181.

Messrs. **J. C. Bucher, W. H. Sponsler,** and **J. N. Keller,** for appellee:

Where a statute makes no exceptions, the courts can make none.

Endlich, Interpretation of Statutes, § 17, p. 23; *Pittsburgh* v. *Kalchthaler*, 114 Pa. 552.

It is the duty of all courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing.

Pennsylvania R. Co. v. *Pittsburgh*, 104 Pa. 553; *Everett* v. *Wells*, 2 Scott, N. R. 531.

The rule of interpretation is, in respect to the intention of the legislature, that when the language is explicit, the courts are bound to seek for the intention, in the words of the act itself, and they are not at liberty to suppose, or to hold, that the legislature intended anything different from what their language imports.

Potter's Dwarr. Stat. 146.

Where the words of a statute are plainly expressive of an intent, the interpretation must be in accordance therewith.

Bradbury v. *Wagenhorst*, 54 Pa. 180; *Shellenberger* v. *Ransom*, 25 L. R. A. 564, 41 Neb. 631.

The legislature has the power to determine and declare the rules of public policy and in regard to the devolution of the property of an intestate, they did so declare it in the plain enactment of our statute of descent.

While the argument of the appellant fitly applies to remedial statutes, it can have no application to our statute of descent which neither recognizes a mischief nor provides a remedy but is itself a legislative declaration of a rule of public policy.

The legislature evidently intended that there should be no exception to the statute, because knowledge of the civil law and of the Code Napoleon, "where, by an exception, they who murdered their ancestors are excluded from the inheritance," is imputed to the legislature at the time of the enactment of our statute.

If there should be such an exception to the statute, it is the province of the legislature to amend it and not of the courts to engraft it.

Endlich, Interpretation of Statutes, § 5, p. 8; *Woodbury* v. *Berry*, 18 Ohio St. 456; *Priestman* v. *United States*, 4 U. S. 4 Dall. 30, 1 L. ed. 728; *Pennsylvania R. Co.* v. *Pittsburgh*, 104 Pa. 553; *Clingan* v. *Mitcheltree*, 31 Pa. 25.

The highest courts of several sister states have decided similar questions and in every instance the court refused to engraft an exception upon a statute of descent.

Owens v. *Owens*, 100 N. C. 242; *Deem* v. *Millikin*, 6 Ohio C. Ct. Rep. 357; *Shellenberger* v. *Ransom*, 25 L. R. A. 564, 41 Neb. 631; *McKinnon* v. *Lundy*, 24 Ont. Rep. 132, reversing 21 Ont. App. Rep. 560.

Green, J., delivered the opinion of the court:

The penalty for murder in the first degree in Pennsylvania is death by hanging. No confiscation of lands or goods, and no depri-

vation of the inheritable quality of blood, constitutes any part of the penalty of this offense. The Declaration of Rights (art. 1, § 18, of the Constitution of the state) declares that "no person shall be attainted of treason or felony by the legislature," and by section 19 it is provided that: "No attainder shall work corruption of blood, nor, except during the life of the offender, forfeiture of estate to the commonwealth. The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death; and if any person shall be killed by casualty, there shall be no forfeiture by reason thereof." These are provisions of the organic law which may not be transcended by any legislation. Inasmuch as the prescribed penalty for murder is death by hanging (Crimes Act 1860, § 75; Brightly's Purdon's Dig. p. 429, pl. 142), without any forfeiture of estate or corruption of blood, it cannot be said that any such consequences can be lawfully attributed to any such offense. In other words, our constitution positively prohibits any attaint of treason or felony by the legislature, and any corruption of blood by reason of attainder, or any forfeiture of estate, except during the life of the offender. The legislature has never imposed any penalty of corruption of blood or forfeiture of estate for the crime of murder, and therefore no such penalty has any legal existence. In the case now under consideration it is asked by the appellant that this court shall decree that in case of the murder of a father by his son the inheritable quality of the son's blood shall be taken from him, and that his estate, under the statute of distributions, shall be forfeited to others. We are unwilling to make any such decree, for the plain reason that we have no lawful power so to do. The intestate law in the plainest words designates the persons who shall succeed to the estates of deceased intestates. It is impossible for the courts to designate any different persons to take such estates without violating the law. We have no possible warrant for doing so. The law says, if there is a son, he shall take the estate. How can we say that, although there is a son, he shall not take, but remote relatives shall take, who have no right to take it if there is a son? From what source is it possible to derive such a power in the courts? It is argued that the son who murders his own father has forfeited all right to his father's estate, because it is his own wrongful act that has terminated his father's life. The logical foundation of this argument is, and must be, that it is a punishment for the son's wrongful act. But the law must fix punishments; the courts can only enforce them. In this state no such punishment as this is fixed by any law, and therefore the courts cannot impose it. It is argued, however, that it would be contrary to public policy to allow a parricide to inherit his father's estate. Where is the authority for such a contention? How can such a proposition be maintained when there is a positive statute which disposes of the whole subject? How can there be a public policy leading to one conclusion when there is a positive statute directing a precisely opposite conclusion? In other words, when the imperative language of a statute prescribes that upon the death of a person his estate shall vest in his children, in the absence of a will, how can any doctrine, or principle, or other thing, called "public policy," take away the estate of a child, and give it to some other person? The intestate law casts the estate upon certain designated persons, and this is absolute and peremptory; and the estate cannot be diverted from those persons, and given to other persons, without violating the statute. There can be no public policy which contravenes the positive language of a statute. The supposed analogies derived from the fraudulent abuse of a contract right, or an actual notice accomplishing the same result as a constructive notice under the recording acts, or the waiver of an exemption act by one entitled to its benefits, and other instances of a similar character, are no analogies at all. There may be reasons why a statutory provision may not be applicable in a given case when the purpose of the statute is subserved in a different mode, or dispensed with altogether; but here is a contingency which does not depend upon any act, or omission to act, of any person whatever. It is the act of the law which casts the descent of estates, and that is not regulated or controlled by the acts, the follies, the frauds, or the crimes of any individual persons. Unless the law itself contains some qualification which changes its application, or provides some disqualification by way of penalty, it must have its way, because there is no other way.

If we consider the question upon authority, we find the great preponderance of judicial decision in accord with the views above expressed. In view of the dreadful and unnatural character of the crime of the son in this case, it is not a matter of wonder that the precise question has never yet been before us, and that there is a dearth of authority among the tribunals upon such a subject. In the case of *Owens* v. *Owens*, 100 N. C. 242, Sarah Owens was convicted of being an accessory before the fact to the murder of her husband. She was sentenced to imprisonment for life, and while undergoing her sentence she petitioned the court to assign her dower in the real estate of her deceased husband. In allowing her petition the court said: "We are unable to find any sufficient grounds for denying to the petitioner the relief she demands, and it belongs to the lawmaking power alone to prescribe additional grounds of forfeiture of the right which the law itself gives to a surviving wife. Forfeitures of property for crime are unknown to our law, nor does it intercept for such cause the transmission of an intestate's property to heirs and distributees, nor can we recognize any such operating principle." In *Deem* v. *Milliken*, 6 Ohio C. Ct. Rep. 357, the facts were that Elmer L. Sharkey murdered his mother for the purpose of succeeding to the title to her real estate. He was convicted and hanged after having mortgaged the real estate. The collateral heirs contended that by reason of his crime no interest had passed to the son and therefore the mortgages were void. In

the opinion the court said: "The statute of descent neither recognizes mischief nor provides a remedy. It is a legislative declaration of a rule of public policy. . . . There should be no difficulty in distinguishing this case from those in which the rights asserted have no foundation other than the fraudulent or unlawful conduct of a contracting party, nor from those in which attempts are made to use the process of the courts for fraudulent purposes. . . . The natural inference is that when the legislature incorporated the general rule into the statute, and omitted the exception, they intended that there should be no exception to the rule of inheritance prescribed." In the case of *Shellenberger* v. *Ransom*, 41 Neb. 681, 25 L. R. A. 564, the supreme court of Nebraska, reversing its own former decision reported in 31 Neb. 61, 10 L. R. A. 810, held that the murderer did not forfeit the estate of his daughter, whom he had murdered in order that he might acquire the title to her real estate. At the first hearing the court followed the decision of a majority of the New York court of appeals in *Riggs* v. *Palmer*, 115 N. Y. 506, 5 L. R. A. 340, but changed their ruling on the re-argument in 1894. In delivering the second opinion the court says: "The conclusion reached by the reasoning of *Judge* Earle in *Riggs* v. *Palmer*, as well as that in this case, was based very largely on that species of judicial legislation above characterized as 'rational construction.' If courts can thus enlarge statutory enactments by construction, it may be that the references in the majority opinion in *Riggs* v. *Palmer*, to the provisions of the civil law were very apt as illustrating how, by rational interpretation, our statute should be made to read. . . . The legislature has spoken. Their intention is free from doubt, and their will must be obeyed. 'It may be proper,' it has been said in Kentucky, 'in giving a construction to a statute, to look to the effects and consequences, when its provisions are ambiguous, or the legislative intent is doubtful. But when the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial, action.'" The case of *Riggs* v. *Palmer* was decided by a divided court, but it was a case of devise, and not of descent, and involved only the question of permitting a devisee to take title under the will of a testator whom he had murdered in order to get the property devised to him by the will. While we do not agree to the conclusion reached, the case only involved the operation of a private grant, and therein differs widely from a case in which the statutory law of descent is in question. In the former case it was only necessary to set aside an instrument between private parties on the ground of fraud, but in the latter it would be necessary to set aside the positive law of the state. The case of *Mutual L. Ins. Co. of New York* v. *Armstrong*, 117 U. S. 591, 29 L. ed. 997, cited for the appellant, merely decided that proof that the assignee of a policy of life insurance caused the death of the assured by felonious means was sufficient to defeat a recovery on the policy. *Mr. Justice* Field, delivering the opinion, said: "It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he has willfully fired," thus showing that the decision was based entirely upon the ground of fraud upon a contract right. The case of *Cleaver* v. *Mutual Reserve Fund L. Asso.* [1892] 1 Q. B. 147, also cited for appellant, is of an entirely similar character. It was an attempt to enforce a trust in favor of one who had brought about the conditions essential to its fulfillment by killing the person whose death made it operative. *Lord Justice* Fry said in the opinion: "If no action can arise from fraud, it seems impossible to suppose it can arise from felony or misdemeanor." In the argument for the appellant no case is cited which presents the very question which arises on this record. But there are at least the three cases above cited which do involve the same question as this, and they are all decided against the contention of the appellant. These authorities appear to us to be far more in consonance with sound principle than those which are seemingly, though not really, of an opposite tendency, and they certainly harmonize with the views we entertain. The assignments of error are not sustained.

The decree of the court below is affirmed, and the appeal is dismissed, at the cost of the appellant.

Williams, *J.*:

I concur in the disposition of so much of the fund as is derived from the estate of Mrs. Carpenter, who was convicted only of being an accessory after the fact to the murder of her husband. I dissent from the disposition of so much of it as is derived from the alleged estate of the son, who was convicted of murder, and whose crime was committed for the purpose of securing the property of his father. The son could not, by his own felony, acquire the property of his father, and be protected by the law in the possession of the fruits of his crime.

IOWA SUPREME COURT

Lizzie T. PRICE
v.
Henry PRICE and Wife, *Appts.*

(.....Iowa.....)

1. **Wrongfully depriving a wife of the affection, companionship, and society of her husband** gives her a right of action for damages, under Code, § 2211, which authorizes a wife to maintain actions "for the preservation and protection of her rights and property as if unmarried."

2. **Evidence of conversations between a husband and his father** and between the latter and the wife's mother may be proved in an action for alienating the husband's affections in order to show the weight and probable effect of a property inducement held out to abandon her.

3. **That both defendants jointly sued for alienating a husband's affections** and who are shown to have acted in concert were not present at a conversation with one of them respecting an inducement held out to the husband will not prevent the admission of the evidence of such conversation.

(October 8, 1894.)

APPEAL by defendants from a judgment of the District Court for Polk County in favor of plaintiff in an action brought to recover damages for the alleged wrongful alienation from her of the affections of plaintiff's husband. *Affirmed.*

Statement by **Robinson, J.:**

Action at law to recover damages alleged to have been caused by the wrongful acts of defendants, in injuring the reputation and good name of plaintiff, and in depriving her of her husband and of a home, in causing her husband to ill-use her, and for the loss of social position, and for mental and physical suffering. There was a trial by jury, and a verdict for the plaintiff in the sum of $4,000. A motion for a new trial was overruled on condition that one half the amount should be remitted. That was done, and from the judgment rendered against them for the remainder the defendants appeal.

Messrs. **C. C. Nourse** and **C. L. Nourse**, for appellants:

No such action can be sustained under the laws of this state. No right of action existed at common law. None is given by the statute, therefore none exists.

Peters v. *Peters*, 42 Iowa, 184; *Duffies* v. *Duffies*, 8 L. R. A. 420, 76 Wis. 374; *Calloway* v. *Laydon*, 47 Iowa, 456, 20 Am. Rep. 489; *Mulford* v. *Clevell*, 21 Ohio St. 196; *Freese* v. *Tripp*, 70 Ill. 497; *Doe* v. *Roe*, 8 L. R. A. 833, 82 Me. 503; *Westlake* v. *Westlake*, 34 Ohio St. 632, 32 Am. Rep. 397.

At common law an action based upon parental influences over the wife was discountenanced by the courts.

Hutcheson v. *Peck*, 5 Johns. 196.

Where the statute of the state, in relation to the right of married woman, confer upon her no additional rights, but merely relate to the form of action for the maintenance of rights recognized by the common law, no action of the wife will lie for the loss of the society of her husband. Such is the character of our statute.

Peters v. *Peters*, 42 Iowa, 184; *Calloway* v. *Laydon*, *supra*; *Miller* v. *Miller*, 78 Iowa, 177; *Tuttle* v. *Chicago, R. I. & P. R. Co.* 42 Iowa, 518, 48 Iowa, 286; *Mowry* v. *Chaney*, 43 Iowa, 609.

Where the right of action has been recognized in the wife, it has only been sustained in the following cases:

1. Where the husband has committed adultery by the enticement of another woman, thereby justifying a separation, and

2. Where the husband has been induced to abandon the wife by charges of adultery or want of chastity, made by defendant against her, and believed by her husband.

This is an action against defendants for a joint tort. No conspiracy or previous agreement to commit the wrong complained of is alleged or charged in the petition. The evidence conclusively shows that the defendant, Mary Price, the mother, said and did nothing in this interview Saturday, or during the difficulty between George and his father on Sunday morning, to which any objection whatever can be made.

The evidence shows that whatever was said or done wrongfully on these occasions was not the joint act of defendants.

La France v. *Krayer*, 42 Iowa, 145; *Ennis* v. *Shiley*, 47 Iowa, 552; *Engleken* v. *Webber*, 47 Iowa, 558; *Richmond* v. *Shickler*, 57 Iowa, 488; *Flint* v. *Gauer*, 66 Iowa, 696.

The district court erred in permitting evidence as to the pecuniary circumstances of defendant.

Guengerech v. *Smith*, 34 Iowa, 348.

Before any damages can be recovered, actual malice must be proved, and it is not to be inferred merely from a wrongful act, however willfully or knowingly committed.

Curl v. *Chicago, R. I. & P. R. Co.* 63 Iowa, 417; *Jones* v. *Marshall*, 56 Iowa, 789; *Inman* v. *Ball*, 65 Iowa, 543.

Messrs. **Bishop & Wilcoxen** and **Hume & Dawson** for appellee.

Robinson, J., delivered the opinion of the court:

On the 14th day of April, 1888, the plaintiff married George L. Price, who is a son of the defendants. She alleges that soon after the marriage the defendants, by means of conversations and letters, communicated to her husband false, defamatory, and slanderous matter concerning her character and reputation, and made threats and promises to him for the express purpose and with the malicious intent to destroy the affection existing between them, and to excite ill-will and ha-

NOTE.—In connection with the above case, see the authorities collected in Warren v. Warren (Mich.) 14 L. R. A. 545, and *note*.

See also 32 L. R. A. 623; 38 L. R. A. 242; 40 L. R. A. 549; 43 L. R. A. 114; 47 L. R. A. 610.

tred on his part for her, for the purpose of causing him to abandon her; that the defendants offered him valuable property and large sums of money if he would abandon her, and threatened to disinherit him if he did not do so; that in consequence of the course pursued by the defendants her husband became angry with and jealous of her, and cursed, choked, wounded, and otherwise ill-treated her, and abandoned her, in destitute circumstances, when alone among strangers and without help, and deprived her of her home, of the social intercourse and confidence of her friends and of her husband, and his care, love, confidence, protection, help, and support, and caused her mental and physical pain and suffering.

1. The judgment in this case was rendered in June, 1891, and the appeal was taken in the next September. At the October term, 1892, of this court, the appellee filed a motion to affirm the judgment of the district court on the ground that the appeal had been abandoned. That motion was supported and resisted by affidavits and a partial transcript of the record, and was submitted with the cause for our determination. It is claimed that when the motion was filed the appellants had neither filed nor served any abstract or argument; but, to excuse their failure to comply with the rules in that respect, they show that negotiations for a settlement had been pending for some time, and that a stipulation of settlement had been signed by the parties to the action. A complete abstract has since been filed, with an argument for each party, and the cause is now ready for determination on the merits. The stipulation of settlement was not signed by all the parties interested in the judgment, and never became effectual to end the case. There is now no reason for disposing of it otherwise than on the merits, and the motion to affirm is overruled.

2. The court charged the jury, in effect, that the plaintiff was entitled to recover "for the loss, if any, she has sustained, of the love, affection, companionship, support, and society of her husband," wrongfully caused by the defendants. The appellants insist that no action for such loss can be maintained under the laws of this state, that no right of action on such grounds existed at common law, and that none is given by the statutes of this state. The authorities are not in accord in regard to the rights of the wife at common law. It was said in *Duffies* v. *Duffies*, 76 Wis. 374, 8 L. R. A. 420, that the common law gave to the wife no cause or right of action for the loss of the society and support of her husband in a case of this kind. That conclusion was based largely upon the fact that under the common law the title to the personal property of the wife was vested in the husband; that he was entitled to her labor, or the proceeds of it; and that an injury to her was, in contemplation of the law, an injury to him alone. In *Dos* v. *Roe*, 82 Me. 503, 8 L. R. A. 883, the right of the wife to maintain an action for the alienation of her husband's affections, and for depriving her of his comfort, society, and support, was denied. But in *Bennett* v. *Bennett*, 116 N. Y. 584, 6 L. R. A. 553, it was said that at common law the right of action for a wrong committed on a married woman belonged to her, and, although it was necessary for her husband to join in an action to recover damages caused by it, yet it was in effect her action. An elaborate discussion of authorities bearing on this question will be found in *Westlake* v. *Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397. The tendency of legislation in this country is towards making husband and wife equal in law, giving to each the rights possessed by the other, and the legislation of this state is designed to accomplish that end, in most respects. Section 2211 of the Code provides that "a wife may receive the wages of her personal labor and maintain an action therefor in her own name, and hold the same in her own right, and she may prosecute and defend all actions at law or in equity for the preservation and protection of her rights and property as if unmarried." Section 2562 is as follows: "A married woman may in all cases sue and be sued without joining her husband with her, to the same extent as if she were unmarried, and an attachment or judgment in such actions shall be enforced by or against her as if she were a single woman." Other provisions of the statute give to a married woman the right to acquire and dispose of both real and personal property to the same extent and in the same manner that the husband can property held by him in his own right, and provide that either the husband or wife owning property in the possession or under the control of the other may maintain an action therefor in the same manner and to the same extent as though unmarried. The wife is liable for civil injuries which she commits, and her husband is not responsible therefor, except in cases where he would be jointly liable if the marriage relation did not exist. The property of each is exempt from the debts of the other, excepting in a few cases, and the wife may contract and incur liabilities which may be enforced by and against her as though she were unmarried. Code, §§ 2202, 2204, 2205, 2212, 2213. It is said in *Foot* v. *Card*, 58 Conn. 1, 6 L. R. A. 829, that from time immemorial the law has regarded the right of the husband "to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation," and that husband and wife have equal rights, in this: that each owes to the other the fullest possible measure of conjugal affection and society. In this state the husband is entitled to the earnings of the wife, when she is not engaged in business on her own account, and is required to provide for the wife a reasonable support, according to their rank and station in society. *Thill* v. *Pohlman*, 76 Iowa, 639; *Van Doran* v. *Marden*, 48 Iowa, 188. But the marriage state is not one entered into for the purpose of labor and support alone. Considerations of the highest character, as the comfort and happiness of the parties to the marriage contract, and the welfare of their children, give to each the right to the affection, companionship, and society of the other, and whoever wrongfully deprives either of that right may be

held responsible. As it is a valuable property right when due to the husband, it must be so regarded when due to the wife. That being true, the recovery by her of damages caused by its loss, as well as for loss of support, is authorized by section 2211 of the Code. Nor is the right of recovery by the wife limited to cases where the loss is wrongfully caused by charges affecting her chastity, as suggested by the appellants. Our conclusion is not only in harmony with and authorized by the legislation of this state, but it finds support in numerous decisions of courts of other states. *Westlake* v. *Westlake*, and *Bennett* v. *Bennett*, *supra*; *Holmes* v. *Holmes*, 133 Ind. 386; *Haynes* v. *Nowlin*, 129 Ind. 581, 14 L. R. A. 787; *Seaver* v. *Adams*, 66 N. H. 142; *Foot* v. *Card*, 58 Conn. 1, 6 L. R. A. 829; *Warren* v. *Warren*, 89 Mich. 123, 14 L. R. A. 545; Cooley, Torts, 228, *note*. In *Peters* v. *Peters*, 42 Iowa, 182, it was held that the wife cannot maintain an action against her husband for damages caused by an assault and battery, and that section 2211 of the Code refers to and authorizes actions against parties other than the husband. The case of *Calloway* v. *Laydon*, 47 Iowa, 456, arose under a statute enacted to regulate the sale of intoxicating liquors. The facts involved in those cases were in legal effect so unlike those involved in this case that the opinion in neither of those cases can properly be regarded as in conflict with the conclusion we have reached in this case.

3. The appellants contend that the verdict was not sustained by the evidence, and that it is contrary to the charge of the court. At the time of their marriage the plaintiff was 23 and her husband was 19 years of age. She was a dressmaker, and had done considerable work, but her health was not good. She had made her home with her mother and a younger brother in Des Moines, but it appears that her mother was in debt, her household goods mortgaged, and that they had but scanty means of support. After the marriage the plaintiff and George made their home with her mother, but in a short time they all went to the home of the defendants, in the same city, with some expectation of living there for a time. Trouble soon arose between them and the defendant Henry Price, and they sought another place of residence. There is irreconcilable conflict in the evidence, but we are of the opinion that the jury were authorized to find that the material facts were substantially as follows: The defendants never fully approved the marriage of the plaintiff to their son. During the few days that the two families were together at the home of the defendants, Henry Price complained that plaintiff's health was not good; and that she would soon be a burden to his son; and that plaintiff and her mother had not disclosed to him their financial condition, and the state of plaintiff's health, before the marriage. He stated that he thought the plaintiff and George should separate; that it would be better if George were free, for in that case he would have a part of the estate, but he did not intend that any of his money should go outside of his family. For several months after their marriage, George lived a part of the time with the plaintiff and her mother, and a part of the time with defendants. He worked for several different firms and persons, and contributed something to the support of the plaintiff, but he did not remain long with any one employer. The defendants were active during that time in trying to induce him to leave the plaintiff. In the fall of 1888, George made his home most of the time with the defendants, meanwhile visiting the plaintiff occasionally. About the 1st of December he went south and finally to Keokuk, and there secured work in a hotel. For about a month after he left Des Moines the plaintiff did not hear from him, or know where he was; and when she applied to defendants for information they professed to be as ignorant as she was in regard to him, although they corresponded with him, and knew where he was and what he was doing. On the 2d day of January, 1889, George wrote to his wife, expressing much affection for her, and asking if she wished to be with him. Her answer appears to have been prompt, as he wrote to her again three days later acknowledging the receipt of a telegram and a letter from her. His second letter was affectionate in terms, and in it he expressed a desire for her to be with him, said he would send for her in a few weeks, and cautioned her not to tell any one where she was going, mentioning especially his own family. He wrote other letters of the same character, but the plaintiff soon joined him in Keokuk. They lived together there until about the 4th of February, 1889, when he left her. During the first part of the time they were in Keokuk, George was kind and affectionate to the plaintiff, and they lived happily together. He received letters from the defendants during that time, and finally received one which the plaintiff did not read. When that was received, George told the plaintiff he was going to leave her, as the defendants wished him to do. He left the next day, but before going she obtained from him, without his knowledge, and kept, several letters he had received from the defendants. After an absence of a few days he returned, and demanded the letters. She refused to surrender them, and he used profane language to her, seized her, struck her, choked her, knocked her down, threatened to kill her if she did not produce the letters, and said he wished he had minded his father before and left her. He then left her in Keokuk, without means, and with a board bill for himself and her unpaid. She finally paid the bill, and reached the home of her mother, in Des Moines, and commenced this action. Since that time he has called on her once or twice, and has written a few letters to her, asking her to return to him. Letter-press copies of them were taken by him, and there is little doubt that they were written for the purposes of this litigation. His conduct toward his wife has been most unmanly, and we are satisfied that, to a considerable extent, it was caused by the unwarranted interference of the defendants. The evidence in regard to the influence which the defendants exercised over their son while he and

the plaintiff were together at Keokuk, to induce him to leave her, is not at all clear and satisfactory. But we are satisfied that the defendants had for months been endeavoring to separate the plaintiff and her husband, and we think the jury were authorized to find that the separation was accomplished by letters he received from them at Keokuk. His statements at the time he left her were to that effect, and his course cannot be attributed to any other probable cause. Two juries have found for the plaintiff, and the evidence is such that we are of the opinion that we should not disturb the judgment for lack of evidence to support it.

4. Objection is made to the ruling of the court in admitting evidence in regard to conversations between George and his father, and between his father and the mother of plaintiff, when the two families were together at the home of defendants. We think the evidence was properly received as tending to explain the relation of the parties to the suit, and the motives which induced them to act. Objection is also made to evidence, to show the property owned by defendant Henry Price. The evidence was properly admitted, not to enhance the amount of recovery, but to enable the jury to judge more accurately of the weight and probable effect of the property inducement which the defendants held out to their son to abandon the plaintiff.

5. It is said that a fatal objection to all the evidence is that this action is against the defendants for a joint wrong, and that whatever of a wrongful nature was said or done by the defendants was not said or done jointly. We do not think this claim is sustained by the evidence. While it is true that each defendant did not participate directly in all of the conversations and acts of the other, yet there was evidence which tended to show that they acted in concert, and to accomplish a common object,—the separation of their son from the plaintiff.

6. What we have said disposes of the controlling questions in the case. Others, including some based upon portions of the charge given, and the refusal of the court to give instructions asked, have been presented in argument, and carefully examined. We do not regard them as of sufficient importance to be stated at length. It is sufficient to say that we do not find in them any reason for disturbing the judgment of the district court.

It is therefore affirmed.

Rehearing denied.

MINNESOTA SUPREME COURT.

Edmund SHERWOOD, *Respt.*,
v.
Roger S. POWELL, *Appt.*

(.....Minn.....)

***Where it appears from a complaint in an action for libel** based on an allegation in a pleading in another action, that the defamatory allegation was wholly gratuitous, irrelevant, and immaterial; that it was well known by defendant to be false and untrue; that it was published without cause or justification, and with express malice,—it is not privileged.

(June 27, 1895.)

APPEAL by defendant from an order of the District Court for St. Louis County overruling a demurrer to the complaint in an action brought to recover damages for the alleged publication of a libel. *Affirmed.*

The facts are stated in the opinion.

Mr. **Roger S. Powell,** appellant, *in propria persona:*

The complaint shows on its face that the alleged libelous matter as published was a publication absolutely privileged according to the great weight of authorities.

Townshend, Slander & Libel, 3d ed. § 221; *Thorn* v. *Blanchard*, 5 Johns. 508; *Wilson* v. *Sullivan*, 81 Ga. 238; *Strauss* v. *Meyer*, 48 Ill. 385; *Bartlett* v. *Christhilf*, 69 Md. 219.

*Headnote by COLLINS, J.

NOTE.—For *note* on libel in pleadings, see Randall v. Hamilton (La.) 23 L. R. A. 649.

Messrs. **J. B. Arnold and Edmund Sherwood,** *in propria persona*, for respondent:

Privilege in all cases is subject to two conditions:

First. The words must be spoken or written in good faith.

Hodgson v. *Scarlett*, 1 Barn. & Ald. 240; *Ring* v. *Wheeler*, 7 Cow. 725; *Jennings* v. *Paine*, 4 Wis. 361; *Bradley* v. *Heath*, 12 Pick. 163, 22 Am. Dec. 418; *Quinn* v. *Scott*, 22 Minn. 462; *Brook* v. *Montague*, Cro. Jac. 90; *Smith* v. *Howard*, 28 Iowa, 51; *Mower* v. *Watson*, 11 Vt. 536, 34 Am. Dec. 704; *Torrey* v. *Field*, 10 Vt. 353; 2 Starkie, Ev. 467, 468; *Johnson* v. *Brown*, 13 W. Va. 71; *Warner* v. *Paine*, 2 Sandf. 195; *Lanning* v. *Christy*, 30 Ohio St. 115, 27 Am. Rep. 431.

Second. The words must be relevant or pertinent to the issue.

Marsh v. *Ellsworth*, 36 How. Pr. 532; 2 Saunders, Pl. & Ev. 801, 802; Starkie, Slander & Libel, chap. 10; *Bradley* v. *Heath*, *supra*; *Remington* v. *Congdon*, 2 Pick. 310, 13 Am. Dec. 431; *Hoar* v. *Wood*, 3 Met. 193; *Hodgson* v. *Scarlett*, 1 Holt, 621; *McLaughlin* v. *Cowley*, 127 Mass. 316; *Garr* v. *Selden*, 4 N. Y. 91.

And the question of good faith and relevancy or pertinency is for the jury.

White v. *Nicholls*, 44 U. S. 3 How. 266, 11 L. ed. 591; *Smith* v. *Howard*, 28 Iowa, 51; *Somervill* v. *Hawkins*, 3 Eng. L. & Eq. 503; *Mayo* v. *Sample*, 18 Iowa, 306; *Howard* v. *Thompson*, 21 Wend. 330, 34 Am. Dec. 238; *White* v. *Carroll*, 42 N. Y. 161, 1 Am. Rep. 508; *Wyatt* v. *Buell*, 47 Cal. 625; *Rainbow* v. *Benson*, 71 Iowa, 301; *Chaffin* v. *Lynch*, 84

Va. 884; *Todd* v. *Hawkins*, 8 Car. & P. 88; *Dada* v. *Piper*, 41 Hun, 254; *Wright* v. *Woodgate*, 2 Cromp. M. & R. 578, Tyrw. & G. 12; *Fairman* v. *Ives*, 5 Barn. & Ald. 642; *Robinson* v. *May*, 2 Smith, 8; *Flint* v. *Pike*, 4 Barn. & C. 484; *Bromage* v. *Prosser*, Id. 247; *Blake* v. *Pilford*, 1 Moody & R. 198; *Parmiter* v. *Coupland*, 6 Mees. & W. 105; *Thompson* v. *Shackell*, 1 Moody & M. 187; *Gilbert* v. *People*, 1 Denio, 41, 43 Am. Dec. 646; *Buddington* v. *Davis*, 6 How. Pr. 401.

Libels in pleadings are actionable when the allegations complained of are false or made without probable cause.

Benning v. *Rielle*, Mont. L. Rep. 6 Q. B. 365; *Weil* v. *Israel*, 42 La. Ann. 955; *Hyde* v. *McCabe*, 100 Mo. 412.

Collins, J., delivered the opinion of the court:

Appeal from an order overruling a general demurrer to a complaint in an action for libel. The language complained of was set forth, used, and published of and concerning this plaintiff in an answer interposed by defendant in a former action between these same parties. Appellant contends that the alleged libelous matter was an absolutely privileged publication, because it was set forth and published in a pleading in a judicial proceeding, and that the rule of law is that under no circumstances can defamatory words published or spoken of a party in the course of such a proceeding be made the basis of an action for libel or slander. An efficient administration of justice requires that in the use of language much latitude must be given in legal proceedings, but we cannot indorse so broad a rule, although it is not without support in the books. It seems to be well established in the English courts that counsel, parties, and witnesses are given free rein in pending litigation, and are absolutely exempted from liability to an action for defamatory words spoken or published of a party in the course of legal proceedings. A rule which tolerates and encourages gratuitous, immaterial, and malicious attacks upon a litigant, and excuses and justifies them, simply affords an opportunity for evilly disposed persons to vilify and calumniate, under the guise of an honest effort to secure the proper administration of justice. The doctrine which prevails abroad has not commended itself to the judiciary of this country, and it has been qualified by the American courts so that statements, verbal or written, made in the course of judicial proceedings, must at least be pertinent and material to the case, to be privileged. *Hoar* v. *Wood*, 3 Met. 193. This qualified rule was subsequently approved in *Rice* v. *Coolidge*, 121 Mass. 393, 23 Am. Rep. 279; *McLaughlin* v. *Cowley*, 127 Mass. 316. See also, *White* v. *Nicholls*, 44 U. S. 3 How. 266, 11 L. ed. 591; *Gilbert* v. *People*, 1 Denio, 41, 43 Am. Dec. 646; *Hyde* v. *McCabe*, 100 Mo. 412; *Whitney* v. *Allen*, 62 Ill. 472.

Referring to some expressions in the cases last cited, as to the effect of a bona fide belief, based on reasonable grounds, in the pertinency and materiality of a statement or allegation in an affidavit or pleading, it is well to say that we are now considering a demurrer to a complaint from which it is apparent that the alleged libel was wholly gratuitous, irrelevant, and immaterial, and in which complaint it is averred that the libelous matter was well known by defendant to be false and untrue, that it was published without cause or justification, and with express malice towards this plaintiff. We have stated that the allegation or paragraph in the answer complained of was irrelevant and immaterial. The statements did not relate or pertain to any matter in issue between the parties, and, although purporting to be pleaded as a counterclaim, it utterly failed to state even the substance of a cause of action against the plaintiff.

Order affirmed.

WASHINGTON SUPREME COURT.

STATE of Washington, *Respt.*,
v.
Newel S. BARR, *Appt.*

(.....Wash.....)

1 The right to fix a loaded gun in a building so that it will be discharged on forcing open the front door and kill a person attempting to enter is a question of fact or mixed fact and law for the jury.

2. An information charging that defendant purposely killed a person named is not insufficient because there was no intent to kill any particular person but merely to kill any one who might attempt to enter a cer-

NOTE.—*Liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments.*

I. *The general doctrine of liability.*
II. *Liable as for homicide.*
III. *When considered as a nuisance.*
IV. *The property owner's or the trespasser's act.*
V. *The question of notice.*
VI. *Act held legal.*
VII. *English cases.*

I. *The general doctrine of liability.*

When it is said that a man may rightfully use as much force as is necessary for the protection of his person or property, the rule is subject to the most important modification that he shall not, except in extreme cases, endanger human life or cause great bodily harm. State v. Morgan (1842) 25 N. C. 186, 198, 38 Am. Dec. 714.

The law not allowing the taking of human life, except for the necessary prevention of a crime, which if committed would be punished by the law with death. Gray v. Combs (1882) 7 J. J. Marsh. 478, 23 Am. Dec. 421.

For it is not every right of person and still less of property that can lawfully be asserted, or every wrong that may rightfully be redressed by extreme remedies. State v. Morgan, *supra*.

tain building, under a statute requiring the fact to be stated but making an information sufficient against such an attack unless the defendant could be misled to his injury.

3. The right to prove the good character of an accused is properly confined to a few years previous to the crime without allowing proof of his reputation long before in boyhood days.

(March 25, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Whatcom County convicting him of murder in the second degree. *Affirmed.*

The facts are stated in the opinion.

Mr. **E. P. Dole,** for appellant:

There is no question but that a man may lawfully set spring guns or any other dangerous traps in his dwelling house or store, to protect his house at night-time from burglars, but he must see to it that they are so arranged as not to inflict injury upon those who go there for lawful purposes, and seek admission in the usual and lawful modes.

Wood, Nuisances, 2d ed. p. 147.

It is not easy to see how the mere act of setting spring guns on his own premises by the defendant can be holden unlawful in itself.

Ilott v. *Wilkes*, 3 Barn. & Ald. 304; *State* v. *Moore*, 31 Conn. 479, 83 Am. Dec. 159; Cooley, Torts, 2d ed. p. 194, and cases cited.

A person cannot, because a wrong has been done to him, commit some other wrong for the purpose of repairing the injury, but must endeavor to obtain redress in a lawful manner. Ibottson v. Peat (1865) 3 Hurlst. & C. 644, 649, 34 L. J. Exch. 113.

A person is not permitted, for the protection in his absence of property against a mere trespasser, to use means endangering the life or safety of a human being, whatever he may do, where the entry on his premises is to commit a felony or breach of the peace. Loomis v. Terry (1837) 17 Wend. 496, 31 Am. Dec. 306.

Proper regard must be had for life and the persons of others, and individuals using deadly weapons and dangerous implements must so use them that injury to others may not be inflicted. Hooker v. Miller (1873) 37 Iowa, 613, 18 Am. Rep. 18.

It is inhuman to catch a man by means which may maim him or endanger his life, and as far as human laws can go, it is the object of the English law to uphold humanity and the sanctions of religion. Bird v. Holbrook (1828) 4 Bing. 628, 1 Moore & P. 607.

For human life is not to be sported with by the use of fire arms. State v. Hardie (1878) 47 Iowa, 647, 29 Am. Rep. 496, 498.

Therefore trespassers and other inconsiderable violators of the law are not to be visited by barbarous punishments or prevented by inhuman inflictions of bodily injuries. Hooker v. Miller, *supra*.

The wrong or guilt of the trespasser or thief if not such as to justify the injury if inflicted directly, cannot be justified because inflicted indirectly and by the assisting agency of the wrongdoer. State v. Moore (1863) 31 Conn. 479, 83 Am. Dec. 159; Johnson v. Patterson (1840) 14 Conn. 1, 35 Am. Dec. 96, 97.

If by the rules of the common law the defendant could not, if present, have discharged the guns which he placed in his shop by his own direct agency, against a thief who had broken and entered for the purpose of stealing, he could not place and leave them so that the thief, if he entered, would discharge them against himself. State v. Moore, *supra*.

For although a man may rightfully use as much force as is necessary for the protection of his personal property, yet he must not, except in extreme cases, endanger human life or do great bodily harm; killing being only justifiable to save life or limb, or prevent a great crime, or to accomplish a necessary public duty. State v. Patterson (1873) 45 Vt. 308, 12 Am. Rep. 208.

The rule being subject to the above important modification. State v. Morgan (1843) 25 N. C. 186, 38 Am. Dec. 714, 718; Carroll v. State (1853) 23 Ala. 29, 58 Am. Dec. 282, 284; Noles v. State (1855) 26 Ala. 31, 62 Am. Dec. 711, 713.

The preservation of human life and of limb and member from grievous harm being of more importance to society than the protection of property. Simpson v. State (1877) 59 Ala. 1, 31 Am. Rep. 7.

One may keep and use such instruments and no other as the same necessary degree of force will justify. A dog is an instrument for protection; a ferocious one is a dangerous instrument, and the keeping him on the premises to protect them against trespassers is unlawful upon the same principle that setting spring guns or concealed spears or placing poisoned food, is unlawful. Woolf v. Chalker (1862) 31 Conn. 121, 131, 81 Am. Dec. 175.

And although the rules of the common law recognized a right in every man to defend his property as well as person and habitation, by taking the life of the aggressor as a natural right, yet they limit and restrain the exercise of that right to the prevention of a certain class of forcible and atrocious crimes, of which breaking in a shop in the night is not one at common law. State v. Moore (1863) 31 Conn. 479, 83 Am. Dec. 159.

If the act of the trespasser is punishable as a misdemeanor that fact does not demand greater violence or more dangerous means to secure protection than if the same act was regarded as a mere trespass and not a crime. In other words, it requires no more violence to protect property from a trespasser when there is a statute punishing him criminally than it would in the absence of such enactment. Hooker v. Miller (1873) 37 Iowa, 613, 18 Am. Rep. 18.

The rule *in pari delicto* affording no protection in a civil action to a party who has control of dangerous implements and negligently uses them or places them in a situation unsafe to others, whereby another without knowledge thereof is injured, although at the time in the commission of a trespass. *Ibid.*

In setting a spring gun the defendant violates the law and becomes liable for injuries sustained, under the doctrine that all injuries inflicted by one while acting in violation of the law will support an action in favor of the injured party against the perpetrator. *Ibid.*

In the absence of any statutory provision making the offense of breaking and entering a shop in the night season burglary, and by the rules of common law, a man may not take life in prevention of such a crime. State v. Moore (1863) 31 Conn. 479, 83 Am. Dec. 159.

The common law independent of statute not authorizing the taking of life for the purpose of preventing a crime such as the breaking and entering of a shop in the night for the purpose of stealing therefrom, the offense not being a burglary at common law; in Connecticut, however, such action is justified, the statute in that state making the offense burglary. *Ibid.*

It being the duty of the owner of the premises to prevent the entry thereon by means not fatal if he can do so consistently with his own safety.

To prevent burglary he can use such instruments, and homicide, through them, of a burglar would be justifiable.

2 Whart. Crim. Law, § 1025; *Gray* v. *Combs*, 7 J. J. Marsh. 478, 23 Am. Dec. 431.

The right of self-defense, in case of this kind, is founded on the law of nature, and is not, nor can be, superseded by any law of society.

2 Whart. Crim. Law, § 1019*a*.

In order to constitute murder, it is necessary that there must have been a specific intent or purpose to kill.

Without a direct and positive allegation of such purpose, the indictment is fatally defective.

Blanton v. *State*, 1 Wash. 268.

The evidence must conform to the allegations.

Distler v. *Dabney*, 3 Wash. 202.

Messrs. **Thomas G. Newman** and **C. W. Howard**, for respondent:

Whether in setting this gun defendant did what he had a right to do or not is not wholly an abstract question of law.

Aldrich v. *Wright*, 53 N. H. 398, 16 Am. Rep. 347.

Defendant is not being tried as to his abstract right to set a gun, but is being tried for the killing of John Erickson, and to successfully defend must show, not that he had an abstract right to set a gun, but that he had a

Brown v. State (1892) 55 Ark. 593, citing Pond v. People (1860) 8 Mich. 177; Carroll v. State (1853) 23 Ala. 28, 31, 58 Am. Dec. 282; Noles v. State (1855) 26 Ala. 31, 62 Am. Dec. 711, 713; State v. Patterson (1873) 45 Vt. 308, 12 Am. Rep. 208.

So a man must not set traps of a dangerous description in a situation to invite his neighbor's dogs, and as it were to compel them by their instinct to come into the traps. Townsend v. Wathen (1808) 9 East, 277.

The malicious intention of the defendant may be considered and the jury are not confined to the actual damages sustained. Sears v. Lyon (1818) 2 Stark. 317.

The English rule expressly authorizes, not only the destruction of all kinds of animals, but of human life. Johnson v. Paterson (1840) 14 Conn. 1, 35 Am. Dec. 96, 97.

The principles upon which the English doctrine is established are the prevention of intrusion upon property, every proprietor being allowed to use such force as is absolutely necessary to vindicate his rights. Ilott v. Wilkes (1820) 3 Barn. & Ald. 304; Johnson v. Patterson, *supra*.

Yet the principles on which the decisions in that country purport to rest are not sustainable or applicable here. Woolf v. Chalker (1863) 31 Conn. 121, 131, 81 Am. Dec. 175.

The English rule as established by the case of Ilott v. Wilkes (1820) 3 Barn. & Ald. 304, is inapplicable in the state of Connecticut, the ordinary protection of fences as required by statute, and redress by impounding and suits at law, being found sufficiently effectual for almost any sort of intrusion on real estate. Johnson v. Patterson, *supra*.

Yet the English act authorizing the setting of spring guns is declaratory as to a part and prohibitory as to a part,—declaratory as to the setting of spring guns without notice, the word "declaratory" being expressly introduced; prohibitory as to setting spring guns, even with notice, except in dwelling houses by night. Bird v. Holbrook (1828) 4 Bing. 628, 1 Moore & P. 607.

In Aldrich v. Wright (1873) 53 N. H. 398, 16 Am. Rep. 339, 347, the court stated that on the subject of defending a man's property in his absence by spring guns, man-traps, or other engines calculated to destroy human life, or inflict grievous bodily harm, the English courts turned a question of fact into a question of law and were not successful in their efforts to prescribe adequate rules for determining the reasonable necessity of such engines in the varying circumstances of different cases.

The error of the English courts was partially corrected by the Acts of 7 & 8 George IV., chap. 18, §§ 1-4, and the Act 24 & 25 Vict., chap. 100, § 31, making it a misdemeanor to set such engines, except in a dwelling house for the protection thereof in the night, and excepting such gun or trap as may have been or may be usually set with the intent of destroying vermin. *Ibid.*

A person passing with a dog through a wood in which he knows dog spears are set, has no right of action against the owner of the wood for the death of or injury to the dog, who by reason of his natural instinct and against the will of his master, runs off the path against one of such spears and is killed or injured. Jordin v. Crump (1841) 8 Mees. & W. 782, 5 Jur. 1113.

In an action to recover damages resulting from injuries sustained by the plaintiff from a gun-shot wound, received by him by means of a spring gun placed by defendant on his own premises, the court in Hooker v. Miller (1873) 37 Iowa, 613, 18 Am. Rep. 18, affirmed the judgment of the court below in favor of the plaintiff.

In Dodson v. Mock (1838) 20 N. C. 146, trespass was brought for killing the plaintiff's dog by means of poisoned meat placed upon the defendant's premises, and the court held that if the dog was killed by the direct administration of poisoning, trespass *vi et armis* was the proper remedy, but if the dog was killed by poisoned food placed where the defendant knew that the dog would come along and eat it, case was the proper remedy.

But unless contrivances are placed upon the premises with an actual or constructive intent to hurt intruders, the owner is not liable for injuries resulting to persons by reason of the condition in which the premises had been left, or from the prosecution of the business thereon in which the perpetrator has a right to engage. Indianapolis v. Emmelman (1886) 108 Ind. 530, 58 Am. Rep. 65.

A trespasser or mere licensee, who is injured by any dangerous machinery or contrivance on the land or premises of another, cannot recover damages unless the contrivance is such that the owner may not lawfully erect or use, or when the injury is inflicted willfully, wantonly, or through the gross negligence of the owner or occupier of the premises. Galveston Oil Co. v. Morton (1888) 70 Tex. 400.

Although it may be admitted that the instrument in question is calculated to do grievous bodily harm to human beings, still where it does not appear to have been set with that intention, there is nothing to show that the setting of it by the defendant is an illegal act. Jordan v. Crump (1841) 8 Mees. & W. 782, 5 Jur. 1113.

II. *Liable as for homicide.*

The responsibility of the defendant is in many instances viewed in the light of a crime, and he is held as for homicide, no matter whether the trespasser has or has not notice of the danger.

Viewed in this light the question of the intention of the property owner must be considered, as without the intention to take life the crime cannot amount to murder and will be extenuated and amount to no more than manslaughter.

The measure of protection to property is declared with certainty, and the force which may be

right to take the life of John Erickson,—that the killing was either justifiable or excusable.

1 Bishop, Crim. L. 7th ed. § 814.

A man may not set spring guns for the protection of his property against trespassers.

Kerr, Homicide, §§ 185, 186; 9 Am. & Eng. Encyclop. Law, pp. 586, 606; *State* v. *Patterson*, 45 Vt. 308, 12 Am. Rep. 208; *Carroll* v. *State*, 23 Ala. 28, 58 Am. Dec. 284.

What may not be done directly, may not be done by means of a spring gun and indirectly.

If the attempted entry of deceased into the house of defendant was not such as under all the circumstances as they appeared to the defendant acting as a reasonably prudent man would justify the injury inflicted, the justification can in no way be strengthened by the manner of its infliction.

Kerr, Homicide, § 186; *Simpson* v. *State*, 59 Ala. 1, 31 Am. Rep. 9; *Johnson* v. *Patterson*, 14 Conn. 1, 35 Am. Dec. 100.

Necessity alone can excuse the taking of human life.

State v. *Morgan*, 25 N. C. 186, 38 Am. Dec. 718; *State* v. *Patterson*, 45 Vt. 308, 12 Am. Rep. 207; *Carroll* v. *State*, 23 Ala. 28, 58 Am. Dec. 284; *Brown* v. *State*, 55 Ark. 593; *Noles* v. *State*, 26 Ala. 31, 62 Am. Dec. 713; *People* v. *Walsh*, 43 Cal. 447.

One who proposes doing an unlawful act, by which the life of a fellow being may be taken, cannot excuse himself from the conse-

employed in its defense is defined, and the secrecy of the trespass or the frequency of the repetition does not enlarge the one or the other. The secrecy and frequency of the trespass will not justify the owner in concealing himself, and with a deadly weapon taking the life or grievously wounding the trespasser as he creeps stealthily to commit the intended wrong, and there is no difference in his concealing his person and weapon and inflicting unlawful violence, and contriving and setting a mute concealed agency or instrumentality which will inflict the same, or it may be greater violence in each case the intention being the same and it is to exceed the degree of force which the law allows to be exerted. Simpson v. State (1877) 59 Ala. 1, 31 Am. Rep. 9.

The setting of a spring gun or other like engine may be harmless if of his own wrong the trespasser does not come in contact with it, and he may lose his right to recover compensation for the injury sustained, yet the state does not lose the right nor is its duty lessened to demand retribution for its broken laws and the unlawful death or wounding one of its citizens. *Ibid.*

It is criminal homicide to set spring guns or other weapons capable of doing mischief on premises so as to cause death. *Ibid.*

Yet it is culpable only because of the intent with which it is done. *Ibid.*

As in order to support a conviction for assault with intent to murder, a specific felonious intent must be proved. *Ibid.*

For an intention to kill cannot be implied from general conduct, or as a matter of law, but must be proved as a matter of fact and its existence must be determined by the facts and circumstances in evidence. *Ibid.*

The question whether the gun set with the intent to kill a particular person who was injured by it was not an attempt to murder, committed by means not amounting to an assault and indictable under another clause of the Alabama statute, was a question not presented by the record. *Ibid.*

By the strict letter of the common law a man may not take life in defense of property in a shop, and therefore may not justify a homicide committed by placing spring guns therein. State v. Moore (1863) 31 Conn. 479, 83 Am. Dec. 159.

It is well settled that a bare trespass against the property of another, not his dwelling, is not a sufficient provocation to warrant the owner in using a deadly weapon in its defense, and if he uses such a weapon and kills the trespasser, it is murder, and this though the killing was actually necessary to prevent the trespass. State v. Vance (1864) 17 Iowa, 138, 141.

A mere trespass against property other than a dwelling is not a sufficient justification to authorize the use of a deadly weapon by the owner in its defense, and if death results in such a case it is murder, though the killing be actually necessary to prevent the trespass. Hooker v. Miller (1873) 37 Iowa, 613, 18 Am. Rep. 18, citing State v. Vance, *supra*.

The rule is based upon the consideration that an act of violence done to prevent trespass which causes death is beyond the provocation and the perpetrator is guilty of murder. Hooker v. Miller, *supra*.

It is based, not on the light in which the law regards the act and the punishment provided for; and the criminality of the act or the terpitude of the trespasser is not the foundation thereof, but it is based upon the limitation which the law imposes upon the right of the owner of property in rendering it protection. Hooker v. Miller, *supra*.

And is supported upon the consideration that the protection of one's property will not justify the resort to means that are destructive to the property of another, when not demanded by necessity or the nature of the rights of property concerned, and humanity requires the extention of the rule to the person of the trespasser. *Ibid.*

If a man deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, he is guilty of murder. State v. Morgan (1842) 25 N. C. 186, 198, 38 Am. Dec. 714.

The principles established in State v. Morgan, *supra*, were followed by the court in State v. McDonald (1856) 49 N. C. 19, and State v. Brandon (1862) 53 N. C. 467.

If the intention was not to take life but merely to chastise the trespasser, and to deter the offender from repeating the same, the offense may be extenuated and no more than manslaughter; the law so far recognizing the adequacy of the provocation arising from the trespass. State v. Vance (1864) 17 Iowa, 138, 141. To the same effect, Claxton v. State (1840) 2 Humph. 181; McCoy v. State (1848) 8 Ark. 451; Com. v. Drew (1808) 4 Mass. 391; Cokely v. State (1857) 4 Iowa, 477; State v. Shelledy (1859) 8 Iowa, 477.

So if the act was done in the heat of passion. Hooker v. Miller (1873) 37 Iowa, 613, 18 Am. Rep. 18.

Where spring guns or other weapons calculated to do mischief are placed upon premises with the general intention to kill trespassers, and one is injured thereby, the owner of such premises cannot be convicted of assault with intent to murder, there being no intention to kill such particular person. Simpson v. State (1877) 59 Ala. 1, 31 Am. Rep. 1.

While, because of the unlawful intent with which the gun is set the owner is made criminally liable for the consequences he contemplates, it is not his violence, except by implication of law which produces the injury, and it is not an assault which connected with an intent to murder is punishable under the Alabama statute. *Ibid.*

quences thereof by giving notice of his evil intention, or of the danger which he himself has created, and this is true although the person killed thereby may have received the notice and was a trespasser at the time of the injury.

Johnson v. *Patterson*, 14 Conn. 1, 35 Am. Dec. 100; *Carroll* v. *State*, 33 Ala. 28, 58 Am. Dec. 282.

Carelessness is criminal, and, within limits, supplies the place of the direct criminal intent.

1 Bishop, Crim. L. 7th ed. § 313; 9 Am. & Eng. Encyclop. Law, p. 588; *State* v. *Hardie*, 47 Iowa, 647, 29 Am. Rep. 496; *State* v. *Emery*, 78 Mo. 77, 47 Am. Rep. 92; 2 Hill's Code, § 1185.

Hoyt, *Ch. J.*, delivered the opinion of the court:

Defendant was convicted of the crime of murder in the second degree, and from the judgment and sentence imposed thereunder prosecutes this appeal. The circumstances connected with the homicide were substantially as follows: Defendant and one Walter Pixley, a boy seventeen years of age, occupied a cabin together. The cabin belonged to the defendant, but the land upon which it was situated was the property of the Bellingham Bay Improvement Company. The cabin was a small building, about ten by fourteen feet in dimensions, constructed of boards one inch in thickness, placed up and down, and

III. *When considered as a nuisance.*

The setting of spring guns, traps, and other dangerous instruments may amount to a public nuisance and as such be indictable or the person so setting them may be liable in an action of damages.

If dangerous to the public it is indictable as a nuisance. Simpson v. State (1877) 59 Ala. 1, 31 Am. Rep. 9; State v. Moore (1863) 31 Conn. 479, 83 Am. Dec. 159.

When placed so as to be actually dangerous to the public who have occasion to pass the highway. State v. Moore, *supra*.

And the person setting them may be indicted and be liable to an action at the suit of the party injured. Hewison v. New Haven (1867) 34 Conn. 136, 141, 91 Am. Dec. 718.

It must, however, be shown that the nuisance to the public is of a real and substantial nature. State v. Moore, *supra*.

But unless the public safety is thereby endangered it is not indictable. Simpson v. State and State v. Moore, *supra*.

Placing a loaded gun so as to range over a highway, cocked and with strings attached to the trigger so that it may be discharged by a cat or a rat, or any other object coming in contact with the string, and sufficiently near and unprotected to inflict injury if any one should then be within its range upon the highway, creates a real and substantial danger to which passengers on a highway should not be subjected. State v. Moore, *supra*.

In State v. Moore, *supra*, information was laid for nuisance consisting in the placing by defendant of spring guns in his shop for protection against burglars, so situated as to endanger persons passing on the adjacent highway. The court held that the mere act of setting spring guns on his own premises by the defendant could not be held unlawful in itself, although the defendant might be responsible for an injury occasioned thereby to individuals and be indictable for the erection of a nuisance, if the public were subjected to any danger and consequent annoyance.

In that case it was found that scattering shot might pass between the cracks in the boarded walls of the defendant's shop which were one thickness of boarding, but it was not found that they would pass through with sufficient force to inflict injury, or even to cross the intervening space between the shop and the highway, and the court therefore held that it was not sufficiently found that the apprehended danger to the public was real and substantial, and therefore gave judgment for the defendant.

In Townsend v. Wathen (1808) 9 East, 277, it was held that if a man places a dangerous trap baited with flesh in his own ground, so near to the highway or to the premises of another that dogs passing along the highway or kept in his neighbor's premises will probably be attracted by their instinct into the traps, and in consequence of such act his neighbor's dog is so attracted and injured thereby, an action on the case lies. The court stated that every man must be taken to contemplate the probable consequences of the act he does, and therefore when the defendant caused the traps scented with the strongest meats to be placed so near to the plaintiff's house as to influence the instinct of those animals and draw them irresistibly to their destruction, he must be considered as contemplating this probable consequence of his act.

IV. *The property owner's or the trespasser's act.*

In some cases the injury has been considered as the act of the person committing the trespass or other wrong. This is noticeably so in the English decisions upon the question but the courts here mostly hold the contrary doctrine.

Thus in Gray v. Combs (1822) 7 J. J. Marsh. 478, 23 Am. Dec. 431, the act was considered as that of the slave, the time and circumstances constituting and coming of necessity and legitimately from the means resorted to.

And especially is this so where the trespasser has notice of the impending danger. Ilott v. Wilkes (1820) 2 Barn. & Ald. 304.

Resistance by force to the setting of it, by an individual (if not dangerous to the public) the law will not sanction though he may apprehend injury to him is intended if he trespass on the premises, the injury existing only in the menace and being conditional, his own act intervening and putting in motion the force from which the injury will proceed. Simpson v. State (1877) 59 Ala. 1, 31 Am. Rep. 12.

The doctrine of contributory negligence has, however, been held not applicable to the case. Hooker v. Miller (1873) 37 Iowa, 613, 18 Am. Rep. 18.

The court in Johnson v. Patterson (1840) 14 Conn. 1, 35 Am. Dec. 103, considered that the argument as used by the judges in the English cases, that the trespasser incurs the evil which he suffers by entering or permitting his creatures to enter on another's land with full knowledge of the impending injury, and must attribute the consequence to his own voluntary act, and that if death ensues it is his own procurement, would, if sound, supercede the necessity of complicated codes of criminal law, and would allow the punishment of death for every offense, even for a trespass and without the interposition of an intelligent jury.

In the Connecticut case, the act of firing off the gun was not considered the agency of the trespasser, the act of discharging the gun being looked upon as accidental and against his will. Although he knew that by his own act he was exposing himself to death, yet he must be considered as meaning to avoid that catastrophe if possible. Johnson v. Patterson, *supra*.

V. *The question of notice.*

The question whether or not the defendant has given notice of the impending danger has been

battened with shingles. There was one door and a single window. The lock on the door fitted so loosely that the door could be pushed open with little force without unlocking it. About December 8, 1893, defendant and Pixley went into the mountains for a hunting trip, intending to be gone most of the winter. On the morning they left, defendant placed a spring gun inside the cabin. It was loaded with a double charge of powder and shot, and in addition thereto a loaded Winchester rifle 45-90 cartridge was placed therein, on top of the shot and powder. It was aimed directly at the casing of the door, in such a way that a person of ordinary height standing in front of the door, and placing his hand on the knob, would, upon pushing the door open a few inches, receive the entire charge in his body. The window and door were then nailed up, the door being first locked with the insecure lock above referred to. The boards were placed up and down over the door, and fastened by nails driven through a one-inch board. Before the cabin was so fastened up, some of the best of its contents were removed to the house of a neighbor, and those remaining were of but little value. On the day of the homicide, and the preceding day, deceased, with three companions, had made several trips to a construction camp a little further from the business part of Whatcom than this cabin, for

made a special element in the English cases in considering the plaintiff's right to recover, the courts in that jurisdiction holding that if due notice has been given and the plaintiff in defiance thereof has placed himself in peril the consequences must be taken to be the result of his own act and therefore he cannot recover. This doctrine has to some extent been followed or approved of by the courts in some of our own jurisdictions.

If the defendant were present himself at the time of such trespass, he could not have used the deadly weapon nor have inflicted any wound, but when absent he has a right to resort to severe measures, and although it is a maxim of the law that a man cannot do that indirectly which he cannot do directly, yet such maxim is not applicable to the case of a plaintiff who has express notice and wrongfully enters, the act of firing off the gun, which is the cause of the injury, being considered his act and not the act of the person who placed the gun there. Ilott v. Wilkes (1820) 3 Barn. & Ald. 304.

Although it may be lawful to put such instruments on a man's own ground, yet as they are calculated to produce great bodily injury to innocent persons many trespasses being comparatively innocent it is necessary to give as much notice to the public as possible, so as to put people on their guard against the danger. Bird v. Holbrook (1828) 4 Bing. 628, 1 Moore & P. 607; Ilott v. Wilkes, *supra*.

For he who sets spring guns without giving notice is guilty of an inhuman act, and if injurious consequences ensue is liable to yield redress to the sufferer. Bird v. Holbrook, *supra*.

The common understanding of mankind showing that notice ought to be given when these means of protection are resorted to. *Ibid.*

Where the plaintiff with notice of the danger gathered nuts on the defendant's woodland upon which nine or ten spring guns were concealed, and was wounded thereby, the court held the defendant's conduct justifiable. Ilott v. Wilkes (1820) 3 Barn. & Ald. 304.

In Jordin v. Crump (1841) 8 Mees. & W. 782, 5 Jur. 1113, the declaration alleged that the defendant wrongfully and unlawfully set and concealed a dog spear, an engine calculated to do grievous bodily harm as well to the leading subjects of the queen as to their dogs, among the bushes near the footpath, by means whereof the plaintiff's sheep dog, which was passing along the footpath with the plaintiff when a rabbit crossed the path which rabbit the dog pursued against the will of the plaintiff, when in pursuit was struck and grievously maimed and wounded by one of such spears and rendered of little value to the plaintiff. The defendant pleaded that the said instrument or engine was so set and concealed for the purpose of preserving his game, and for the purpose of disabling and killing dogs in pursuit thereof, further verifying his action on the ground of notice. The court held the defense good even without the allegation of notice.

The case of Jordin v. Crump, *supra*, was distinguished from that of Deane v. Clayton (1817) 7 Taunt. 489, 2 Marsh. 577, 1 J. B. Moore, 208, upon the ground that in the former case the plaintiff had express notice that the dog spears were set in the wood, but the court stated that even though there was such a distinction, yet in the absence of notice the court's decision would still be in favor of the defendant, on the ground that the setting of such spears was a lawful act and the accident occasioned by them was the act of the dog and not of the defendant, and that the plaintiff was bound to keep his dog on the footpath.

In Deane v. Clayton, *supra*, the owner of a wood which was not divided from adjoining property except by a low bank and a shallow ditch, not sufficient to prevent dogs passing from crossing, for the purpose of preventing hares in his woods from being killed by dogs and foxes, kept iron spikes screwed into trees so placed that each end would point along the course of a hare path and at such a height as to allow a hare to pass under it without injury, but to wound and kill a dog that might happen to run against one, the spikes being in their nature and positions adapted to effect that purpose. None of the spikes were less than fifty yards distant from the footpath, some being one hundred and fifty or one hundred and sixty yards distant. Notice was painted on boards on the outside of some parts of the wood, that steel traps, spring guns, and dog spears were set for vermin. The plaintiff with the permission of the owner of the adjoining wood was hunting with a valuable pointer, which, when pursuing a hare which ran over the bank and ditch in the defendant's wood, ran against a spike and was killed. The court were equally divided in opinion as to the liability of the defendant for damages for loss of the dog.

Where such means are used, the nature and value of the property sought to be protected must be such as to justify the proceeding, and full notice of the mischief to be encountered must be given and the principles of humanity must not be violated, otherwise the owner will be subjected to damages for the injury sustained. Loomis v. Terry (1837) 17 Wend. 496, 31 Am. Dec. 306.

With regard to the question whether notice to the trespasser of the dangerous contrivances laid for the protection of the property would relieve the owner of liability for injuries received thereby, the court in Hooker v. Miller (1873) 37 Iowa, 613, 18 Am. Rep. 18, did not determine, as the facts did not involve that question and no such defense was raised, but the court intimated that the authorities recognized such a rule.

In this case the defendant was the owner of a vineyard and placed a spring gun there for the protection of his fruit, so arranged that it would be discharged in the direction of one entering his

the purpose of securing work upon a road in process of construction. On the morning of the day of the homicide they took their blankets and started for said camp, but, not having completed arrangements for getting work, they thought best not to carry their blankets all of the way, and left them in a tree or stump a short distance from this cabin. After arriving at the camp they found it would be necessary to return to town to find the man they wished to see. Having done so, they found this man, and completed arrangements under which they were to go to work, on the road. Thereafter two of them, deceased and one Nels Anderson, after purchasing a loaf of bread and some bologna sausage, upon which to make a supper, started to walk to camp. It was then dark, the road was rough and muddy, and it was raining. When they came near the cabin, which they had passed before, and which was boarded up, and apparently unoccupied, the deceased stated that he did not think anybody had lived in it for a long while; that he would see if they could not get in, and, if they could, they had better get their blankets, and sleep there, instead of going on to camp. In attempting to make an entrance through the door, secured as before stated, the spring gun was discharged, and the entire charge penetrated the casing of the door, and passed entirely through the body of the de-

premises, and gave no notice whatever that he had so arranged a gun or of his intention to do so.

The court instructed the jury in this case that if the defendant had set the gun in such a way as to destroy life, or do great bodily harm, of which plaintiff had no knowledge, and the plaintiff, in entering the premises for the purpose of taking grapes without defendant's permission, was wounded by means of the gun, he was entitled to recover; that the act of the plaintiff in that case was but a misdemeanor and would not justify its resistence by means that would take life or do great bodily harm; that the defendant had no right to use a spring gun for his protection against a mere trespasser without notice to him, and the defendant's liability on account of the wound caused by the spring gun was the same as though he had discharged it with his own hands.

In Bird v. Holbrook (1828) 4 Bing. 628, 1 Moore & P. 607, the action was upon the case for shooting plaintiff with a spring gun which the defendant had set for the protection of his property, some of which had been stolen, the gun being set without notice in a garden walled around, the plaintiff climbing over the walls in pursuit of a stray fowl, and the court held the defendant liable in damages.

That case was distinguished by the court from that of Ilott v. Wilkes (1820) 3 Barn. & Ald. 304, in that the defendant placed his gun for the express purpose of doing injury, his intention being shown by the fact that when called upon to give notice he said, "if I give notice I shall not catch him," his intention being that the gun should be discharged and that the contents should be lodged in the body of his victim if he could not be caught in any other way, and on these grounds the court held the action clearly maintainable, particularly upon the latter ground. Bird v. Holbrook, *supra*.

VI. *Act held legal.*

In some few instances the act of setting spring guns and traps upon once own property has been held lawful even by our own courts, where the defendant could not otherwise protect his property, the right to defend it being looked upon as a necessity to individual security and as not incompatible with the public good, the right being one emphatically brought by the individual into society and not derived from it, and one that the owner is not deprived of where the obstinate injustice of the trespasser would deprive him thereof, the act being considered as that of the trespasser, the party contemplating the injury giving the owner an indefinite right over his person or a right to make use of such means to prevent the injury as his behavior and the owner's situation make necessary. Thus—

The law of nature allows us to defend our persons or property, and such a general allowance implies that no particular means of defense are prescribed to us, whatever means are necessary must be lawful because it would be absurd to suppose that the law of nature allows us defense and yet forbids us at the same time to do whatever is necessary for this purpose. It therefore follows that he who attempts to injure us gives us an indefinite right over his person, or a right to make use of such means to prevent the injury as his behavior and and our situation make necessary. Gray v. Combs (1832) 7 J. J. Marsh. 478, 23 Am. Dec. 431, quoting Rutherford's Institutions.

So it is said the right of defense, its possession and exercise, are necessary to individual security, and are not incompatible with the public good. Society may curtail this right and restrain its exercise in many important particulars, yet it is emphatically a right brought by the individual with him into society and not derived from it, and he there retains the plenary right except so far as it has been restrained by the laws of society. Gray v. Combs, *supra*.

The right of defending goods is an indefinite one, and one is not naturally debarred from proceeding to extremities in their defense, where the obstinate injustice of those who would deprive us of them renders this necessary. Gray v. Combs, *supra*, quoting Rutherford's Institutions.

It is lawful for a person having valuable property in a warehouse secured by locks and doors, as additional security in the night-time, to erect a spring gun explodable only upon entering the premises. Gray v. Combs, *supra*.

The person setting a spring gun in a warehouse for its defense in the night-time is not responsible to the owner of a slave for the death of such slave, who is killed by such gun when breaking and entering such warehouse in the night-time to steal. *Ibid.*

In the above case the court deemed the defense used by the defendant in the protection of his premises lawful, and the calamity which pursued ascribable to the slave's own act, the time and circumstances constituting and coming of necessity and legitimately from the means resorted to.

In McClelland v. Kay (1853) 14 B. Mon. 103, 107, the court construed the opinion in the preceding case as authority for the right of defense of property against depredations to the extent of justifying one in shooting a slave when in the act of stealing.

So in King v. Kline (1847) 6 Pa. 318, where plaintiff brought trespass to recover damages for the killing of his dog by the defendant, who had set an iron trap for the dog upon his premises and shot him when caught therein, the court held the defendant had a right to protect and preserve the convenient use of his property against the plaintiff's dog, and if he could not otherwise protect it he was justified in killing the dog when caught on his premises in the act of destruction.

In Gray v. Combs, *supra*, the court looked upon the doctrine as laid down by Sir William Black-

ceased, killing him instantly. There is some testimony as to statements made by the defendant tending to show what his intentions were in setting the spring gun. Such testimony is more or less conflicting, and the determination of what was proved thereby was properly left to the jury; and to our minds it appears, from a fair preponderance of such testimony, that the statements made by the defendant were not such as would have been likely to have been made by one who had no other motive than to protect his cabin and the property therein by such means as could be made use of without wanton disregard for the lives of his fellow men. But whether or not this was so is, in our opinion, immaterial in the determination of the questions presented on this appeal. There was also testimony tending to show that, after the door had been nailed up, a placard bearing the word "danger" was posted on the outside of the boards nailed over the door. But whether or not this was so is also immaterial.

The principal contention of the defendant was that in setting the gun as above stated he only did what he had an absolute right to do, and he asked the court so to instruct the jury, and now assigns as error its refusal so to do, which assignment of error, if sustained, will result in the reversal of the judgment and sentence, and the discharge of the defendant. If the question as to what the defendant had a right to do by way of providing for the defense of the cabin and property contained therein were one of law, unmixed with any question of fact, there might be force in this claim; but, in our opinion,

stone in Volume 4 of his Commentaries, page 181, to the effect that the law will not "suffer any crime to be prevented by death unless the same, if committed, would be punished by death," as incorrect, stating that in most civilized countries the authorized extent of resistance in the necessary defense of the person or property against the perpetrator of crimes must greatly exceed the amount of punishment prescribed by the law for their perpetration.

VII. *English cases.*

In Jay v. Whitfield (1807) 3 Barn. & Ald. 308, 4 Bing. 644, the plaintiff having entered on the defendant's premises for the purpose of cutting a stick, was shot by a spring gun and damages were allowed for the injuries thus inflicted.

In Bird v. Holbrook (1828) 4 Bing. 628, 1 Moore & P. 607, the court looked upon the plaintiff as a mere trespasser, and as the defendant would not be authorised in taking him into custody, he could not do indirectly that which he was forbidden to do directly.

In Evans v. Lisle (1836) 7 Car. & P. 562, the action was brought for placing lighted brimstone in a church tower whereby the plaintiff, who with others was ringing the bells, was annoyed by the fumes, the defendant pleading the general issue and that the plaintiff was wrongfully in such tower creating a disturbance, and that the brimstone was so placed there by the directions of the rector for the purpose of causing the defendant to depart therefrom, after a request and refusal on the plaintiff's part. The court held that in order to support such special plea a request to depart must be shown, and also the authority of the rector to place the brimstone, and further that in order to entitle the plaintiff to a verdict on the general issue, the jury must be satisfied that some substantial damage from the fumes had been sustained by the plaintiff.

The setting of dog spears is not in itself an illegal act, nor is it rendered such by the Statute 7 & 8 Geo. IV., chap. 18, which prohibits the setting or placing of man traps, or other engines calculated to destroy human life or inflict grievous bodily harm, with intent that or whereby the same may destroy human life or inflict grievous bodily harm. Jordin v. Crump (1841) 8 Mees. & W. 782, 5 Jur. 1113.

In Wootton v. Dawkins (1857) 2 C. B. N. S. 412, in which the declaration contained two counts, one founded upon the Statute 7 & 8 Geo. IV., chap. 18, § 1, for unlawfully setting a spring gun or engine calculated to inflict grievous bodily harm, the second claiming damages generally in consequence of a personal injury sustained by plaintiff through the wrongful act of the defendant, the defendant pleaded not guilty. The facts were that the plaintiff believing that his bantam fowl had strayed into the defendant's garden obtained permission in the daytime to search for it and that not finding it upon that occasion plaintiff went again without permission in the night-time, and while engaged in such search came in contact with a wire which exploded and injured him. There being no evidence to show what the nature of the engines or the substance which caused the explosion was, or that the injury complained of was occasioned by a spring gun or other engine calculated to destroy human life, or to inflict grievous bodily harm, or that it was caused otherwise than by the plaintiff's own carelessness, the plaintiff was nonsuited and upon appeal the court of queen's bench upheld such verdict, holding that in the absence of such evidence the defendant was not liable, either at common law or under the statute.

In Daniel v. Janes (1877) L. R. 2 C. P. Div. 351, the defendant was summoned under the English Statute 24 & 25 Vict., chap. 97, § 41, for placing poisoned flesh in an inclosed garden for the purpose of destroying a dog which was in the habit of straying there. It was held that he was not liable within the provision of the act although the offense might be within the provision of the Act of 27 & 28 Vict., chap. 115, § 2.

In Clark v. Chambers (1878) L. R. 3 Q. B. Div. 327, 47 L. J. Q. B. 427, 38 L. T. N. S. 454, 27 Week. Rep. 613, the defendant was the occupier of premises abutting on a private road leading to certain other premises as well as to his own. The road consisted of a carriage road and a foot-way the soil of both being the property of different owners, the defendant having no interest in it beyond the right of way to and from his premises, which he used as a place where athletic sports were carried on by persons resorting thereto for that purpose for their own amusement. The defendant, for the purpose of preventing vehicles from getting as far as the grounds and overlooking such sports, erected barriers across the road consisting of a hurdle set up lengthwise next to the foot-path with two wooden barriers armed with spikes blocking the entire road at the time the sports were carried on. Part of the barriers armed with spikes were removed by some person without defendant's authority and placed in an upright position across the foot-path and the plaintiff while lawfully on such road in the night-time was damaged by the spikes upon such barrier his eye coming in contact therewith, and the court held that the defendant having placed such dangerous instrument in the road was liable even though the immediate cause of the accident was the act of a third person.

R. W.

it is not. It is no doubt true that in the old English cases, and perhaps in some of the earlier cases in this country, this question was passed upon by the courts as one of law; but, in our opinion, in so deciding this question, such courts made a mistake which has led to most of the trouble connected with the proper determination of this and kindred questions. The relation of the English cases to this question is so well stated by the learned judge who wrote the opinion in the case of *Aldrich* v. *Wright*, 53 N. H. 398, 16 Am. Rep. 339, that we quote therefrom: "On the subject of defending a man's property, in his absence, by spring guns, mantraps, or other engines calculated to destroy human life or inflict grevious bodily harm, the English courts turned a question of fact into a question of law, and were not successful in their efforts to prescribe adequate rules for determining the reasonable necessity of such engines under the varying circumstances of different cases." This error of the courts, and the trouble and uncertainty arising therefrom, resulted in the regulation of this matter in England by statute, the enactment of which was necessary and proper, under the circumstances, but would have been unnecessary if the courts had treated this question as one of fact, and left it to the jury to decide, under proper instructions, in the light of the facts of each particular case. If the reasonable necessity of employing defensive machinery of all kinds had been left to the jury, as such a question of fact should have been, this judicial and legislative trouble would have been avoided, and the general principles of the common law would have been amply sufficient to protect the rights of all concerned. The result in England of holding this to be a question of law, instead of one of fact, furnishes a good reason for the courts of this country adopting a different rule. Those of several of the states have done so, while those of others have adhered to the rule laid down in England. By this decision we hope to place this court in a line with those of the former class, for the reasons above suggested, and for many others which might be given.

It is a universal principle that neither in defense of person or property can one go further than is reasonably necessary for that purpose, and this single principle, followed to a logical conclusion, will establish the proposition that whether or not what was done in a particular case was justified under the law must be a question of fact, or mixed law and fact, and not a pure question of law. It follows that the contention of the defendant that the court should have taken this question from the jury, and decided it itself, cannot be sustained, and since for that reason it was properly submitted to the jury, under what seems to us to have been proper instructions, we could content ourselves with what we have said as sufficient to require us to find against the above-stated contention of the defendant; but owing to the importance of the question, and the fact that it is claimed that there was some technical error connected with the instructions, we feel called upon to make some brief additional observations. It was the settled law in England that means which might reasonably be expected to cause death could not be made use of to prevent other crimes than those classed as felonies. But it was held that, to prevent felonious crimes, such means might be made use of, and this same distinction has been adopted by many of the courts of this country, but without any good reason existing therefor. The reason why the use of such means was allowed to prevent crimes of that kind in England was that they were there punishable by death. This being so, there was reason for the rule. If one was about to perpetrate a crime for which, under the law, his life would be forfeited, there was reason in holding that his life might be taken, if necessary to prevent his committing it. But in this country few crimes subject the ones who have committed them to the death penalty, and it is only as to those which do that the reason of the rule has any force. What were felonies at common law usually subject the offender here to comparatively light punishment, and upon principle it should be here held that one could only properly make use of means which might be expected to cause death to prevent the commission of a capital offense.

We are aware that courts of high standing have come to a contrary conclusion, and have held that such means might be made use of to prevent the commission of some felonies, especially to prevent the crime of burglary; but it seems to us that in so doing they have lost sight of the changed condition of things in this country, and have adhered to the English rule, when the reason therefor has no existence. The crime of burglary has been so much extended by the statutes of this state that, excepting in the case of burglary of a dwelling house when occupied by the owner or some member of his family, there is no reason why more extreme means should be allowed for its prevention than to prevent other felonies. As to what may properly be done to prevent the burglary of a dwelling house when occupied is another question. There it is not simply the damage to the property which may result from the burglary, or the sanctity connected with the property when so protected, that it can only be reached by the commission of a burglary that is involved, but in addition thereto is the question of the risk to the lives of the inmates. It is common knowledge that burglaries under such circumstances often result in the death of some of the inmates of the dwelling upon which the burglary is committed, and for that reason it might well be held that a burglary of that kind could rightfully be prevented by such means as might result in death.

Applying the principles which will naturally arise from the above suggestions to the conceded facts in the case at bar, it must result that not only was the defendant not entitled to the instruction asked for, but that, on the contrary, the court might have been justified in holding that the defendant did that which he had no right to do. The undisputed facts showed that there was no person in this cabin whose life could have been endangered by a burglary committed thereon:

hence, if what we have said is correct, it might not be prevented by means which might be expected to destroy the life of a human being. That the means used were of that kind is evident, whether judged by what might reasonably have been expected to have been the result or by the result itself.

It is not necessary, however, to go to the extent above suggested in order to sustain the ruling of the trial court. Even if it should be assumed that the defendant had a right to protect his cabin by setting a gun to defend the same, such right would still be subject to the universal rule that only such means as are reasonably necessary to prevent the crime should be made use of, and the undisputed facts abundantly warranted the jury in coming to the conclusion that more than the prevention of the burglary of the cabin was intended by the defendant in loading and setting the gun as he did. The extreme charge of both powder and shot, and the addition of such a terrible missile as an entire rifle cartridge, in a gun so placed that it would hit one but a few feet from the muzzle, furnished abundant reason for the jury to find that a vindictive desire to take the life of whoever should interfere with the cabin, rather than the prevention of the commission of a crime therein, was the object sought by the defendant. Authorities might be given upon this proposition, but on account of the confusion and want of harmony among the cases, growing in part, at least, out of the reasons above suggested, their citation would be of little use. In our opinion, the court committed no error in refusing the instruction asked, for the reason that the question to be decided was one of fact, or mixed fact and law, and therefore for the jury; and for the further reason that, under the disputed facts, any proper interpretation of the law applied thereto would have warranted the court in instructing the jury that the defendant had no right to protect his property by the means used. Some other reasons for reversal have been urged in behalf of the defendant. If considered as founded upon each separate exception taken during the progress of the trial, as they seem to be by the manner of their statement in the brief of appellant, their examination would prolong this opinion into a treatise upon criminal law. We shall content ourselves with considering two propositions which cover most of the exceptions taken, and with a statement that we have carefully considered the others, and find in regard thereto that the rulings excepted to deprived the defendant of no substantial right.

The questions which it is necessary to briefly discuss are: "First, as to the sufficiency of the information; and, second, as to the proofs introduced and offered as to the character of the defendant. In the information the defendant is charged with having purposely killed the deceased, and, since the proofs showed that he could have had no intention to kill any particular person, it is claimed that the information was insufficient, or, if sufficient, was not supported by the proofs. In our opinion, the statement in the information as to the intent to kill the particular person would have been sufficient in an indictment at common law, and would have been supported by proof of having done an act with intent to kill another person than the deceased, which resulted in the death of the person whom it was charged he intended to kill. But it is contended that our statute, which requires the fact to be stated in the information, controls, and that, even although this information would have been good at common law, it was not good under our statute, for the reason that the facts were not correctly stated therein. The information was proof against this attack for two reasons: First, that the facts were substantially stated,—the general intent to kill became special when the means made use of had taken effect on a particular person; and, secondly, our statute as to informations, when invoked, must be taken as a whole, and when so taken an information is good thereunder against an attack of this kind, unless it were possible that the defendant could in some manner have been misled thereby to his injury; and it is evident that this defendant could not have been so misled by the statement that he intended to kill the deceased when the facts were that he had a general intent to kill, which resulted in the death of the deceased.

The other question, above suggested, arises upon the action of the court in refusing to allow a witness to testify as to the reputation of the defendant from his boyhood days to the time of the homicide. Upon this question the court allowed the defendant to introduce proof covering all the later years of his life, and some that went further back. This being so, the rights of the defendant were not infringed; for while it is true, as suggested by counsel for defendant, that even boyhood reputation might in some degree affect his probable action at the time of the homicide, a due consideration of the rule that testimony must not be too remote will justify the action of the court If a defendant puts in evidence as to good character, it is competent for the prosecution to show bad character, and, in order that this right of the prosecution may be made effective, it is necessary that the evidence on the part of the defendant should be confined to a time not too remote from the date of the commission of the crime. It would be impracticable for the prosecution, in most cases, to trace the life and habits of a defendant for more than a few years; and to allow him to go back to boyhood, and put in proof which it would be out of the power of the prosecution to contradict or in any manner rebut, however false it might be, would result in an advantage to the defendant which the rule in question never contemplated. The case seems to have been tried carefully, and in such a manner as to protect every substantial right of the defendant.

The judgment and sentence will be affirmed.

Anders, Gordon, and Scott, JJ., concur.

TENNESSEE SUPREME COURT.

COMMERCIAL NATIONAL BANK OF COLUMBUS, Ohio, *Appt.*, v. MATHERWELL IRON & STEEL CO. *et al.*

(.....Tenn.....)

1. **A receiver appointed by the courts of one state cannot sue in another state** to recover property belonging to the estate which has never been in his possession.
2. **Milliken & Vertrees' Code, § 5040, providing that residents of other states having exhausted their remedies there** against debtors residing in such states, may subject to the satisfaction of their claims property situated in Tennessee, gives such creditors a remedy to the same extent, and in the same manner, and with the same priority as a citizen of Tennessee.
3. **A statute making a judgment confessed by a corporation,** after a petition has been filed for its dissolution, void as against the receiver and creditors, is not effective to control the disposition of property attached according to the laws of another state under such judgment.
4. **That a nonresident creditor has exhausted his remedy against his debtor in the state of his residence,** so as to be enabled to take advantage of Milliken & Vertrees' Code, § 5040, permitting him to subject property in that state to the payment of his claim, is shown by the fact that the property of the debtor in the state of his residence has been placed in the possession of a receiver under a statute forbidding interference with it.

(June 17, 1895.)

APPEAL by complainant from a decree of the Chancery Court for Shelby County in favor of defendants in a suit brought to enforce collection of an Ohio judgment from assets of defendants located in the state of Tennessee. *Reversed.*

The facts are stated in the opinion.

Messrs. **William M. Randolph & Sons** and **F. F. D. Albery,** for appellant:

It is immaterial that both the Commercial National Bank and the Matherwell Iron & Steel Company are corporations doing business in Ohio.

Taylor v. *Badoux*, 92 Tenn. 249; Gibson's Suits in Chancery, §§ 962, 968.

The return of *nulla bona* on an execution is not essential in such cases as the present.

Turley v. *Taylor*, 3 Lea, 173; *Montgomery* v. *McGee*, 7 Humph. 284; *McKeldin* v. *Gouldy*, 91 Tenn. 679.

There is nothing in the character of a judgment entered upon confession without action to prevent it from being available as a cause of action in another state, equally as well as one rendered upon adversary proceedings.

Sipes v. *Whitney*, 30 Ohio St. 69; 2 Black, Judgm. § 868; *Fitzsimmons* v. *Johnson*, 90 Tenn. 481.

The judgment sued on in this case was authorized.

2 Ohio Rev. Stat. ed. 1884, § 5324, and *note; Matthews* v. *Thompson*, 3 Ohio, 272; *Huntington* v. *Finch*, 3 Ohio St. 448; 1 Black, Judgm. §§ 51, 52, 61; *Willis* v. *Louderback*, 5 Lea, 561.

The appointment of Rochester as receiver had no effect whatever upon the note of the Matherwell Iron & Steel Company, held by the Commercial National Bank, nor upon the power of attorney contained in that note authorizing the confession of the judgment here sued on.

Mechem, Agency, §§ 206, 221, 241, 264, 265; Wait, Insolvent Corp. §§ 203, 215; *Pringle* v. *Woolworth*, 90 N. Y. 502; *Kain* v. *Smith*, 80 N. Y. 469; *Kincaid* v. *Dwinelle*, 59 N. Y. 548; High, Receivers, §§ 204. 318.

A corporation is not disabled to discharge its corporate duties, or exercise its corporate powers, nor relieved from the effect of judicial proceedings against it, as long as it is a going concern, even though it is in fact insolvent.

Moseby v. *Williamson*, 5 Heisk. 278; *Comfort* v. *McTeer*, 7 Lea, 660; *City Savings Bank* v. *North Alabama Lumber & Mfg. Co.* 91 Tenn. 12.

Proceedings in bankruptcy are ineffective as against attaching creditors, until they are either adopted by domestic process, or the property is realized by the assignee.

Wharton, Confl. L. §§ 799, 800; *Allen* v. *Bain*, 2 Head, 100.

The receiver has no extraterritorial jurisdiction, or power of judicial action, and cannot go into a foreign state, or jurisdiction, and there institute a suit for the recovery of demands due the person or estate, subject to his receivership.

High, Receivers, § 239; *Booth* v. *Clark*, 58 U. S. 17 How. 322, 14 L. ed. 164; *Johnson* v. *Powers*, 139 U. S. 156, 35 L. ed. 112; *Cagill* v. *Wooldridge*, 8 Baxt. 580, 35 Am. Rep. 716; Wait, Insolvent Corp. §§ 189, 284; *Day* v. *Postal Teleg. Co. of Baltimore*, 66 Md. 360; *Taylor* v. *Columbian Ins. Co.* 14 Allen, 353; *Dunlop* v. *Paterson F. Ins. Co.* 12 Hun, 627; *Dunlop* v. *Patterson, F. Ins. Co.* 74 N. Y. 145, 30 Am. Rep. 283; 2 Morawetz, Priv. Corp. §§ 958, 960, 964, 965; *Talmadge* v. *North American Coal & Transp. Co.* 3 Head, 337.

The Matherwell Iron & Steel Company made no voluntary conveyance or transfer of its property. This case comes within the rule of *Green* v. *Van Buskirk*, 72 U. S. 5 Wall. 310, 18 L. ed. 600, 74 U. S. 7 Wall. 139, 19 L. ed. 109; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; and *Walworth* v. *Harris*, 129 U. S. 365, 32 L. ed. 715.

The Statute, Code, § 5040 (4297) is not limited to citizens of the state.

Lisenbee v. *Holt*, 1 Sneed, 42.

If we were to concede that the order or judgment of the court of common pleas of Hocking county, appointing Rochester receiver, and dissolving the Matherwell Iron & Steel Company, as a corporation, had the effect of a conveyance or transfer by the Matherwell Iron & Steel Company to Rochester,

NOTE.—See Gilman v. Hudson River Boot & Shoe Mfg. Co. (Wis.) 23 L. R. A. 52, and *note*, for rights of receiver as to property outside of the jurisdiction in which he is appointed.

See also 41 L. R. A. 367; 42 L. R. A. 706; 43 L. R. A. 222.

which we do not, still those orders or decrees, to be valid and effectual in Tennessee, as against the Commercial National Bank's lien, or attachment, were required to be recorded in the register's office of Shelby county.

Code, §§ 2837 (2030), 2890 (2075); *Hervey* v. *Champion*, 11 Humph. 569; *Boyd* v. *Roberts*, 10 Heisk. 474; *Hadley* v. *Freedman's Sav. & T. Co.* 2 Tenn. Ch. 122.

A foreign creditor, rightfully in a court of the state pursuing a remedy given by the statutes of the state, may enforce that remedy to the same extent, in the same manner, and with the same priority of lien, as a citizen.

Hibernia Nat. Bank v. *Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518; *Re Waite*, 99 N. Y. 433; *Paine* v. *Lester*, 44 Conn. 196, 26 Am. Rep. 442; *Rhawn* v. *Pearce*, 110 Ill. 350, 51 Am. Rep. 691.

It is only those judgments of the courts of other states which are complete and final in themselves that will support an action or a defense outside the state.

Sadler v. *Robins*, 1 Campb. 253; Whart. Confl. L. §§ 646, 647; Whart. Ev. §§ 763, 781, 801; *Brinkley* v. *Brinkley*, 50 N. Y. 185, 10 Am. Rep. 460; *Webb* v. *Buckelew*, 82 N. Y. 555; 2 Black, Judgm. §§ 509, 845, 867, 959; 1 Black, Judgm. §§ 44, 45; *Claflin* v. *McDermott*, 12 Fed. Rep. 375; *Walser* v. *Seligman*, 13 Fed. Rep. 415; *Thorner* v. *Batory*, 41 Md. 593, 20 Am. Rep. 74; *Pana* v. *Bowler*, 107 U. S. 545, 27 L. ed. 480; *Hart* v. *Sansom*, 110 U. S. 151, 28 L. ed. 101; *National Tube Works Co.* v. *Ballou*, and *Globe Rolling-Mill Co.* v. *Ballou*, 42 Fed. Rep. 749; *Davis* v. *Bruns*, 23 Hun, 648; *Tarbell* v. *Griggs*, 3 Paige, 207, 3 L. ed. 119, 33 Am. Dec. 790; *Guillander* v. *Howell*, 35 N. Y. 657; *Warner* v. *Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616; *Schindehole* v. *Cullum*, 55 Fed. Rep. 885.

A foreign bankrupt assignment will not be permitted to transfer property, whether movable or immovable, as against domestic attaching creditors.

Whart. Confl. L. § 390.

The fact that a bank has been declared judicially insolvent in Rhode Island, where it is chartered, and its effects passed into the hands of a receiver, does not preclude an attachment in Illinois by a creditor of the property of the bank situated in Illinois.

City Ins. Co. v. *Commercial Bank of Bristol*, 68 Ill. 348; *Taylor* v. *Columbian Ins. Co.* 14 Ala. 353; *Willitts* v. *Waite*, 25 N. Y. 577; *Hooper* v. *Tuckerman*, 3 Sandf. 311; *Moseby* v. *Burrow*, 52 Tex. 396; *Farmers & Merchants Ins. Co.* v. *Needles*, 52 Mo. 17; *Hunt* v. *Columbian Ins. Co.* 55 Me. 298, 92 Am. Dec. 592; *Kelly* v. *Crapo*, 45 N. Y. 86, 6 Am. Rep. 35.

The law of one state dissolving an attachment of the debtor's property where he makes an assignment under the insolvent laws for the benefit of all his creditors, does not affect an attachment of the debtor's personal effects in another state by one of his creditors.

South Boston Iron Co. v. *Boston Locomotive Works*, 51 Me. 585; *Upton* v. *Hubbard*, 28 Conn. 274, 73 Am. Dec. 670; Whart. Confl. L. §§ 347, 364, 803.

It is immaterial that the attaching creditor does not reside in the state.

Paine v. *Lester*, 44 Conn. 196, 26 Am. Rep. 442; *Willitts* v. *Waite*, 25 N. Y. 577; *Keller* v. *Paine*, 107 N. Y. 83.

Messrs. **Taylor & Carroll** for appellees.

McAlister, J., delivered the opinion of the court:

This bill was filed in the chancery court of Shelby county by the Commercial National Bank, located at Columbus, in the state of Ohio, to enforce the collection of a judgment obtained by it in the state of Ohio against the Matherwell Iron & Steel Company, a corporation also domiciled in the state of Ohio. The defendant C. Mundinger was the agent at Memphis of the Matherwell Iron & Steel Company, the judgment debtor, and had in his possession certain property which complainant sought to subject to the payment of its judgment. The bill alleged that the Matherwell Iron & Steel Company was insolvent, and that the judgment could not be collected in the state of Ohio, where it was rendered; that execution had issued, and was returned by the proper officer unsatisfied. In accordance with the prayer of the amended bill, an attachment issued, and was levied upon certain goods, wares, and merchandise in the hands of Mundinger, as the agent of the defendant company at Memphis. The Matherwell Iron & Steel Company filed an answer to the original and amended bills, in which it was averred that prior to the rendition of the judgment in Ohio, where both corporations were domiciled, certain creditors filed their petition against it in the court of common pleas of Hocking county, Ohio, to have it dissolved as a corporation, and its affairs administered under the statutes of Ohio; that, in pursuance of such proceedings, the court, on the 6th of July, 1892, made an order appointing one Frank C. Rochester temporary receiver, with authority to take charge of all the property, of every kind and description, belonging to said corporation. The judgment in favor of the Commercial National Bank against the Matherwell Iron & Steel Company, for the sum of $5,000, was confessed on the 20th of July, 1892, in the court of common pleas for Peckaway county, Ohio, in pursuance of a warrant of attorney embodied in the note. It further appears that on the 12th of October, 1892, the Hocking county court of common pleas pronounced a decree dissolving the Matherwell Iron & Steel Company as a corporation, and appointed Rochester permanent receiver, to wind up its business and distribute its assets among its creditors. Rochester qualified, and entered upon the discharge of the duties pertaining to his receivership. It is claimed by defendant that the confession of the judgment without notice to the receiver, and the prosecution of the present suit, are an attempt to evade the laws of Ohio, and to acquire for the Commercial National Bank a priority to which it is not entitled, and that, complainant and defendant being residents of the state of Ohio, the court will not lend its aid to such purpose. Defendant further insists that said confessed judgment was an absolute nullity in the state of Ohio, where rendered, and is therefore of no extraterritorial validity. Said

contention is based upon section 5661 of the Revised Statutes of Ohio, regulating insolvent corporations, to wit: "All sales, assignments, transfers, mortgages, and conveyances of any part of the estate, real or personal, including things in action, of every description, made after the petition for the dissolution of the corporation is filed, in payment of or as security for any existing or prior debt or for any other consideration, and all judgments confessed by such corporation after that time shall be absolutely void as against the receiver appointed on such petition, and as against the creditors of the corporation."

It further appears that on the 28th of February, 1893, Frank C. Rochester, the Ohio receiver, filed his bill in the chancery court of Shelby county against the Commercial National Bank and McLendon, the sheriff of said county. The bill recites in full the proceedings in the state of Ohio for the dissolution of the Matherwell Iron & Steel Company as an insolvent corporation, and his appointment as temporary receiver. It also exhibits the decree of October 12, 1892, dissolving the Matherwell Iron & Steel Company as a corporation, and the appointment of complainant as permanent receiver. The bill then claims that the judgment rendered in Ohio was void, for the reason that the Matherwell Iron & Steel Company was then in the hands of complainant, as receiver. The bill further charges that, at the date of the filing of its bill, the Commercial National Bank and its officers knew of the proceedings in Ohio to wind up the Matherwell Iron & Steel Company, and that complainant had been appointed receiver, and directed to take charge of all the assets of the company, and had entered upon the discharge of his duty. It is then stated that, by the laws of the state of Ohio, all creditors are required to come in and present their claims to receive *pro rata* distribution, and that by such laws, after the filing of such petition, one creditor could not obtain priority over others, but each and all were required to fare alike. The prayer of the bill is that a receiver be appointed to take charge of the goods in Memphis, and sell them, or that they be turned over to complainant, under his appointment as receiver in the state of Ohio; so that in either event he may realize the proceeds thereof, and take them to Ohio. Answer was filed by the Commercial National Bank, in which it relied upon the validity of its judgment recovered in Ohio. It submits that the appointment of Rochester as receiver in Ohio gave him no title to or right to the possession of the property of the Matherwell Iron & Steel Company in Tennessee, and avers the fact to be that Rochester had not taken such property into possession, and had not assumed any control of it, when the judgment was recovered in Ohio, and when the bill was filed in Tennessee, and the property attached by the Commercial National Bank. The answer then denies that the courts of Tennessee have any jurisdiction to administer the laws of Ohio with reference to its corporations, and insists that in Tennessee the Matherwell Iron & Steel Company, at the bringing of this suit, was only an individual, owning the property in the hands of Mundinger as an individual could own it.

On the 29th of March, 1893, after the last bill was filed, a decree was entered in both suits, by agreement of parties, that all the property in controversy in Tennessee be turned over to Rochester, the Ohio receiver, to be sold by him for the best price possible, and that the fund arising from the sale be held by him as a separate fund, to be disposed of according to the final decree made by the court on the two suits. The two causes were heard together, and the chancellor decreed: First. The confession of the judgment by the Matherwell Iron & Steel Company in the state of Ohio on the 20th of July, 1892, in favor of the Commercial National Bank, was by the laws of Ohio absolutely void as against Rochester, the receiver; and he accordingly dismissed the bill of the Commercial National Bank. Second. That Rochester, as receiver of said defunct corporation, have and retain possession of said property, to be administered by him as directed by the proper court in the state of Ohio. The Commercial National Bank appealed, and has assigned errors.

The insistence of complainant is that, by virtue of its original and amended bills and the attachment sued out thereunder, it acquired a lien upon the property in controversy, and that such lien is superior to any claim or title of Rochester, the Ohio receiver. Complainant bases its remedy upon section 5040, Milliken & Vertrees' Code, viz.: "When a judgment has been recovered in any other state against a resident of such state, and the creditor has exhausted his legal remedy, the real or personal property of the debtor in this state may be subjected to the satisfaction of such debt by bill stating the facts under oath, and filed in the court of the district in which the property is situated." *Taylor* v. *Badoux*, 92 Tenn. 249. It will be remembered that one of the present bills was filed by the receiver, in which he prays that said goods be turned over to him under his appointment as receiver in the state of Ohio, or that a receiver be appointed to take charge of and sell the goods, so that in either event he may realize the proceeds of the goods, and take them to Ohio, to enable him to administer his trust, to the end that the assets of the corporation may be divided *pro rata* among all its creditors. This bill cannot be maintained for any purpose, for want of authority in the receiver to institute an action in a jurisdiction beyond that of his appointment. Says Mr. High in his work on Receivers (sec. 289), viz.: "Upon the question of the territorial extent of a receiver's jurisdiction and powers for the purpose of instituting actions connected with his receivership, the prevailing doctrine established by the Supreme Court of the United States, and sustained by the weight of authority in various states, is that the receiver has no extraterritorial jurisdiction, and cannot . . . go into a foreign state or jurisdiction and there institute a suit for the recovery of demands due the person or estate subject to

his receivership. His functions and powers for the purposes of litigation are held to be limited to the courts of the state within which he was appointed, and the principles of comity between nations and states which recognize the judicial decisions of one tribunal as conclusive in another do not apply to such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction." *Booth* v. *Clark*, 58 U. S. 17 How. 322, 15 L. ed. 164; Beach, Receivers, §§ 680, 681. We think, therefore, the chancellor was in error in recognizing the right of the Ohio receiver to sue in a Tennessee court to recover property which had never been in his possession. *Cagill* v. *Wooldridge*, 8 Baxt. 580, 35 Am. Rep. 716.

The next question presented is whether, in view of the proceedings in Ohio and the laws of that state, where both of these corporations are domiciled, the Commercial National Bank is entitled to enforce its judgment against the Matherwell Iron & Steel Company in the courts of Tennessee, and to subject to the satisfaction thereof property belonging to the latter in this state. It will be observed that the Matherwell Iron & Steel Company made no voluntary conveyance or transfer of its property in Ohio. The proceedings against it in Ohio were *in invitum*, and under statutes authorizing the dissolution of insolvent corporations. This fact must be kept in view, for it will be found to be the differential feature that marks two distinct lines of decisions.

In *Cole* v. *Cunningham*, 133 U. S. 107, 129, 33 L. ed. 538, 547, and in *Barnett* v. *Kinney*, 147 U. S. 476, 481, 37 L. ed. 247, 249, the Supreme Court of the United States points out the difference between a voluntary transfer of property out of the jurisdiction and the transfer of such property as the result of legal proceedings at the place of his domicil, saying, viz.: "Although in some of the states the fact that the assignee claims under a decree of a court or by virtue of the law of the state of the domicil of the debtor and the attaching creditor, and not under a conveyance by the insolvent, is regarded as immaterial, yet in most the distinction between involuntary transfers of property, such as work by operation of law, as foreign bankrupt and insolvent laws, and a voluntary conveyance, is recognized. The reason for the distinction is that a voluntary transfer, if valid where made, ought generally to be valid everywhere, being the exercise of the personal right of the owner to dispose of his own, while an assignment by operation of law has no legal operation out of the state in which the law was passed." Says Mr. Wharton in his Conflict of Laws (secs. 799, 800), viz.: "With regard to proceedings in bankruptcy or insolvency of the courts of the several states *in invitum*, the universal rule is that such proceedings are ineffective as against attaching creditors until they are either adopted by domestic process or the property is realized by the assignee. Local lien creditors, whose liens are prior to the actual arrest under local process, unquestionably have precedence. The question of priority between them and the bankrupt assignee is one of which the *lex rei sitæ* is the sole arbiter." The author in the text is speaking of state bankrupt or insolvent laws, and not in respect of national bankruptcies. In *Reynolds* v. *Adden*, 136 U. S. 348, 34 L. ed. 360, *Mr. Justice* Bradley referred to the same distinction, viz.: "Every state exercises to a greater or less extent, as it deems expedient, the comity of giving effect to the insolvent proceedings of other states, except as it may be compelled to give them full effect by the Constitution of the United States. Where the transfer of the debtor's property is the result of a judicial proceeding, as in the present case, there is no provision of the constitution which requires the courts of another state to carry it into effect, and, as a general rule, no state court will do this, to the prejudice of the citizens of its own state." Our statute (Milliken & Vertrees' Code, § 5040) is not limited to citizens of this state; but, as held by this court in *Taylor* v. *Badoux*, *supra*, a citizen of another state is entitled to pursue the remedy it affords. *Lisenbee* v. *Holt*, 1 Sneed, 42, 51. It was held by the court of appeals of New York in *Hibernia Nat. Bank* v. *Lacombe*, 84 N. Y. 367, 38 Am. Rep. 518, that an assignment by virtue of or under a foreign law does not operate upon a debt or right of action as against a person in that state, and that a foreign creditor rightfully in a court of that state, pursuing a remedy given by the statutes of that state, may enforce that remedy to the same extent, in the same manner, and with the same priority of lien, as a citizen. In that case it appeared that the plaintiff, a national bank, organized and having a place of business in New Orleans, purchased for value of defendant the Mechanics' & Traders' Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for $10,000, payable to plaintiff's order. The draft was duly presented to the payors in New York, and payment refused. It was duly protested, and notice given to the drawer. It further appeared that, after the delivery of the draft to plaintiff, the Mechanics' & Traders' Bank was placed in liquidation, under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets. The plaintiff afterwards commenced an attachment suit in the supreme court of New York, which was served on M. Morgan's Sons, bankers of New York, who had funds of the Mechanics' & Traders' Bank of New Orleans in their hands. It was held that the statute of New York authorized the proceeding, and that neither the law of Louisiana nor the adjudication of that state under which the commissioners were appointed could have any operation here to defeat or affect the lien of plaintiffs' attachment. The court said, viz.: "The remaining question relates to the claim made by the commissioners appointed by the court in Louisiana. Neither the law nor the adjudication under which they were appointed can have any operation here. They are strictly local, and affect nothing more than they can reach; for the rule, as we conceive, is well settled that an assignment by virtue of or under a foreign law does not operate upon a debt or right of action as against

a person in this state. The plaintiff, as we have seen, although a foreign creditor, is rightfully in our courts, pursuing a remedy given by our statutes. It may enforce that remedy to the same extent and in the same manner and with the same priority as a citizen. Any other construction would make the permission of the statute a form without benefit, a formality, and not matter of substance; a mere delusion. Once properly in court, and accepted as a suitor, neither the law nor court administering the law will admit any distinction between the citizen of its own state and that of another. Before the law and in its tribunals there can be no preference of one over the other. It follows that, however fatal the adjudication in Louisiana may be to the existence of the defendant corporation in that state, it cannot deprive its creditors of the remedies afforded by other forums against its property. This action was commenced before the intervention of the commissioners, and to it they have established no defense, nor shown sufficient reason for defeating the priority of lien acquired by the proceedings therein. *Willitts* v. *Waite*, 25 N. Y. 586; *Folger* v. *Columbian Ins. Co.* 99 Mass. 267, 96 Am. Dec. 747. If the plaintiff has by its proceedings obtained an advantage against the law and adjudications of Louisiana, it is a resident of that state, and, as such, the appellant's counsel contends, may there be overhauled and made to account for what it has gained here. To that remedy, if it exist, the defendants may properly be remitted." In the later *Case of Waite*, reported in 99 N. Y. 448, the court of appeals of that state held that, where neither the rights of domestic creditors nor of foreign creditors proceeding against the property under state laws were involved, the foreign assignees may be permitted to sue in their courts for the benefit of all the creditors, on principles of national comity, without a surrender of the principle that a foreign statutory assignment does not operate as a transfer of the property in that state. It was distinctly held in that case that a statutory title of foreign assignees can have no recognition in that state solely by virtue of the statute. The case of *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. ed. 538, is not an authority against the principles already announced. It appeared in that case that all the parties were domiciled in the state of Massachusetts. The debtor had made a general assignment of all his property for the benefit of all his creditors, as required by the laws of that state. A creditor was proceeding in a foreign jurisdiction to subject property of his insolvent debtor situated in the sister state to the satisfaction of his claim. Upon bill filed in the state of Massachusetts, where all the parties resided, the creditor was enjoined from proceeding further with the prosecution of his suit to obtain preference in property situated in such foreign jurisdiction. It is obvious that case is entirely dissimilar in its facts to this case. We have also carefully examined the case of *Bagby* v. *Atlantic, M. & O. R. Co.*, 86 Pa. 291, cited in the brief of defendants' counsel; and, while it supports his contention, the case, in our opinion, is opposed to the great weight of authority on the subject. The other case, *Hadley* v. *Freedmans Sav. & T. Co.*, 2 Tenn. Ch. 122, we do not think apposite.

It is contended, however, on behalf of defendants, that complainant's judgment cannot be enforced in the state of Tennessee, because it was void in the state of Ohio, where rendered. This contention is based upon the statute of that state, which provides, viz.: "And all judgments confessed by such corporation (after the petition for the dissolution of the corporation is filed) shall be absolutely void as against the receiver appointed on such petition and as against the creditors of the corporation." It will be observed that the statute does not in terms declare that the judgment shall be void as against the corporation, nor does it undertake to vest the receiver with the title to property belonging to the insolvent corporation situated beyond the limits of that state. The statute only provides that such judgment shall be void as against the receiver, and the creditors of the corporation. The decree dissolving the Matherwell Iron & Steel Company was not rendered in Ohio until the 12th day of October, 1892; and until that time the corporation was a going concern, with the right to exercise its corporate functions, and was, of course, subject to be impleaded at the suit of any creditor. *Moseby* v. *Williamson*, 5 Heisk. 278; *Comfort* v. *McTeer*, 7 Lea, 660; *City Savings Bank* v. *North Alabama Lumber & Mfg. Co.* 91 Tenn. 12; Wait, Insolvent Corp. § 372; *Central Nat. Bank of Baltimore* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 73, 26 L. ed. 693, 701; 2 Morawetz, Priv. Corp. § 1010. It is true, the petition for the dissolution of the corporation was filed on the 6th of July, 1892, and this judgment was confessed afterwards, to wit, on the 20th of July. It is only against the receiver and creditors of the corporation that such judgment is by the statute declared void. We are of opinion that this statute is only operative in Ohio in favor of the receiver, and in respect of property situated in that state. The chattels in controversy were in the state of Tennessee, and subject to its laws, when these attachment proceedings were begun, and, being the property of the Matherwell Iron & Steel Company, were subject to complainant's judgment, and the lien of complainant's attachment is in no wise affected by the proceedings that transpired in Ohio.

Finally, it is insisted by counsel for defendants that it does not appear that complainant has exhausted its legal remedy in the state of Ohio. This contention is based upon the language of section 5040, Milliken & Vertrees' Code, viz.: "When a judgment has been recovered in any other state against a resident of such state, and the creditor has exhausted his legal remedy," etc. It is claimed on behalf of defendants that up to the date of filing the amended bill in this cause, as shown by the record, the only execution that had issued on said judgment was levied upon property of defendants, or some of them. The proof in the record shows that the property levied on was either released or

subject to prior liens, and that nothing could be made in satisfaction of the judgment. It is, moreover, a conclusive answer to this position that, at the date of the rendition of complainant's judgment in Ohio, all the property of the Matherwell Iron & Steel Company was and has continued to remain in the hands of Rochester, receiver; and complainant absolutely had no remedy in the state of Ohio for the collection of its judgment. It had to all intents and purposes, in the language of the statute, exhausted its legal remedy. *Porter* v. *Sabin*, 149 U. S. 479, 37 L. ed. 818; *Turley* v. *Taylor*, 3 Lea, 178; *Montgomery* v. *McGee*, 7 Humph. 284; *Case* v. *Beauregard*, 101 U. S. 690, 25 L. ed. 1004.

It results that *the bill of Rochester, receiver, filed herein, must be dismissed, and complainant will be entitled to a decree* for the amount of its judgment and interest, and to subject the property herein attached, or its proceeds, to the satisfaction of said decree.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Stephen A. BROWNELL *et al.*
v.
OLD COLONY R. CO. *et al.*

(.....Mass.....)

1. **A railroad company owning a ferry franchise** which runs a ferry as part of its line cannot while operating the rest of its line discontinue the ferry because it is not profitable and refuse to obey a legislative requirement to operate it.
2. **An order by the court to operate a ferry** may be in the first instance to provide a suitable ferry without definitely deciding what kind of a ferry is suitable.
3. **Special mention of a ferry franchise** is not necessary to convey it in a transfer of a railroad of which the ferry is practically an extension.
4. **Acquiescence by the state in the abandonment of a ferry** is not shown by mere failure of officers to take action to compel its operation.
5. **Duty to operate a ferry under a franchise may be specifically enforced** by a suit in court authorized by statute, and the forfeiture of the charter is not the only remedy.
6. **The enforcement of a penalty due to the state** under Stat. 1894, chap. 392, for failure to operate a ferry cannot be had in a suit on petition of individuals to compel the operation of the ferry.

(June 19, 1895.)

CASE reserved by the Supreme Judicial Court for Bristol County for the opinion of the full court in a proceeding to compel defendants to operate a ferry between Fairhaven and New Bedford and to enforce the statutory penalty for their refusal to do so. *Decree in favor of complainants.*

The facts are stated in the opinion.

Messrs. **T. M. Stetson** and **L. Le B. Holmes,** for plaintiffs:

Statute 1882, chapter 80, authorizes union of Old Colony Railroad and said Boston, Clinton, Fitchburg & New Bedford Railroad, under the name of Old Colony Railroad Company, which shall enjoy all the franchises and property belonging to both, and shall assume all the duties of said corporations.

The Old Colony Railroad votes union and to be subject to all the duties of a railroad which in its title deed of ten years before was expressly and in terms bound to this ferry duty and powers, "as fully and amply as if they had first been granted directly to said New Bedford Railroad Company." The Old Colony Railroad was inexcusable if it did not know what the title deed of its grantor set forth. But whether it knew or not, its duty to the public was the same.

And that river crossing was just as much its duty as to maintain the railroad to Taunton, or any bridge.

Wheeler v. *San Francisco & A. R. Co.* 31 Cal. 68, 89 Am. Dec. 147.

A consolidation "subjects to all the duties of both"—defendant became liable not only to duties owed the public, but even to existing tort damages.

John Hancock Mut. L. Ins. Co. v. *Worcester, N. & R. R. Co.* 149 Mass. 214; Morawetz, Priv. Corp. §§ 969, 942–957.

A privilege is a duty: if a charter is a contract, then the railroad owes the consideration, *i. e.*, burdens for the privileges granted it.

Com. v. *Hancock Free Bridge Corp.* 2 Gray, 64.

This ferry was more than an appendage, it was the railway itself. By Act of 1854, "it shall exist and be known as the Fairhaven Branch Railroad."

Fitch v. *New Haven, N. L. & S. R. Co.* 31 Conn. 38; *Cohen* v. *Wilkinson*, 12 Beav. 125 *Wheeler* v. *San Francisco & A. R. Co.* and *Com.* v. *Hancock Free Bridge Corp. supra.*

By virtue of this deed the Old Colony Railroad owns the Fairhaven Branch Railroad, including the ferry. Its answer says it owns the said Fairhaven Branch Railroad. It shall not be permitted to say, "We have violated our duty, and so should not be held to such duty." The grantee of a charter cannot relieve himself by violation. That is not his right.

Barker v. *Barrows*, 138 Mass. 580; *Rawson*, v. *Uxbridge School Dist. No. 5*, 7 Allen, 127, 83 Am. Dec. 670; *Sohier* v. *Trinity Church*, 109 Mass. 1; *Packard* v. *Ames*, 16 Gray, 327; *Episcopal City Mission* v. *Appleton*, 117 Mass. 326.

Throughout the chain of deeds it was not necessary ever to use the word "duties."

Com. v. *Hancock Free Bridge Corp.* 2 Gray, 61.

A mere transfer of a franchise carries its duties, as well as its privileges, without any other words.

Com. v. *Hancock Free Bridge Corp.* 2 Gray, 65.

NOTE.—In connection with the above case, see *note* to State v. Dodge City, M. & T. R. Co. (Kan.) 24 L. R. A. 564, on mandamus to compel operation of railroad.

See also 32 L. R. A. 315.

A Massachusetts franchise cannot be ended by "abandonment."

Boston Glass Manufactory v. *Langdon*, 24 Pick. 49, 35 Am. Dec. 292; *Russell* v. *McLellan*, 14 Pick. 63; 2 Kent, Com. *305, *note*, 311 312.

The commonwealth's remedy is not limited to a forfeiture of charter. Enforcement of chartered duty has always been law, by mandamus, injunction, indictment, action or tort for penalty, etc.

2 Kent, Com. *290, *note; Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 187; *Mower* v. *Leicester*, 9 Mass. 250, 6 Am. Dec. 63; Morawetz, Priv. Corp. §§ 1075*b*, 1076, 1132, 1133; *Keene* v. *Eastern R. Co.* 103 Mass. 259; *Re Fencing*, Pub. Stat. chap. 112, § 115; *Fitchburg R. Co.* v. *Grand Junction Railroad & Depot Co.* 4 Allen, 205; *Roxbury* v. *Boston & P. R. Corp.* 6 Cush. 436.

Or by indictment.

2 Kent, Com. *290, *note*; *Com.* v. *Hancock Free Bridge Corp.* 2 Gray, 67.

No limitation runs against the commonwealth unless expressly so provided.

Stoughton, Sharon & Canton v. *Baker*, 4 Mass. 528, 3 Am. Dec. 236; *Com.* v. *Alger*, 7 Cush. 100; *United States* v. *Hoar*, 2 Mason, 313; *Arundel* v. *McCulloch*, 10 Mass. 70; *People* v. *Gilbert*, 18 Johns. 227; *United States* v. *Thompson*, 98 U. S. 486, 25 L. ed. 194; *Com.* v. *Alburger*, 1 Whart. 469; *Peoria & R. I. R. Co.* v. *Coal Valley Min. Co.* 68 Ill. 489; *United States* v. *Alexandria*, 19 Fed. Rep. 611; *United States* v. *Nashville, C. & St. L. R. Co.* 118 U. S. 125, 30 L. ed. 83; *Com.* v. *Allen*, 128 Mass. 310; *Charles River Bridge Proprs.* v. *Warren Bridge Proprs.* 36 U. S. 11 Pet. 544, 9 L. ed. 822.

Acceptance by stockholders of Act of 1894, or similar mandatory acts, is absurd.

Com. v. *Eastern R. Co.* 103 Mass. 257, 4 Am. Rep. 555; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *Atty-Gen.* v. *Old Colony R. Co.* 22 L. R. A. 112, 160 Mass. 96; *Fitchburg R. Co.* v. *Grand Junction Railroad & Depot Co. supra; Mobile & M. R. Co.* v. *Steiner*, 61 Ala. 559; *Gowen* v. *Penobscot R. Co.* 44 Me. 145; *State* v. *New Haven & Northampton Co.* 43 Conn. 351; *Eastern R. Co.* v. *Boston & M. Railroad*, 111 Mass. 129, 15 Am. Rep. 13.

Profit and loss are not important where there is a legislative act.

A ferry is part of a unit, like a bridge, or rock cut.

Com. v. *Eastern R. Co.* 103 Mass. 257, 4 Am. Rep. 555; *Parker* v. *Metropolitan R. Co.* 109 Mass. 506; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 64; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *Metropolitan R. Co.* v. *Highland Street R. Co.* 118 Mass. 293.

The lessor is the one to proceed against.

Braslin v. *Somerville Horse R. Co.* 145 Mass. 67; *Nelson* v. *Vermont & C. R. Co.* 26 Vt. 721, 62 Am. Dec. 614; *Bower* v. *B. & S. R. Co.* 42 Iowa, 548; *Singleton* v. *Southwestern Railroad*, 70 Ga. 465, 48 Am. Rep. 574; *Central & M. R. Co.* v. *Morris*, 68 Tex. 49; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *New Bedford R. Co.* v. *Old Colony R. Co.* 120 Mass. 399; *Com.* v. *Tenth Massachusetts Turnp. Corp.* 5 Cush. 509; *Langley* v. *Boston & M. Railroad*, 10 Gray, 103, *Davis* v. *Providence & W. R. Co.* 121 Mass. 134; *Ingersoll* v. *Stockbridge & P. R. Co.* 8 Allen, 439; *Notice in hac*, Pub. Stat. chap. 105, § 37; *Chicago & N. W. R. Co.* v. *Crane*, 113 U. S. 424, 28 L. ed. 1064; *Bouknight* v. *Charlotte, C. & A. R. Co.* 41 S. C. 415; *Balsley* v. *St. Louis, A. & T. H. R. Co.* 119 Ill. 68, 59 Am. Rep. 784; *Chollette* v. *Omaha & R. V. R. Co.* 4 L. R. A. 135, 26 Neb. 168; *Macon & A. R. Co.* v. *Mayes*, 49 Ga. 355, 15 Am. Rep. 678; *Harmon* v. *Columbia & G. R. Co.* 28 S. C. 401; *Gale* v. *Troy & B. R. Co.* 51 Hun, 470.

If a railroad attempts to divest itself generally of its personal property, or the bulk of its property, the act is *ultra vires* and void.

Central Transp. Co. v. *Pullman's Palace Car Co.* 139 U. S. 49, 35 L. ed. 64; *Branch* v. *Jesup*, 106 U. S. 468, 27 L. ed. 279; 2 Kent, Com. *314, and *notes*.

Act of 1894, chapter 392, is valid by legislative competence and power, without any previous duty.

Massachusetts General Hospital v. *State Mut. L. Assur. Co. of Worcester*, 4 Gray, 227; *Fitchburg R. Co.* v. *Grand Junction Railroad & Depot Co.* 4 Allen, 205; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *Mobile & M. R. Co.* v. *Steiner*, 61 Ala. 559; *Railroad Comrs.* v. *Portland & O. Cent. R. Co.* 63 Me. 269, 18 Am. Rep. 208; *Gowen* v. *Penobscot R. Co.* 44 Me. 145; *State* v. *New Haven & Northampton Co.* 43 Conn. 351; *State* v. *Hartford & N. H. R. Co.* 29 Conn. 538; *Boston & M. R. Co.* v. *York County Comrs.* 79 Me. 386; *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Crawford* v. *Branch Bank of Alabama at Mobile*, 48 U. S. 7 How. 282, 12 L. ed. 702; *People* v. *Boston & A. R. Co.* 70 N. Y. 569; *Parker* v. *Metropolitan R. Co.* 109 Mass. 506; *Metropolitan R. Co.* v. *Highland Street R. Co.* 118 Mass. 293; *Re Northampton's Petition*, 158 Mass. 301; *Norwood* v. *New York & N. E. R. Co.* 161 Mass. 264; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 63; *Keene* v. *Eastern R. Co.* 103 Mass. 259.

Mr. **J. H. Benton, Jr.**, for defendant.

Mr. **H. M. Knowlton**, *Atty-Gen.*, for the Commonwealth.

Allen, *J.*, delivered the opinion of the court:

By Statute 1854, chapter 124, the proprietors of the New Bedford & Fairhaven Ferry were authorized to transfer their charter to the Fairhaven Branch Railroad Company by deed, which should vest in the latter company all the rights and powers conferred by said charter, with a provision that the latter company should be held to perform all the duties prescribed thereby, and that from and after the execution and delivery of the deed the name of the ferry company should be changed, and that the said corporation should afterwards exist and be known by the name of the Fairhaven Branch Railroad Company, and should not be required to hold separate meetings as a ferry company, but that all acts needful and proper to be done should be done at regular or special meetings of the railroad corporation, or by the directors thereof. The deed which was executed under the above statute was expressed to be upon the condition that the railroad company and their successors should at all times discharge the duties, and become and remain subject to

the liabilities, prescribed and set forth in the charter of the ferry company, and also in Stat. 1854, chap. 124. Various intermediate transfers were made, until, in 1888, by virtue of Stat. 1882, chap. 80, the Old Colony Railroad Company succeeded to all the franchises and property which had belonged to the Fairhaven Branch Railroad Company. The evidence in the case leaves no doubt, and it is conceded, that after the deed to the Fairhaven Branch Railroad Company the railroad of that company and the ferry became one line, and were operated as such for a number of years. It was the same in effect as if the railroad company, by its original charter, had been authorized to establish and operate the ferry as a part of its line. The ferry became practically an extension of the railroad, just as if the railroad had been extended over a bridge. The railroad line having been thus extended and operated until 1873, the ferry was in that year discontinued as unprofitable; and by Stat. 1894, chap. 392, the Old Colony Railroad Company was expressly required to provide and operate a suitable ferry in accordance with the provisions of the original ferry charter and of Stat. 1854, chap. 124.

The first question which we have to determine is whether this statute is within the legislative power; that is to say, whether a railroad company, which runs a ferry as a part of its line, and which is operating the rest of its line, can discontinue the ferry, and refuse to obey a legislative requirement to operate it. A railroad company has by no means an absolute power to determine what parts of its line it will operate. Its franchises are granted for the public good, and in exercising them it is largely subject to the control and direction of the legislature. Either by virtue of the police power or of the reserved power to alter charters, many acts may be required which involve expense, and which a railroad corporation, or other corporation to which like rules would apply, would not, if left to itself, undertake. Numerous illustrations of this are found in the decisions of this court, as well as in those elsewhere. *Roxbury* v. *Boston & P. R. Corp.* 6 Cush. 424; *Com.* v. *Hancock Free Bridge Corp.* 2 Gray, 58, 64; *Fitchburg R. Co.* v. *Grand Junction Railroad & Depot Co.* 4 Allen, 198; *Com.* v. *Eastern R. Co.* 103 Mass. 254, 4 Am. Rep. 555; *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Worcester* v. *Norwich & W. R. Co.* 109 Mass. 103; *Re Northampton's Petition*, 158 Mass. 299, 301; *Union Pac. R. Co.* v. *Hall*, 91 U. S. 343, 23 L. ed. 428; *Railroad Comrs.* v. *Portland & O. Cent. R. Co.* 63 Me. 277, 18 Am. Rep. 208; *State* v. *Hartford & N. H. R. Co.* 29 Conn. 538; *People* v. *Albany & V. R. Co.* 24 N. Y. 261, 82 Am. Dec. 295; *People* v. *Boston & A. R. Co.* 70 N. Y. 569; *Monticlair Trop.* v. *New York & G. L. R. Co.* 45 N. J. Eq. 486; *People* v. *Louisville & N. R. Co.* 120 Ill. 48; *State* v. *Iowa Cent. R. Co.* 83 Iowa, 720. The present case is merely an instance of compelling a railroad company to operate its entire line. The legislature has seen fit to pass an imperative statute to this effect. In view of this statute, it is not open to the railroad company to determine that the ferry should be discontinued while all the rest of its various lines are operated. The defendant appears to rely on *Com.* v. *Fitchburg R. Co.*, 12 Gray, 180, as sanctioning a contrary doctrine; but in that case there was no statute requiring that the railroad company should run the unprofitable trains. There is nothing in the decision which declares or implies that the legislature might not have imposed this as an absolute duty. The same thing may be said of *People* v. *Rome, W. & O. R. Co.*, 103 N. Y. 95, and *People* v. *New York, L. E. & W. R. Co.* 104 N. Y. 58, 58 Am. Rep. 484.

The defendant contends that Stat. 1894, chap. 392, did not impose a new obligation on the defendant, but only required the defendant to perform such obligation as the ferry company would have been under to maintain and operate the ferry, if it had not transferred its charter in 1854; and an elaborate argument is made to show that the original ferry company was not bound to maintain the ferry for all time. But, whatever may have been the obligation of the original ferry company, the Fairhaven Branch Railroad Company, when it made the ferry a part of its line, no longer had the power to discontinue the ferry, provided the legislature expressly required that it should be operated. And we are unable to give to the Statute of 1894 the construction suggested by the defendant. This statute makes it the imperative duty of the defendant to operate the ferry, whether it is profitable or not. The defendant contends that the statute requires it to provide and operate a "suitable" ferry, and that there is no proof before the court upon which it can be definitely decided what kind of a ferry is suitable. We think, however, that an order to provide a suitable ferry is sufficient in the first instance, and that, if complaint is made that a ferry boat which may be provided is not suitable, a further application may be made to the court.

The defendant further contends that the requirement to operate a ferry forces it into a new business, and that, if the legislature can require it to operate a ferry for a mile, it could also require it to maintain a line of steamboats to Nantucket. The only answer which needs to be given to this argument is that the ferry, by legislative authority, was adopted by the railroad company as a part of the line of the railroad, and that its subsequent maintenance is no more outside of the business of the railroad company than the maintenance of any other part of the railroad line.

The defendant further contends that the only liability of the defendant for failure to operate the ferry is a liability to forfeit the ferry charter. This argument cannot prevail, since the blending of the ferry franchise with that of the railroad company.

The defendant also contends that it has never acquired the franchise to maintain the ferry. The ground of this argument is that the deed of the ferry franchise to the Fairhaven Branch Railroad Company was upon

condition, and that the deed became void by the failure to perform the duties required by the condition; and, moreover, that in the recent transfers no express mention has been made of the ferry franchise. But the deed of the proprietors of the ferry to the Fairhaven Branch Railroad Company cannot be considered as technically a deed upon condition subsequent. No clause of re-entry for breach of condition was inserted, and the purpose of the proviso was rather to show that the grantee was to assume and perform the duties prescribed and set forth in the charter. *Rawson* v. *Uxbridge School Dist. No. 5*, 7 Allen, 125, 83 Am. Dec. 670; *Sohier* v. *Trinity Church*, 109 Mass. 1, 19; *Episcopal City Mission* v. *Appleton*, 117 Mass. 326. No conveyance upon condition subsequent was contemplated by Stat. 1854, chap. 124, or by the vote of the stockholders of the Fairhaven Branch Railroad Company to make the purchase. The effect of the transaction was to transfer the duties from one corporation to another, after which the original corporation had no further interest in the matter; but the railroad company was bound by law to perform all and singular the duties of the ferry company. The ferry company was not authorized to make a conditional transfer. By section 8 of the statute, its only existence after the transfer was as the Fairhaven Branch Railroad Company. Moreover, an estate on condition subsequent is not defeated except by re-entry for breach of condition. No such re-entry has been made in this case, nor is it easy to see how it could be, since the ferry company, as a separate corporation, has ceased to exist. In reference to the suggestion that no special mention of the ferry franchise has been made in the recent conveyances, it may be said that none need be, since the provisions of Stat. 1854, chap. 124, and the delivery of the deed thereunder. Since that time the ferry corporation has existed and been known by the name of the Fairhaven Branch Railroad Company, and has been included in all transfers of that company.

The defendant further contends that it cannot be required to maintain the ferry during the term of the lease of its railroads and property to the New York, New Haven & Hartford Railroad Company. This lease was not pleaded in defense, and we have no reason to suppose that the omission was through inadvertence. Its admission in evidence was objected to as incompetent, and not open, and no motion was made to amend the answer by pleading it. We therefore have no occasion to consider whether the existence of the lease would exonerate the defendant as lessor from its obligations to the commonwealth, respecting which, however, see *Braslin* v. *Somerville Horse R. Co.* 145 Mass. 64; *Davis* v. *Providence & W. R. Co.* 121 Mass. 134.

The defendant also suggests that any obligation to the commonwealth to operate the ferry was waived by the acquiescence of the commonwealth in its abandonment for a period of twenty years after 1878, and also by legislation subsequent to the abandonment in 1878, by which the railroads were permitted to lease and consolidate upon the basis of such abandonment. But no such waiver on the part of the commonwealth is to be presumed without the use of language in some statute clearly expressing or implying it. The omission by officers of the commonwealth or by others to take steps earlier for enforcing the duty signifies nothing. No statute has been pointed out showing an intention on the part of the legislature to waive the performance of it.

The defendant contends that the legislature could not provide for the specific enforcement of the obligation to maintain the ferry by a suit in court, such as is provided for in Stat. 1894, chap. 392. The numerous cases already cited in which resort has been had to the courts for the enforcement of similar obligations and duties show to the contrary, and that the forfeiture of the charter is not the only remedy.

Finally, it is contended that the penalty of $100 a day for each day's delay in operating such ferry cannot be enforced in this suit. Upon this point the statute is not clear, but we have come to the conclusion that the better construction of the statute is as the defendant contends. The principal reasons supporting this view are as follows: The forfeiture of the sum prescribed is to the commonwealth, but the statute contains no provision making the commonwealth or any one of its officers a party to the suit which ten or more citizens may bring to enforce the provisions of the act. The maintenance of the ferry is for the peculiar benefit of New Bedford and Fairhaven, but the citizens of those places have no special interest in the enforcement of the penalty. The legislature can hardly have intended that the penalty should be paid to the ten or more citizens who are authorized to file a petition in equity to enforce the provisions of the statute, yet nobody else is required to be a party plaintiff. The plaintiffs have made the attorney-general a party to represent the commonwealth; but he is not a financial officer of the state, and we are at a loss to see how he can properly be made a party, or be entitled to appear in his own name to represent the pecuniary interest of the commonwealth under this statute. The ordinary way of enforcing a penalty which is to go to the commonwealth is by proceeding in the name of the commonwealth, unless some other mode is enacted by statute or established by custom. We have a difficulty in inferring that the legislature intended that a heavy pecuniary penalty inuring to the commonwealth should be enforceable by a suit or petition in equity in this court, which suit is instituted, managed, controlled, and subject to be discontinued solely by private citizens, who have no interest in such penalty. The provision of the statute that this court should have jurisdiction in equity upon the petition of ten or more citizens of New Bedford or Fairhaven to enforce the provisions of this act is satisfied by holding that it means the provisions requiring the Old Colony Railroad Company to provide and operate a suitable ferry. These citizens may maintain a petition in equity to enforce so much of the statute as concerns the citizens of New Bedford and

Fairhaven. The commonwealth may enforce the penalty which inures to its benefit. This view derives some confirmation from Pub. Stat., chap. 217, § 2, providing that "all fines and forfeitures . . . expressly appropriated to the use of the commonwealth . . . may, unless otherwise expressly provided by law, be prosecuted for and recovered by indictment in the superior court . . . or the same may be recovered in an action of tort.

The result is that the *plaintiffs are not entitled to a decree for enforcing the forfeiture of $100 a day to the commonwealth, but, in the opinion of a majority of the court, they are entitled to a decree requiring the defendant to provide and operate a suitable ferry.*

Ordered accordingly.

IOWA SUPREME COURT.

E. E. ELLSWORTH
v.
CHICAGO, BURLINGTON & QUINCY R. CO., *Appt.*

[(.....Iowa.....)

1. **The clause "continuous passage within one day** of date of sale" on a railroad ticket does not make the ticket invalid on the day of sale because it bears a prior date.
2. **Failure to pay for a ticket when purchased** because of haste to catch a train, and the acceptance of a promise to pay on return, will not defeat the right of the passenger to recover damages for ejection because the ticket bears a prior date.
3. **A passenger is not called upon to submit to a wrongful ejection** for the purpose of economizing the damages to be recovered, but may make any resistance not amounting to a criminal disturbance of the peace.
4. **Exemplary damages may be recovered** by a passenger for an ejection which was malicious as well as wrongful.

(May 28, 1895.)

APPEAL by defendant from a judgment of the District Court for Adams County in favor of plaintiff in an action brought to recover damages for plaintiff's alleged unlawful ejection from defendant's train. *Affirmed.*

Statement by **Granger, J.:**

On the morning of September 27, 1893, the plaintiff procured a ticket on defendant's line of road from Prescott to Corning, a distance of seven and one third miles. Because of the fair at Corning, the company was selling round-trip tickets at reduced rates, which tickets had to be filled in with a pen. The plaintiff was late reaching the depot at Prescott, so that there was no time to fill up a round-trip ticket, and he told the agent to give him a "straight ticket." The train was moving, and plaintiff took the ticket handed him, and caught the train, and got onto the rear platform. Because of his haste, he did not pay for the ticket, but said to the agent that he would pay on his return, to which the agent assented. By a rule of the company, tickets must be used on the day they are purchased, and, if not so used, they may be returned, and the purchase money will be refunded. The ticket given plaintiff was dated September 24, 1893, instead of the 27th, the day on which it was handed to plaintiff. The delivery of the ticket to plaintiff was a mistake, it having before been sold, and not used, and then redeemed, as above stated. The redemption was by the night agent at Prescott, who put it in the drawer in the ticket office, and the day agent, without noticing the date, gave it to plaintiff. When a short distance from Prescott, the conductor asked for plaintiff's ticket, and the ticket in question was handed him, which, because of its date, he refused, and demanded the fare. The regular fare to Corning is twenty-two cents, and by the rules of the company, authorized by the laws of the state, ten cents above the regular fare is collected by conductors when the ticket office has been open for a reasonable time before the departure of trains, and tickets are not secured. After the refusal of the conductor to receive the ticket, plaintiff offered to pay the regular fare, but refused to pay the additional ten cents. The train was stopped, and plaintiff ejected, and this action is for damages. There was a verdict and judgment for the plaintiff, and the defendant appealed.

Mr. **Smith McPherson** for appellant.
Messrs. **Davis & Wells,** for appellee:

A passage ticket in the ordinary form is merely a voucher taken or receipt adopted for convenience to show that the passenger has paid his fare from one place to another, and does not constitute the contract of carriage; although it may and often does have upon it some condition or limitation which enters into and forms a part of the contract, accordingly it is admissible to prove by parol evidence the terms of the contract in fact entered into between the carrier and the passenger.

Burnham v. *Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220; *Johnson* v. *Concord R. Corp.* 46 N. H. 213, 88 Am. Dec. 199; *Logan* v. *Hannibal & St. J. R. Co.* 77 Mo. 663; *Lewis* v. *New York Sleeping Car. Co.* 143 Mass. 1267, 58 Am. Rep. 135; *Frank* v. *Ingalls,* 4 Ohio St. 560; *Baltimore & O. R. Co.* v. *Campbell,* 36 Ohio St. 647, 38 Am. Rep. 617; *Hufford* v. *Grand Rapids & I. R. Co.* 64 Mich. 631; *Georgia R. & Bkg. Co.* v. *Dougherty,* 86 Ga. 744;

NOTE.—The present case seems to be one of first impression in regard to the effect of the words "day of date of sale" on a railroad ticket.

As to ejection of passenger for refusal to pay fare, see also Peabody v. Oregon R. & Nav. Co. (Or.) 12 L. R. A. 823, and note.

30 L. R. A.

See also 30 L. R. A. 730.

Georgia Railroad v. *Olds*, 77 Ga. 673; *Pennsylvania Co.* v. *Bray*, 125 Ind. 229; *Philadelphia, W. & B. R. Co.* v. *Rice*, 64 Md. 63; *Murdock* v. *Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307; *Bradshaw* v. *South Boston R. Co.* 135 Mass. 407, 46 Am. Rep. 481; *Gulf, C. & S. F. R. Co.* v. *Rather*, 3 Tex. Civ. App. 77.

A passenger is under no obligation in order to avoid wrongful expulsion from a train to pay an extra fare demanded, and then sue to recover it back.

Texas & P. R. Co. v. *Dennis*, 4 Tex. Civ. App. 90; *Jeffersonville R. Co.* v. *Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Chicago, St. L. & P. R. Co.* v. *Graham*, 3 Ind. App. 28; *Chicago & E. I. R. Co.* v. *Conley*, 6 Ind. App. 9; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 387, 45 Am. Rep. 464; *Chicago, St. L. & P. R. Co.* v. *Holdridge*, 118 Ind. 281; *Ohio & M. R. Co.* v. *Cope*, 36 Ill. App. 97; *Georgia Railroad* v. *Olds*, *supra*; *New York, L. E. & W. R. Co.* v. *Winter*, 143 U. S. 71, 36 L. ed. 79; *Palmer* v. *Charlotte, C. & A. R. Co.* 3 S. C. 580; *Burnham* v. *Grand Trunk R. Co.* 63 Me. 299, 18 Am. Rep. 220; *Murdock* v. *Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307; *Arnold* v. *Pennsylvania R. Co.* 115 Pa. 135; *English* v. *Delaware & H. Canal Co.* 66 N. Y. 454, 23 Am. Rep. 69; *Brown* v. *Memphis & C. R. Co.* 7 Fed. Rep. 51; *Louisville, N. A. & C. R. Co.* v. *Conrad*, 4 Ind. App. 88.

Granger, J., delivered the opinion of the court:

1. The court gave the jury the following instruction: "The ticket introduced in evidence, and which is admitted as the one purchased by plaintiff of defendant's agent, is dated September 24, 1893, and contains the following clause: 'Continuous passage within one day of date of sale. You are instructed that said clause is a limitation of the time on which said ticket will be honored, and, as such, is a reasonable limitation and rule. You are further instructed that, presumptively, the date of the ticket was the day of its sale. But if, as a matter of fact, the day of the sale differs from the date of the ticket, yet the said ticket by its express terms was good from the date of sale, and if you find from the evidence that said ticket was purchased by plaintiff on the 26th or 27th day of September, 1893, and was presented within one day from the actual date of such sale, it was good for such passage between the points named, to wit, Prescott and Corning." The instruction is said to involve error because it treats the transaction between the agent and plaintiff as a sale of the ticket, when it appears that the ticket was not paid for on delivery, but it was paid for afterwards on the same day. On that branch of the case the court gave the following instruction: "In the case at bar it is admitted that plaintiff procured a ticket from the defendant's agent at Prescott before entering defendant's cars. It is also admitted that payment was not made until thereafter. On this branch of the case you are instructed that a neglect of plaintiff to pay for the same at that time, under the circumstances shown on the trial of this case, would not alone, or for that reason, invalidate the ticket; and an acceptance on the part of the agent of plaintiff's promise to pay therefor on his return, and a payment thereafter, constitute a valid consideration and payment therefor." It seems to us that that is the correct rule. Had there been a refusal to accept the ticket because not paid for, the question might be different. It is not what could be called a credit sale, nor was it intended as such, but only a delay in payment because there was not time to pay and get the train, and payment was expected the same day, and so made.

2. There is a further complaint of instruction No. 6 because, notwithstanding the clause, "continuous passage within one day of date of sale," it holds the ticket good if presented "within one day from the actual date of such sale." This contention means that the validity of the ticket for the passage depended upon its date rather than the fact as to the sale. We cannot concur in that view. It is not to be believed that the company ever intended to sell a ticket that should not be honored for a passage on the day of the actual sale. It is true that the intent is, in such cases, to have the two dates concur, but no company or person would ever design that its mistake in such a way should be to the prejudice of a purchaser of a ticket. It is not to be doubted that both the company and the plaintiff intended that the ticket in question should be good for a passage on the train on which it was offered. The facts admit of no other conclusion. It is equally true that the plaintiff was, as between himself and the company, entitled to passage on that train, and that his ejectment from it was wrongful. The more difficult question is as to his remedy for the wrong done him; that is, when the conductor refused to accept the ticket because of its date, had the plaintiff the legal right to insist on a passage on that train, and resist removal therefrom, or should he have paid his fare, as demanded, and sought redress from the company on that basis, or, not wishing to do that, should he, on request of the conductor, to avoid damage, have left the train without resistance, and based his damage on the mistake in selling him the ticket? Authorities on this question are far from being harmonious. Other courts have, and this court should, in determining these questions, keep in mind the difficulties to be met with and overcome in a successful management of the railway passenger traffic of the country, both as to the public and the carriers. To such an end it is clearly important that there shall be rules for the guidance of employés in the different parts of the service, and that such rules should be conclusive as to their course of conduct, even though at times the rule may operate to the prejudice of an individual passenger. We may instance a case or two as illustrative of it, as when a person who has purchased a ticket loses it. All will at once see that, although he has paid for the passage, he is not entitled to it on the lost ticket, because the only evidence to show the conductor that he has purchased a ticket is his word, and the confusion and consequences to result from such a system of

management are too manifest to deserve comment. Take, also, a case in which a ticket is paid for, but no ticket handed to the passenger, through the neglect of the agent, and the passenger boards the train with no evidence of a right to a passage. The equitable status of the passenger in this case is somewhat stronger than in the other, but the importance of a rule of conduct for the conductor is equally strong. In such a case there is no harshness in the rule requiring him to seek his damage, if any, on the basis of a failure to deliver the ticket, and which excludes him from any rights on the train because of his payment for the ticket. It is safe to state, as a rule of passenger traffic, that no person has a right to passage on a train without paying fare, unless a ticket or other evidence of a right to transportation is presented to the conductor. This holding, at the outset, puts us to that extent in line with the authorities on the subject, a number of which are cited by appellant in support of its contention in this case. A case relied on by appellant is *Frederick* v. *Marquette, H. & O. R. Co.*, 87 Mich. 342, 26 Am. Rep. 531. We have examined the case with care. In that case it was claimed by plaintiff that he called and paid for a ticket from Ishpeming to Marquette, and, by mistake, the conductor gave him one to Morgan, an intermediate station. He rode to Morgan on the ticket, and, refusing to pay his fare to Marquette, he was ejected from the train, because of which he brought the action. In that case it will be seen that the passenger had no ticket from Morgan to Marquette, a fact known to him before reaching Morgan. The case in this respect is quite in line with the rule we announce, and, in this respect, unlike the case at bar. The opinion in that case deals somewhat elaborately with the importance of rules to guide conductors, and of the conclusiveness of the ticket as to his duty. In the opinion in that case it is said: "As between the conductor and passenger, the ticket must be the conclusive evidence of the extent of the passenger's right to travel. No other rule can protect the conductor in the performance of his duties, or enable him to determine what he may or may not lawfully do in managing the train or collecting fares." With the proposition we do not differ, for, as between the conductor and passenger, no other rule can well obtain, but that is not to say that a passenger may not have rights on a train that a conductor, observing his instructions, may not violate so that the company will be liable. The reasoning in that case would carry the effect of the rule further than we indicate our approval. It treats of the duties of passengers, even when entitled to a passage on a ticket, and the right is denied by a conductor, and when a wrong ticket is issued by mistake of the agent, so that he has not the ticket he should have, and it favors a yielding on the part of the passenger to the claims of the conductor in either case, and his seeking a remedy otherwise than for an ejectment from the train. The force of that case as an authority in the respects stated is much lessened, if not entirely lost, from the fact that, of the four judges, two of them place their concurrence in an affirmance on a different ground, and it does not appear that the reasoning referred to is approved by them. In a later Michigan case, that of *Hufford* v. *Grand Rapids & I. R. Co.*, 53 Mich. 118, the language of the *Frederick Case*, that we approve, is in substance stated and approved. In the latter case the ticket purchased was a part of an excursion ticket that had, in part at least, been canceled, and this was apparent on the face of the ticket. The agent, when shown the ticket by the purchaser, said it was good, but it really was not. In that case, to prevent ejectment from the train, the passenger paid the fare, and the action was for damages because the conductor laid his hand on him to put him off, and took hold of the bell rope to stop the train for that purpose. It is not necessary for us to say whether or not we concur in the holding in that case, for we understand that court to rest its holding on the apparent invalidity of the ticket on its face, it having been canceled. It is said in that opinion: "But we are all of the opinion that, if the plaintiff's ticket was apparently good, he had a right to refuse to leave the car." That is what we regard as the situation in this case. Plaintiff's ticket was apparently good on its face. It should have entitled him to one first-class passage from Prescott to Corning. The fact rendering it not good was a rule of the company as to the time in which it could be used. These rules are changeable at the pleasure of the company, and when a ticket is purchased from one station to another, and on its face it indicates a right to that passage, no rule or regulation of the company should be permitted to defeat that right. A passenger has a right to assume that an agent placed at a station will observe the rules with reference to such matters as dates in or on a ticket. What may be the rule to-day may not be to-morrow. Conceding plaintiff to have known of the rule previously, he was not called upon to question the act of the agent as to the rule on the day he bought the ticket. It is neither reasonable nor practicable for passengers to take notice of such matters, or attempt to correct agents in regard to them. With a ticket that expressed his right to a passage to Corning, he was not required to look behind it for the authority of the agent to issue it. We do not understand that the supreme court of Michigan would apply the rule as to yielding to the directions of a conductor to a case like this, where the ticket is apparently good, but, even if otherwise, we cannot so hold. It would be doing too much in favor of a party in the wrong merely to subserve a public convenience, for which much is claimed. A thought in argument is, and some language of the opinions referred to seems to favor it, that it is the duty of the passenger to not enhance damages by resistance, because it is of no use, but that he should submit quietly to ejectment, and then seek his damages. To say the least, we think he may make any resistance, not amounting to a criminal disturbance of the peace, as was done in this case

and that he is not called upon to submit to a wrongful ejection for the purpose of economizing the damages to be recovered.

Townsend v. *New York Cent. & H. R. R. Co.*, 56 N. Y. 295, 15 Am. Rep. 419, is another case cited and relied upon by appellant. In that case the passenger had surrendered his ticket to a conductor on another train. He changed trains, as was necessary, to reach his destination, but he had no evidence whatever of a right to a passage on that train. He claimed to the conductor that he had purchased a through ticket, and that the other conductor had taken it, and not given it back. For a refusal to pay, he was ejected, and a recovery had in the lower court. The case was reversed on two grounds, the latter ground being the part of the opinion relied on by appellant. The rule of the case is that the remedy was an action for the wrongful act of the first conductor in taking his ticket; that the act of the first conductor did not justify the violation of the lawful regulations of another train; that he should have left the train without resistance, and if he invited force, by resistance, the company was not liable for it. The rule is not against our conclusions. The conductor was right in refusing the passage without a ticket. In such a case the passenger must pay or leave the train. If he does not he is in the wrong. But even in that case two of the judges based their concurrence on the first ground, and one on the last.

The case of *Hufford* v. *Grand Rapids & I. R. Co.*, cited above, was appealed a second time and is reported in 64 Mich. 631, it will be remembered that it is the case where the canceled ticket was sold and refused by the conductor. As bearing upon the effect of such a ticket when presented this language is used: "The ticket given by the agent to the plaintiff was the evidence agreed upon by the parties, by which the defendant should thereafter recognize the rights of the plaintiff in his contract; and neither the company, nor any of its agents, could thereafter be permitted to say that the ticket was not such evidence, and conclusive upon the subject. Passengers are not interested in the internal affairs of the companies whose coaches they ride in, nor are they required to know the rules and regulations made by the directors of a company for the control of the actions of its agents and the management of its affairs." The case holds that even the canceled ticket, because issued for a passage, was good and conclusive. In *Georgia & B. R. Co.* v. *Dougherty*, 86 Ga. 744, which was an action by a colored woman for being ejected from a train, where there was a mistake, her ticket being to Asheville, N. C., instead of Atlanta, Ga., as she supposed, in the opinion it is said: "We think she had a right to rely on the ticket she had purchased from the agent of the railroad company as being a proper one, without an examination of the same; and, nothing else appearing, there being no intervening circumstances which required her to look at the ticket, if she could have read the same, such conduct upon the part of the railroad company and its agents authorized her to recover damages. See *Georgia Railroad* v. *Olds*, 77 Ga. 673; *New York, L. E. & W. R. Co.* v. *Winter*, 143 U. S. 60, 36 L. ed. 71; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Chicago, St. L. & P. R. Co.* v. *Holdridge*, 118 Ind. 281; *Philadelphia, W. & B. R. Co.* v. *Rice*, 64 Md. 63; *Murdock* v. *Boston & A. R. Co.* 137 Mass. 293, 50 Am. Rep. 307; *Burnham* v. *Grand Trunk R. Co.* 63 Me. 298, 18 Am. Rep. 220.

Some importance is attached to the fact that the plaintiff acquiesced in the demand of the conductor by offering to pay the regular fare, and only objected to the extra ten cents, but we do not see how that makes a difference as to his right of recovery. It is not to be questioned but that he claimed his right to a passage on the ticket, and made the offer to avoid ejectment from the train. As he had a ticket, he felt that he should not be called upon to pay a penalty for a neglect of which he was not guilty. We cannot see how an offer to pay that was not accepted could excuse his ejectment from a train on which he was entitled to be.

The court authorized the jury to find exemplary damages, if it found that the act of defendant was malicious. Complaint is made of the instruction under the evidence, but it was warranted. There was evidence of the previous bad feeling and threats which, with what was done at the time of the ejectment, made the question one for the jury.

The judgment is affirmed.

INDIANA SUPREME COURT.

John M. WOHLFORD *et al.*, *Appts.*,
v.
CITIZENS' BUILDING, LOAN & SAVINGS ASSOCIATION.

(.....Ind.....)

1. **Sustaining a demurrer to one paragraph of an answer** is not cause for reversal if the appellant could avail himself of the same defense under the paragraphs remaining.
2. **An assessment to cover losses and equalize members is properly made by the board of directors** of a building and loan association, instead of by the association as a whole, under a statutory provision that the business of the association shall be managed by a board of directors.
3. **An assessment on stock in a building and loan association** for the purpose of covering losses and equalizing the members so that they may all go out at the final close on an equal footing, is within the liabilities of a member upon a note and mortgage which include a provision for the payment not only of installments of dues, but of any fees or assessments.
4. **A formal acceptance in writing of the provisions of the Act of 1885,** which expressly grants to building and loan associations power to make assessments on stock calls to cover losses is not necessary in order that such an association may exercise the enlarged powers granted by that statute, including the power to make an assessment to cover losses, and thereby equalize members so that all at the close may go out on an equal footing.

(April 25, 1895.)

APPEAL by defendants from a judgment of the Circuit Court for Huntington County in favor of plaintiff, in an action brought to enforce payment of a note given by defendants to plaintiff and to foreclose a mortgage securing the same. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. M. Hatfield, M. L. Spencer,** and **W. A. Branyan,** for appellants:

Section 3419, Rev. Stat. 1881, says: "All such associations shall have power to assess" 25 cents per month for expenses. In this law no other power is given to make assessments, and here it must be made by the association, not by the board of directors, president, secretary or any set of officers.

Section 851 of Elliott's Supplement says: "All such corporations shall have power" to make assessments of 25 cents per month to pay expenses, and adds the further authority "to make assessments upon the capital stock to pay losses."

Section 145 of Morawetz on Private Corporations says: "A provision in a charter declaring that the corporation shall be authorized to levy assessments by vote, places the power in the hands of the majority in stockholders' meeting; under such a provision, the directors

NOTE.—*Liability of advanced member of building and loan association to assessment for losses.*

As to the method devised by some of the courts for settling this question, that of compelling the advanced members to repay their loans and then dividing the surplus assets equally among all the members, see *note* to Southern Bldg. & Loan Asso. v. Anniston Loan & T. Co. *ante*, 120.

The tendency of the American cases is to treat the members of the association, advanced and unadvanced, as in the relation of partners, and to compel them to share equally in losses. The English cases, however, do not require this unless the rules of the association provide for it or it is necessary to protect strangers. Under the English conception of such associations, the advanced members bear no relation to them except as stated in their contracts. They can be required to make all the payments provided for, but no more, so far as their mortgage is concerned.

Decisions proceeding on the partnership theory.

The true indebtedness of a member of a building and loan association is not necessarily the difference between what he has received and what he has paid back. The very nature of such an institution involves a profit and loss account. And advanced or borrowing members as well as the rest hold a relation to that account which must be adjusted before they can repudiate their contracts and take leave of the association. As they take their chances for the profits in case of the early closing up of the concern, the rule of equity requires that they should incur the hazards fairly incident to the business, and bear their due proportion of the same. Patterson v. Albany Bldg. & Loan Asso. 63 Ga. 378.

In Rowland v. Old Dominion Bldg. & Loan Asso. 115 N. C. 325, it is said expenses and losses may not only destroy all hope of profits but may bring the deluded borrower to the necessity of paying back for the benefit of the creditors of the association the loan he borrowed after he had settled the debt, as he thought, by the payment of his monthly dues through all the tedious years of his bondage to the association, for however valid between the borrowing member or stockholder and the association may be their agreement that his debt shall be considered extinguished when he has paid in $100 per share, creditors of the association might rise up and object to the consummation of this arrangement upon the very plausible theory that the assets of the corporation should not be applied to the use of the stockholders until the creditors are paid in full.

While a person remains a member of the association he is under obligation to contribute his share of its expenses. Though as a mortgagor he will not be compelled to pay more than the sum actually borrowed by him with legal interest thereon; it was only as a member that he could claim a share of the profits of the association or any benefit in the payments made by others. If he should now set off against his mortgage a share of the profits made equal to the liability which he has incurred for expenses, he will, in effect, recover more than he has paid in, and will throw upon his associates the whole of the burden which, in truth, is his as well as theirs. That cannot be. The association has a right to treat his payments while his membership continues as a contribution, so far as they are needed to the discharge of the expenses incurred in the management of the enterprise in which he had a joint interest with others. Nor has he now any title to the premiums paid by the other borrowers. McGrath v. Hamilton Sav. & Loan Asso. 44 Pa. 383.

The inability of the association to proceed to its

See also 29 L. R. A. 184.

and other agents of the company have no original authority to make assessments, and it seems that the power cannot be delegated to them by vote of the majority."

Spelling, Priv. Corp. § 556.

Section 854 of Elliott's Supplement, provided that associations organized prior to that date could have the advantage of its provisions and be subject to its requirements by filing a written acceptance, acknowledged by the president and attested by the secretary.

These powers could certainly not be exercised by associations organized prior to that date until the new law had been accepted as therein prescribed.

When appellee showed by its complaint that it was incorporated prior to the passage of the act, it was incumbent on appellee to prove, by proper averments, that it had done all that was necessary to authorize it to make an assessment to pay losses.

Cooper v. *Arctic Ditchers*, 56 Ind. 283.

It is claimed in the complaint that by the terms of said note it became due on the 12th day of November, 1891, and said note is therefore due and unpaid.

Supposing, at the time of the loan, the officers had said: "We will loan you $1,060 upon which you are to pay six per cent interest until November 12, 1891, pay $130 per year for eight years as dues, and pay all assessments that our board of directors may make and at the end of the time, November 12, 1891, you will owe us $2,000." No sane man would ever be caught borrowing money on such terms if they were made known to him.

The member had to pay to the association for the loan obtained as follows: Dues for eight years $1,040. Assessments for expenses for eight years $8.00. From February 5, 1885, to November, 1891, he paid six per cent interest on $1,060, although, he at no time, had more than $800 of the money of the association. Is it not about time that the note and stock were set off against each other?

The borrower who pays weekly dues and installments for a period of six years, discharges his obligation to the association.

Lime City Bldg. Sav. & Loan Asso. v. *Wagner*, 122 Ind. 78.

But if the board of directors had a right to make a binding assessment against appellants, was it done? The meeting was a special one called by the secretary, as the by-laws authorized, at which seven members attended.

The board was composed of nine directors. There is nothing said of notice being given the other two directors and it cannot be presumed that such notice was given.

In *Doernbecher* v. *Columbia City Lumber Co.* 21 Or. 573, it was held that where a board was composed of five directors, three could not meet in special meeting and transact the business of the company without giving notice to the other two.

Bank of Little Rock v. *McCarthy*, 55 Ark. 478; *Paola & F. R. R. Co* v. *Anderson County Comrs.* 16 Kan. 309; *Doyle* v. *Mizner*, 42 Mich. 332; Spelling, Priv. Corp. § 424; *Criswell's App.* 100 Pa. 488; *People* v. *Lowe*, 117 N. Y. 175.

Long after this concern began business, the

expected termination by reason of the impairment of its collectible loans is attributable alike to each stockholder. The officers of the association are their agents and the results of their investments are alike the fortune or misfortune of each stockholder whether it be borrower or non-borrower. When a condition thus brought about justifies equity in prematurely terminating the career of the association, the adjustment should be assearly upon the line of what would take place if the association lived out its life as possible. Towle v. American Bldg. Loan & Investment Soc. 61 Fed. Rep. 446.

Where the association could not close, as was contemplated, the court said the borrowing members now want their loans canceled and their liens satisfied, although their stock has not matured. This would let them out without having paid up in full and throw the whole loss on the non-borrowers. It needs no argument to show that this cannot be done. Booz's App. 16 W. N. C. 367.

Where the association was closed up before the shares had reached the amount contemplated by the scheme, the court held that, in distribution, each member, for each share held by him, was entitled to practically the same amount in the assets of the society. Those who were debtors, if they owed more than their distributive share, should pay the balance to the society and upon such payment should have such mortgages canceled. If they owed less than their distributive shares they should have their mortgages canceled and receive balance so as to make them equal with the creditor members. People v. Lowe, 117 N. Y. 175.

When stock matures, the holder is not entitled absolutely to its par value. From such value must necessarily be deducted any expenses or losses incurred in winding up the particular series. What the stockholders are entitled to is an equal division of the assets, less expenses and losses. Laurel Run Bldg. Asso. v. Sperring, 106 Pa. 339.

The mere fact that the assets of the association were sufficient to bring each share to par will not entitle a mortgagor to have his bond canceled and mortgage given up as a matter of course. Buist v. Fitzsimons (S. C.) 21 S. E. Rep. 610.

The original loan association theory.

If there is no provision in the article making an advanced member liable to contribute to losses and there are no creditors except ordinary creditors and the assets are insufficient, the members will be personally liable, whether advanced or unadvanced, and will be settled on the list of contributaries. This liability depends, not on the terms of the contract between the members, but on the fact of all members being principals and of the directors being their agents in relation to the necessary business of the society. In regard to money borrowed under a rule of the society the security of the lenders is the total amount of contributions of members and the creditors can have no recourse except against such funds and property. If the mortgage makes the advanced members liable for all sums of money payable according to the rules of the society he is not entitled to redeem his mortgage without providing for a liability to ordinary or loan creditors. The advanced members are not liable to make further contributions to the losses of the unadvanced in the absence of any contract by the rules or otherwise to that effect. *Re* West London & General Permanent Ben. Bldg. Soc. [1894] 2 Ch. 358.

Where an association was in process of liquidation, it was contended that the borrower must pay the full amount of his loan and leave the amount which he had paid on his shares to be dealt with in the liquidation. The lord chancellor said: "I am

officers induced others, among them appellants, to buy stock and take out loans, holding out the inducements shown by a fair reading and interpretation of their by-laws, briefly to this effect: The stockholder should pay 25 cents per week on each share; this was to pay for the stock. No other provision of any sort is found anywhere nor any sort of notice that any other payment would be required except the fixed payment for expenses. The borrower would be charged only six per cent on the money actually borrowed, to be paid in weekly installments, and at the expiration of eight years from incorporation, if the borrower made these payments as required by the by-laws, it would pay his stock and his stock should cancel the note. Appellant did all of these things.

The contract of purchase was fixed by the law governing, such as it then was, the by-laws of the plaintiff and the acceptance of the shares by appellant on the terms so fixed.

Wohlford, then, has paid for his stock.

There were no losses and the appellee had a large amount of cash in excess of the debts. Why should Wohlford make up, not losses, not debts, not expenses, but a mere deficiency of anticipated, speculative profits?

Lime City Bldg. Sav. & Loan Asso. v. *Wagner*, 122 Ind. 78.

Messrs. **J. B. Kenner** and **U. S. Leah,** for appellee:

All former legislation was repealed by the Act of 1885. An association organized before could act under the latter act. Section 857 of the Act of 1885 provides that they shall.

McLaughlin v. *Citizens Bldg. Loan & Sav. Asso.* 62 Ind. 264.

Just before the end of the eight years, when it was supposed the association would be closed out or wound up, it is discovered that the borrowers have received their $200 per share in full, but that there is not enough money left to pay off the non-borrowing stockholders in full, and other debts of the association. The corporation thereupon assesses each borrowing stockholder with a sum of money sufficient to equalize the borrowing and non-borrowing stockholders, or in other words calls for that further amount on his stock.

The association is insolvent.

The insolvency of the company puts an end to the operations as a building association; to a certain extent, it also ends the contract between it and its members respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors, and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally, and not throw upon either borrowers or non-borrowers more than their respective share. The result may be reached by requiring the borrower to repay what he actually received with interest. He would then be entitled, after the debts of the corporation are paid, to a *pro rata* dividend with the non-borrower for what he has paid upon his stock. He will then be obliged to bear his proper share of the losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the

totally at a loss, and have been throughout, how to understand the argument that you can cancel or treat as a nullity an actual payment on account of that transaction, merely because the society may have made bad investments and lost the money which had been paid." This gentleman, on paying the full amount of his shares, would do al which, as a contributor or otherwise, he could possibly be required to do. Brownlie v. Russell, 8 App. Cas. 235, 48 L. T. N. S. 881, 47 J. P. 757.

Borrowing members are entitled to have their securities discharged on the terms of the rules when there are no outside creditors and are not bound to remain members to bear a share of the losses incurred by the society. Tosh v. North British Bldg. Soc. 11 App. Cas. 496. In that case the lord chancellor quotes the language of *Lord* Selborne, in Brownlie v. Russell: "A fallacy which has pervaded much of the argument which has been offered to your lordships in support of the appeal, is that because the members of this society are associated together for a common purpose, therefore there must, in equity and reason and by implication from their contract, although not in terms expressed, be a right on the part of some of the members to hold all the others liable in contribution to them for any loss which, in the actual state of things, they may have sustained. It appears to me that such a result cannot be arrived at by presumptions or inferences from the law relating to companies of a different kind, but that we must look to this particular contract."

The advance made to a member of the society is not a loan to be repaid. It is a payment in advance of the amount to which he will be entitled at the end of his term. Should losses occur afterwards which were not foreseen when the advance was made, the claim of the society to make the advanced members contribute will be in effect, "We have advanced you too much; repay a portion of the advance." To increase the stipulated monthly payments which he must make to redeem the mortgage would only be a mode of effecting such repayment of part of the advance. But the ground of such a claim against an advanced member is not a mistake of fact; it is that losses have occurred after the advance which were not anticipated at the time. There is no equity arising from that fact which would found a claim for recovering any part of the advance. In the absence of a contract by the advanced member to contribute to the deficiency of funds to pay other members arising from losses incurred after the advance was made, it is difficult to see any principle on which such contribution could be claimed. Buckle v. Lordonny, 56 L. J. Ch. 437, 56 L. T. N. S. 278, 35 Week. Rep. 360, 51 J. P. 422.

Where the rules of the society did not make the advanced members liable to contribute to losses, he cannot be put on the list of contributaries although his mortgage secured payment of all moneys whatsoever to be paid by the mortgagor, pursuant to the rules of the society, in respect to the shares received by him in advance or otherwise "in respect of his being a member of said society." *Re* Britania Permanent Ben. Bldg. Asso. 65 L. T. N. S. 196.

Where there was a surplus of assets at the time a winding up order, was passed it was held that the advanced members would be required to pay the amount of their arrearages at the time that the order was passed but could not be required to contribute anything beyond that date. *Re* Middlesborough, R. & S. Bldg. Soc. 58 L. J. Ch. 771.

Where the rules of the society provided that when the amount paid by the borrower should equal the sum advanced, with interest and other charges thereon, he should be entitled to release, it was held that he could not be compelled to pay a call for the benefit of the other members although he might have been compelled to contribute

losses, and throw them wholly upon the non-borrowers. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner.

Strohen v. *Franklin Sav. Fund & Loan Asso.* 115 Pa. 278, approved in *Callahan's App.* 124 Pa. 139; *Laurel Run Bldg. Asso.* v. *Sperring*, 106 Pa. 334; *Booz's App.* 16 W. N. C. 365.

The holders of matured stock are not creditors, and can only share *pro rata* with the holders of unmatured stock, after the payment of the creditors of the corporation.

Criswell's App. 100 Pa. 488.

The same idea of equality is carried out in New York, when it was held that each member for each share held by him was entitled to the same amount, *i. e.* a proportionate share of the assets; if a debtor, and if he owed more than his distributive share, he was bound to pay the balance, and upon such payment was entitled to a discharge of his mortgage.

People v. *Lowe*, 117 N. Y. 175, reversing 47 Hun, 577. See also *Everman* v. *Schmitt*, 24 Ohio L. J. 56; *McGrath* v. *Hamilton Sav. & Loan Asso.* 44 Pa. 383.

To allow a member to retire and demand all he paid in, without contributing anything to losses which are manifest and impending, would be unjust towards his fellow members. And it would be bad faith in him. He has a right to share the profits while a member, and he must also bear his proportion of the losses.

Knoblanck v. *Robert Blum Bldg. Asso.* 25 Pittsb. L. J. 39.

A stockholder withdrawing from a building association must bear his proportion of losses sustained prior to notice of withdrawal.

Wittman v *Concordia Bldg. Asso. No. 4*, 18 Phila. 95; *Lime City Bldg. Sav. & Loan Asso.* v. *Wagner*, 122 Ind. 78.

It is the duty of members to contribute to losses and expenses of the society.

Endlich, Bldg. Asso. §§ 88, 104–106; *Robertson* v. *American Homestead Asso.* 10 Md. 397, 69 Am. Dec. 145 and *note; McGrath* v. *Hamilton Sav. & Loan Asso.* 44 Pa. 383; *United States Bldg. & Loan Asso.* v. *Silverman*, 85 Pa. 394.

Jordan, J., delivered the opinion of the court:

This action was commenced by appellee against appellant and wife, in the court below, on January 14, 1892, upon a certain note and mortgage. A trial resulted in the former obtaining a judgment upon the note, and a decree of foreclosure upon the mortgage. Appellee is a corporation duly organized under the laws of this state providing for organization and operation of building, loan and savings associations, and its existence for doing business was, by its articles of association, limited to eight years from and after the date of its organization, which was November 12, 1883; and at the time of bringing this action it was engaged in winding up its business, under section 3006, Rev. Stat. 1881 (Rev. Stat. 1894, § 3429), which continued its existence for three years for that purpose. The association was composed of two classes of members; namely, "borrowers" and "non-borrowers." Appellant was a member of the association belonging to the first-mentioned class, and was a holder and owner of ten shares of the capital stock, of $200 each, which he obtained at the time he executed the note and mortgage in question. Under the law and constitution rules and by-laws governing the operation of appellee's association, the weekly payments on shares of stock, which are denominated "dues,"

towards payment of the creditors had there been any. *Re* Doncaster Permanent Ben. Bldg. & Investment Soc. 15 L. T. N. S. 270, L. R. 3 Eq. 158, 15 Week. Rep. 102.

If there are outside creditors at the time of winding up an association, an advanced member will be placed on the list of contributaries as to the amount unpaid under the terms of his mortgage and compelled to pay the amount immediately, but when that is paid he will be free from all further liability to the society. London Provident Bldg. Soc. v. Morgan [1893] 2 Q. B. 266.

In Bowker v. Mill River Loan Fund Asso. 7 Allen, 100, it was held that the position of an advanced member of the association was merely that of a debtor for the full amount of his bond which remained unpaid.

Mortgages are not assets to be applied to the satisfaction of the claims of unpaid shareholders. Lister v. Log Cabin Bldg. Asso. 38 Md. 115.

Effect of rules or provisions in mortgage.

If the rules of the association provide that at the expiration of six years the stock shall be applied in cancellation of the loan, when the time arrives the borrower cannot be required to do more and his obligation to the association is extinguished. Lime City Bldg. Sav. & Loan Asso. v. Wagner, 122 Ind. 78.

Where the constitution of the association provides that "any stockholder desiring to settle a loan shall be charged with the actual amount loaned him together with all fines due and credited with the amount of dues paid in upon the stock on which the loan has been made," any person meeting these conditions has a right to have his mortgaged ischarged, regardless of the conditions of the affairs of the association and his right with respect to the other members. Myers v. Schoyer, 9 Mackey, 254.

Clauses for the division of profits are not sufficient to establish the liability of advanced members. *Re* West Riding of Yorkshire Permanent Ben. Bldg. Asso. L. R. 43 Ch. Div. 407.

Where the mortgage provides for payment of whatever will become due under the rules and a rule provides that if there is a deficiency of income by which the society may be prevented from meeting its anticipated expenditures and liabilities, the amount of such deficiency is to be equitably and equally apportioned between the investing and borrowing members, any loss will be included which arises whereby the assets will be insufficient for the payment of investing members and the borrowing members are liable to contribute in favor of the investing members to the losses. *Ibid.*

Where the mortgagee covenants to pay the weekly dues and fines until such time as the association might have a sufficient fund to pay all the holders of unredeemed shares of stock the sum of $100 per share clear of all losses and liabilities, the mortgagor can be required to contribute to losses and liabilities of the association only in case of its continued existence and operation and termination in regular course and mode, as provided in the articles of the association, and then only by the prolonged and extended payment of weekly dues. Low Street Bldg. Asso. No. 6 v. Zucker, 48 Md. 452.

were loaned to members, and the plan was to offer the money on hand each month to its members at a public bidding, for the privilege of obtaining the loan; and the stockholder offering the highest premium was granted the loan, provided he could give the required security. It appears, then, by this plan, that if a member is the owner of one share of stock of $200, and desires to procure a loan, he bids, say 20 per cent premium; or, in other words, offers to relinquish to the association $20 on each $100, or $40 on his share of $200. He, in this manner, only receives in money on his one share $160, and is required to execute his note for $200, and secure the same by a mortgage. It also appears from this mode of procedure that the borrowing member, including the amount which he bids as a premium, receives his full share in advance of the maturity of his stock. He and all other members are required to pay 25 cents per week on each share of stock, amounting to $13 per year, or during the period of eight years—the lifetime of the association—the amount so paid in dues would be $104 on his share of $200, which, in other words, would, at the end of eight years, leave unpaid upon it $96, provided he pays no further sum than the weekly dues of 25 cents. He also pays the interest weekly on his loan along with his stock dues.

In February, 1885, appellant seems to have borrowed from this association, by the plan above stated, $1,060, and executed to the corporation the following note or obligation, and also the mortgage to secure the same, in which he expressly agreed to pay the sum secured thereby: "$1,060.00. Huntington, Ind., February, 1885. For value received, I promise to pay to the order of the Citizens' Building, Loan & Savings Association, of Huntington, Ind., two thousand dollars, with interest on ten hundred and sixty dollars, eight years after the date of incorporation of said association, viz., November 12th, 1883, or whenever said association shall be declared by its board of directors legally ended; interest at the rate of six per cent per annum, payable in equal weekly installments on Saturday of each week. And I do further promise and agree that should the weekly installments of interest hereon as aforesaid remain due and unpaid for three months, or should my stock in said association be forfeited for the nonpayment of the weekly installments of dues, or for any fines or assessments thereon, or for the nonpayment of the taxes, ground rents, or fire insurance premium on the property mortgaged to said association to secure the payment of this note, for three months after the same becomes due, as provided by the constitution and by-laws of said association, then, and in either case, the whole amount of principal and interest of this note, together with all unpaid dues, fines, and assessments on the shares of stock of said association owned by me, and all ground rents, fire insurance premiums, and taxes paid or advanced by said association on said mortgaged premises, shall become immediately due and collectible; all without relief from valuation or appraisement laws, with attorney's fees. No 17. John M. Wohlford." It appears from the claim made by appellee in its brief that, shortly prior to the end of its corporate existence, it was ascertained that its entire assets, accumulated from all sources, would not be sufficient to pay all of its debts, claims and losses; these, in the main, growing out of the fact that a portion of its stockholders, who were non-borrowers, had paid to the association their money during the entire period of eight years, but had

Change of rules.

Where the mortgage provided that the borrower should be governed by the rules which should be made by the society from time to time, he will be bound by a rule that requires the borrower to contribute to the payment of losses of the society. Wilson v. Miles Platting Bldg. Co. L. R. 22 Q. B. Div. 381, *note*; Rosenberg v. Northumberland Bldg. Soc. Id. 375.

Although the mortgage does not provide for submission to change of rules, yet the member is subject to them as stockholder and if, after his mortgage is executed, the rules are changed so as to make him subject to a levy for losses, he will be bound to pay them. Bradbury v. Wild [1896] 1 Ch. 233.

In *Re* Norwich & Norfolk Provident Permanent Ben. Bldg. Soc. L. R. 1 Ch. Div. 481, 45 L. J. Ch. 143, 24 Week. Rep. 108, it was held that where the rules at the time the advance was made did not provide for the contribution by advanced members to losses, the rules could not be changed so as to make him liable, although his mortgage makes him liable to the rules, "for the time being."

Liability as members after release of mortgage.

If the mortgagor redeems his mortgage, his liability as shareholder may be retained. Henninghausen v. Tischer, 50 Md. 568.

If when the time is reached for the dissolution of the association, enough has not been obtained to pay all members the full value of their stock, the borrowing members are entitled to redeem from their mortgages but their liability continues to pay their monthly dues until the shares reach par. Farmer v. Smith, 5 Jur. N. S. 533, *note*, 4 Hurlst. & N. 196, 28 L. J. Exch. 226.

In Sparrow v. Farmer, 26 Beav. 511, 5 Jur. N. S. 530, 28 L. J. Ch. 537, 33 L. T. 216, a rule of the association provided that a borrower may redeem upon the subscriptions that would have become due on the shares up to the end of the thirteen years, and the court held that upon paying the amount the mortgage must be satisfied, although the obligation of the member to continue the payment of dues might not then terminate. And the same ruling was made in Handley v. Farmer, 29 Beav. 362.

If the loan has been repaid and the borrower has received a receipt and withdrawn from the association, he cannot be made to contribute to losses subsequently ascertained. *Re* West Riding of Yorkshire Permanent Ben. Bldg. Soc. L. R. 45 Ch. Div. 463.

But the equities between the members of the association will not allow a borrowing member to escape his share of the common burdens by shielding himself behind an improvident and mistaken discharge of his mortgage. Callahan's App. 124 Pa. 139.

Statutory provisions.

In Ohio the borrowers are required by statute to share their proportion of the losses of the association. Everman v. Schmitt, 24 Ohio L. J. 56.

H. P. F.

received nothing in return upon their stock, and that they will not, under the circumstances, receive anything unless each member is compelled to pay, in addition to what he has paid, a sum sufficient to equalize all, so, at the close of the association, the non-borrower may be on an equality with the borrower, and all go out alike. In order to effectuate this, appellee's board of directors convened in special session on July 28, 1891, and adopted the following resolution, levying an assessment on each share of stock: "Whereas, the legal limit of the Citizens' Building, Loan and Savings Association ends November 12, 1891; and whereas, at that date, the dues, interest, and accumulations from every source will not pay every share of stock out in full; and whereas, the borrowing members have received the amount of two hundred dollars on each share by them borrowed on, but the non-borrowers have not, and there will not be realized from the dues, interest and all other sources, a sufficient sum of money to pay all stockholders an equal sum with the borrower and other debts of the association, except by an assessment: Therefore, be it resolved that this association levy an assessment of 22 $\frac{51}{100}$ per cent on each dollar of stock outstanding, for the purpose of paying all members equally on their stock, at the expiration of the association. Resolved, that the secretary of this association is hereby ordered to notify each stockholder of this assessment, and said notice shall contain the amount due from each."

The principal assignments of errors, and the only ones that we deem necessary to consider, are: "(1) Overruling the demurrer to the complaint; (2) sustaining a demurrer to the fifth and sixth paragraphs of answer; (3) overruling motion for a new trial."

We think the complaint is substantially good. One similar was held sufficient by this court in *Borchus* v. *Buntington Bldg. Loan & Sav. Asso.* 97 Ind. 180.

There was no error in sustaining the demurrer to the fifth paragraph of the answer, even if we could hold that the facts therein set up constituted a defense to the action, for the reason that appellant could avail himself of the same defense under other remaining paragraphs of his answer. By the sixth paragraph of the answer, appellant attempted to set up, as a defense to the action, that the assessment in suit was made by the board of directors, instead of the association as a whole. There was no error in sustaining a demurrer to this paragraph. Section 3408, Rev. Stat. 1881 (Rev. Stat. 1894, § 4445; Elliott's Supp. 841), provides "that the business of the association shall be managed by a board of directors." And section 14 of appellee's constitution provides "that the directors shall meet at a time stated therein for the transaction of the business of the association." Where it is provided by the statute under which a corporation is organized that the business thereof shall be managed by its directors, the provisions must be construed to vest in them full authority to act for the corporation in all ordinary matters within the scope of its powers. Beach, Priv. Corp. §§ 227, 232. The assessment against appellant upon his stock, made by virtue of the aforesaid resolution, amounted to $450.20. This he refused to pay, which refusal upon his part resulted in this action being instituted upon the note and mortgage heretofore mentioned.

The remaining and in fact the controlling question in the case to be determined is this: Was appellee authorized to make the assessment call in controversy upon appellant's stock, and, upon his refusal to pay the same, proceed to collect it by suit upon the note and mortgage? The contentions of the learned counsel for the appellant upon this proposition are: First. That the debt embraced in the note, and secured by appellant's mortgage was wholly paid by him before the commencement of the action, inasmuch as appellee's by-laws provided that all loans should become due in eight years, and at the end of that time the note and stock should be set off against each other. Second. That the statute (Rev. Stat. 1881, § 3419) limits assessments to 25 cents per month, to be collected with other installments for expenses; and inasmuch as appellee had not accepted the provisions of the Act of 1885 (Acts 1885, p. 81), as provided by section 15 of said Act (Rev. Stat. 1894, § 4458), it could not be held to be authorized under this Act to make assessments to pay losses. Third. That the note in suit does not include assessments to pay losses, debts, and expenses. While, on the other hand, the learned counsel for appellee contends that its association had full power and authority to make the assessments upon its stockholders for the purpose of closing up its business, paying its debts and losses, and adjusting matters among its members, in order that the "borrowers" and "non-borrowers," at the winding up of the corporation, might stand on an equality with each other.

The determination of these important questions, which are new, as far as the decisions of this court are concerned, require a careful examination and consideration of the statutes pertaining to building and loan associations. In our opinion, neither of the contentions of the learned counsel for appellant can be sustained. It is evident, as a legal proposition, that when appellant became a borrowing member of this corporation, he did so subject to its by-laws, rules and regulations, and also to the express and implied powers with which it was invested by law. Section 30 of appellee's by-laws, among other things, provides "that the notes and mortgages given by members who receive loans must secure the repayment thereof, interest and premium thereon, with all weekly dues, together with all fines and assessments on stock held by the member," etc. It would seem that this by-law contemplated that assessments upon stock might and would be made, and therefore provided that payment of the same should be covered by the borrower's note, secured by his mortgage. By an examination of the several sections of the Act of 1875, under which appellee was organized, it will be found that section 4 (being section 3410, Rev. Stat. 1881) provides "that every share of stock shall be subject to a lien

for the payment of unpaid installments and other charges incurred therein, under the provisions of the constitution and by-laws." Again, in section 3412, Rev. Stat. 1881, it is stipulated that "good and ample real estate or personal security, as prescribed by the by-laws of the corporation, shall be given by the borrower to secure the repayment of the loan, with interest, and also for the payment of the dues, fines and assessments that may be assessed on his share of stock, upon which the loan is made." Section 3413 provides "that a borrower who is not in arrears for dues, interest, fines or assessments, may pay his loan at any time, and withdraw from the association," etc. Section 3419 reads as follows: "All such associations shall have power to assess, in addition to section four of this Act [section 3410] . . . and shall also have the power to provide in their by-laws for the assessment of fines and penalties, . . . interest, installments and assessments." It is manifest, we think, that, giving a reasonable interpretation to these several sections, we must conclude that assessments such as the one in question were intended to be and are authorized to be levied by these corporations upon the unpaid capital stock of their members. But, if we are wrong in this conclusion, the law must still be held to be with appellee upon the proposition in controversy. Under and by virtue of section 12 of the Act of 1885, being section 4455, Rev. Stat. 1894, which is similar in some respects to section 3419, Rev. Stat. 1881, an express warrant is granted therein to these associations to make an assessment or stock call to cover losses. This section in part reads as follows: "All such corporations shall have power to charge, in addition to the amount heretofore provided by this Act, a sum not exceeding twenty-five cents per month upon each share of stock, for the purpose of defraying the expenses of the association, which sum shall be payable with the regular installments; to make assessments upon the capital stock to cover losses." etc. But it is insisted by appellant that appellee has no right to exercise any powers under this last-mentioned Act, for the reason that it is not shown that it filed its written acceptance of the provisions thereof, as provided by section 854, Elliott's Supp. (Rev. Stat. 1894, § 4458). This contention, in view of the interpretation of the Act of 1885 by this court, cannot be upheld.

In the case of *Hatfield* v. *Huntington City Bldg. Loan & Sav. Asso.* 132 Ind. 149, this court, in passing upon this question, said: "Nor do we think it was necessary to allege that the appellee had filed a written acceptance provided for by section 854, Elliott's Supp. It is evident from the reading of the entire Act, of which that section constitutes a part, that it was not the intention of the general assembly to dissolve or abolish existing building and loan associations, or to deprive them of any of the rights they possessed under the laws then in existence. It was its purpose to enlarge, rather than to restrict, their powers and privileges." See also *McLaughlin* v. *Citizens' Bldg. Loan & Sav. Asso.* 62 Ind. 264, and section 4461, Rev. Stat. 1894. We concur in this construction placed upon the Act of 1885, and, in our opinion, it was not necessary for appellee to formally accept in writing the provisions of this Act, in order that it might exercise the enlarged powers granted to it thereunder. It, therefore, follows from this conclusion that it must be held that appellee, by section 4455, *supra*, was given the right and power to make the assessment upon appellant's stock, for the purpose of covering losses, and thereby equalizing its members; so that, at the final close, all might go out on an equal footing.

Appellant, in support of his first contention, relies upon the case of *Lime City Bldg. Sav. & Loan Asso.* v. *Wagner*, 122 Ind. 78. It is true that, in that case, on the question therein involved, this court held, under a by-law of the association which provided that all loans should become due in six years from the date of incorporation, or upon the stock of the association becoming of par value, and that then the stock and note of the borrower might be set off against each other, that a borrower who had paid his weekly dues and installments for a period of six years discharged his obligation to the association. This was upon the theory of the by-law that, by paying the required dues and installments for that period, he would and had paid the equivalent of the loan which he obtained. The rule thus stated by the learned judge in the opinion in that case, under the facts and issues in the case at bar, is not applicable to the determination of the question now before this court. While it appears that the by-law in the *Wagner Case*, *supra*, was identical, except as to time, with the one relied upon by appellant, however, the point in controversy in the *Wagner Case* was as to the right of the corporation to exact the payment of the weekly dues and interest from the borrower after the expiration of the legal limit of the association. It did not appear in that case, as it does in this, that the corporation was insolvent, and that, prior to the termination of its existence, the borrowing member was in arrears upon his stock assessment, made for the purpose, as was the one now in question. Had the same facts and theory been involved, a different question would have necessarily arisen. It is apparent, therefore, that the principle of law therein enunciated must be distinguished from the one now involved, and that appellant, under the facts herein, is not in a position to invoke that decision to sustain his contentions. The case of *Lister* v. *Log Cabin Bldg. Asso.* 88 Md. 115, and other authorities cited by the court in support of the rule laid down in the *Wagner Case*, do not sustain the theory of appellant's defense,—namely, that his membership had ceased, and that he was under no obligation to pay his proportion of the losses; but, upon the other hand, they tend to support the claim of appellee. Appellant was, under the law, entitled, with all the other members of this association, borrowers and non-borrowers, to share in the common gains and profits of the enterprise, in the direct ratio of his interest therein; and was also, in our judgment, liable to contribute, in the same

proportion, to the payment of the losses and debts incident to the operation of the business of the association; and this obligation he could not evade during his membership, when such arrears stood against him, by a transfer of his stock or a withdrawal from the corporation. Section 3413, *supra*, and see authorities cited in 2 Am. & Eng. Encyclop. Law, pp. 618, 622.

Appellee was a corporation organized, as are others, for the purpose of profit and gain, and, near the close of its existence, it is discovered that it is virtually in a state of insolvency, and that a certain sum is necessary to liquidate losses and debts, and settle and adjust affairs among its stockholders. Why, then, can it be said that it must be denied the right, under the law, to levy an assessment upon the unpaid stock of its members for that purpose? We can see no reason why this may not be done under the statutes to which we have referred, in like manner as is done by other corporations that are organized for manufacturing or other purposes. It is, perhaps, true that the unfortunate business affairs of appellee, which seemed to have led to its insolvency, and forced it to take the action which it did, will, as contended, result in a hardship upon its members. But we must presume that all who embarked in this common scheme did so upon their own volition and for the purpose of pecuniary benefit; and appellant cannot now be heard to complain because the equities of the law will not permit him to escape liability, and cast the whole burden of sustaining the losses in question upon his non-borrowing associates. This the law will not tolerate. It appears that the note in suit contained the stipulations provided for by the by-law and the statute, and that appellant thereby expressly agreed to pay any assessment that might be made upon his stock. Assessments or demands authorized by the charter or by-laws of a building association may be included in and covered by the note and mortgage of a borrowing member, executed by him upon the loan obtained, and in addition thereto; and, in default of payment, an action may be instituted thereon for the recovery thereof. See 2 Am. & Eng. Encyclop. Law, p. 688, and other authorities hereinafter cited.

It follows from the conclusion reached and it is so adjudged, that appellee was authorized, under the law, to make the assessment for the purpose aforesaid, and that appellant was liable upon his note and mortgage for the payment of the same. In support of the rule which we have stated, see the following authorities: *Strohen* v. *Franklin Sav. Fund & Loan Asso.* 115 Pa. 273; *Callahan's App.* 124 Pa. 138; *Laurel Run Bldg. Asso.* v. *Sperring*, 106 Pa. 334; *Criswell's App.* 100 Pa. 488; *People* v. *Lowe*, 117 N. Y. 175; *McGrath* v. *Hamilton Sav. & Loan Asso.* 44 Pa. 383, and authorities cited in note in *Robertson* v. *American Homestead Asso.* 69 Am. Dec. 150; *Parker* v. *United States Bldg. Land & Loan Asso.* 19 W. Va. 769; *Everham* v. *Oriental Sav. & Loan Asso.* 47 Pa. 352; *Pattison* v. *Albany Bldg. & Loan Asso.* 68 Ga. 378; Endlich, Bldg. Asso. 2d ed. §§ 78, 79, 104 and 523.

The court did not err in denying appellant's motion for a new trial.

Judgment affirmed, with costs.

All concur.

OHIO SUPREME COURT.

George H. EVERSMANN, Receiver of New Ohio Building Association, *Plff. in Err.*,
v.
Maria Theresa SCHMITT.

(52 Ohio St. —.)

***1 The members of a building association,** whether borrowers or non-borrowers, have a mutual interest in its affairs; and sharing alike in its earnings, must assist alike in bearing its losses.

2. A borrowing member is one who receives in advance the par value of his shares and agrees, in consideration of such advance, to pay the weekly dues on the shares and the interest on the loan, until the dues paid and the dividends declared and not paid, are equal to the par value of his shares. He then ceases to be a member and is entitled to a cancellation of the mortgage given to secure the obligations arising from the loan.

3. The mortgage executed by a borrowing member of a building association contained, among other conditions, a stipulation for the payment of such "assessments" as might be levied on him as a member. Losses occurred and the association became insolvent, whereupon a receiver was appointed to wind up its affairs, who ascertained the "shortage" in the assets, and made a *pro rata* assessment on the members to meet the same. *Held*, that an assessment for such purpose is within the above stipulation of the mortgage, and that the member is not entitled to its cancellation until paid. *Held*, further, that, in such case, the receiver is the proper person to ascertain the amount of the losses and make an assessment on the members to meet the same.

*Headnotes by the COURT.

(June 11, 1895.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas in favor of defendant in an action brought to foreclose a mortgage to secure payment of an assessment upon stock in an insolvent building association. *Reversed.*

Statement by **Minshall**, *Ch. J.*:

George H. Eversmann, Receiver of the New Ohio Building Association, an insol-

NOTE.—As to liability of advanced member of building and loan association to assessment for losses, see *note* to case immediately preceding this one.

vent corporation, on March 10, 1890, brought suit in the Hamilton Common Pleas to foreclose a mortgage that had been given it by the defendant below, Maria T. Schmitt. The defendant being a member of the association, and the owner of twelve shares of the aggregate value of $3,000, when paid up, on May 1, 1880, had received an advanced loan of that amount, bidding therefor $240. To secure the obligation to the association arising from the loan, she executed and delivered a mortgage to it, on definitely described property. The defeasance clause of the mortgage is contained in the finding of facts, hereinafter inserted. Among other conditions, it stipulates for the payment of the dues on the stock and interest on the loan "until such time as the weekly dues paid and dividends declared and unpaid, shall amount to the said sum of three thousand dollars," and the payment of such assessments as may be levied upon her as a member of the association.

The petition avers that by reason of the payment of dividends that had not been earned and the misappropriation of funds by its treasurer, the capital of the association had become impaired to the extent of thirty-one and a fraction per cent; that the defendant had participated in the receipt of these unearned dividends, that the plaintiff had been appointed as a receiver to wind up the affairs of the association; and, as such receiver, had made an assessment on the stock of the members to meet the losses, that against the defendant amounting to the sum of $934.17, which she refused to pay. The defendant claimed to have paid in dues the full amount of her loan, $3,000, and all the interest thereon, and had performed all the requirements of the mortgage according to the constitution and by-laws, and was entitled to its cancellation, and prayed accordingly.

Issues having been made up, the case was tried in the common pleas, and both parties appealed from the judgment to the circuit court.

The circuit court made a finding of facts which is as follows:

"The New Ohio Building Association is an insolvent corporation. Its insolvency is due partly to the over-payment of dividends by its secretary, George R. Topp, and partly to a misapplication of its moneys by its treasurer, William Peters. The amount of the shortage, as determined by the receiver, is about thirty-one per cent. George H. Eversmann is the receiver of the company, and is engaged in winding up its affairs. The receiver was appointed December 5, 1889. Maria Theresa Schmitt became a member of the corporation May 5, 1880, and subscribed for twelve shares of its stock ($250.00, each) and bid for a loan of money for the amount of her shares, three thousand ($3,000.00) dollars. This sum was advanced to her, and she gave to the company her mortgage on certain real estate in Cincinnati, described in the petition in this case. This mortgage was duly recorded May 6, 1880. The clause of defeasance provided: "That if said Maria Theresa Schmitt, who has become a member of said building association and subscribed to twelve shares therein and received in advance from said association said sum of three thousand ($3,000.00) dollars, the par value of said shares, shall pay or cause to be paid to the said building association, without demand therefor, according to its constitution and by-laws, until such time as the weekly dues paid and dividends declared and unpaid, shall amount to said sum of three thousand ($3,000.00) dollars, or, in case of the dissolution of said association, until, within the meaning of the constitution and by-laws of said association, she shall be released therefrom:

"1. The sum of six dollars per week from the date hereof, the same being the dues on said twelve shares;

"2. The sum of six per cent interest upon said three thousand ($3,000.00) dollars, payable *pro rata* in weekly payments, subject to rebatement every corporate year;

"3. The sum of six ($6.00) per week from the date hereof for a period of forty (40) weeks, the same being in payment of the premium of two hundred and forty dollars bid on said twelve shares;

"4. All fines, assessments, and penalties which the said Maria Theresa Schmitt shall incur, and which may be levied upon her as a member of said association, and in accordance with its constitution and by-laws;

"5. All rents, taxes, assessments, and premiums of insurance upon the said mortgaged premises, in accordance with the constitution and by-laws of said association; then this instrument to be null and void."

The constitution of said association contains the following sections:

"ARTICLE XI.

"1. All members shall pay for every share fifty (50) cents initiation fee, and an installment of fifty (50) cents per week.

"ARTICLE XII.

"1. Every shareholder shall be entitled to a sum equal to the amount of $250.00 for each share.

"3. Every share for which the money has been drawn shall be considered as a 'paid-out' share, and shall bear six per cent interest (6 per cent) annually, and the premium must be paid in weekly rates. The interests and premiums shall be payable '*pro rata*,' as soon as any part of the money is ready to be paid out. Interest will only be charged on the amount remaining due at the beginning of each year.

"4. Every member, who wishes to draw the amount of his or her shares, shall secure the payment by the executing of an acceptable mortgage on real estate, and this mortgage shall remain in force until the weekly dues and undrawn dividends make up the sum of $250.00 on each share, the mortgage shall then be canceled, and such a member shall then cease, on the ground of such shares, to be a member.

"Those members who have not yet drawn money can have their dividend paid to them; they may also draw their money before six months without the dividends.

"Maria Theresa Schmitt was a stockholder, and shared equally with the others in the

profits of the company, and withdrew the same from time to time. She withdrew dividends from time to time as they were declared, amounting to nine hundred and ninety-five and 92-100 ($995.92) dollars, with the consent of the association.

"Maria Theresa Schmitt made the last payments in her book on November 27, 1889, which was the last regular meeting night but one before the receiver was appointed, and demanded cancellation of her mortgage, which was refused.

"The last payment of dues with the other payments of dues made the entire amount paid in by her, as dues, the sum of $3,000.00. In addition to the dues, defendant paid interest and premium in full. The losses occurred during her membership. The assets of the company are mortgages. The liabilities are to members only.

"The entire premium of $240.00 due under said mortgage was paid by Maria Theresa Schmitt, at the time she became a member of the association, to wit, May 5, 1880. The dues and interest called for by the mortgage were paid regularly and according to the terms of the mortgage.

"The court finds that the proceedings in the superior court of Cincinnati, in which plaintiff was appointed receiver, were for the dissolution of the association; and that the assessment set up in the petition herein was made by the said receiver; that there are a great number of members of said association, both borrowing and non-borrowing, and that none of said members, including the defendant, were parties to said case in which the receiver was appointed, nor were they, or this defendant, given an opportunity to be heard in reference to said assessment; that there were a large number of members of said association, both borrowing and non-borrowing, who were members thereof during the time said losses set up in the petition occurred, and who withdrew from said association prior to the time said association went into the hands of the receiver, and that none of said parties have been brought into said suit in the superior court of Cincinnati, nor have the liabilities of said parties been considered in making said assessment."

The court found and adjudged that the defendant was liable as a member for her proportion of the losses, but held that the condition of the mortgage had been performed and that she was entitled to have it canceled, and decreed accordingly.

The plaintiff in error claims that the judgment, ordering a cancellation of the mortgage is not sustained by the findings, and asks to have it reversed.

Messrs. **Huntington & Holmes**, for plaintiff in error:

Borrowers and non-borrowers of a building association are stockholders.

The weekly payments made by stockholders are payments on "stock or shares subscribed." They are not payments on the mortgage.

Seibel v. *Victoria Bldg. Asso.* 48 Ohio St. 373.

Where they share equally in the profits they must share equally in the losses.

Ibid.

Payments on "stock or shares subscribed" are subject to the payment of the expenses incident to the management, and to losses of any kind.

Being equally entitled with all the others in the direct ratio of his interest in the society to share in the common gains of the enterprise, every member is liable to contribute, in the same proportion in which he expects to profit, to the losses and expenses incident to its management.

Endlich, Bldg. Asso. § 104; *McGrath* v. *Hamilton Sav. & Loan Asso.* 44 Pa. 383.

He cannot evade such liability by a transfer of his stock without the consent of the corporation, nor can he be allowed to withdraw from the association for the purpose of escaping his proportion of the common burden.

Endlich, Bldg. Asso. § 104; *Everhart* v. *Westchester & P. R. Co.* 28 Pa. 339; *McGrath* v. *Hamilton Sav. & Loan Asso. supra.*

The society may assess the loss on each share *pro rata.*

Endlich, Bldg. Asso. § 105; *United States Bldg. & Loan Asso.* v. *Silverman*, 85 Pa. 390; *Wittman* v. *Building Asso.* 7 W. N. C. 84; *Knoblanck* v. *Robert Blum Bldg. & Loan Asso. No. 2*, 8 Pittsb. L. J. N. S. 39: *Paffert* v. *Paffert*, Id. 40.

Messrs. **Tugman & Baker** for defendant in error.

Minshall, *Ch. J.*, delivered the opinion of the court:

Mutuality is the essential principle of a building association. Its business is confined to its own members; its object being to raise a fund to be loaned among themselves, or such as may desire to avail themselves of the privilege. This is done by the payment, at stated times, of small sums in the way of dues, interest on loans and premiums for loans. Each shareholder, whether a borrower or non-borrower, participates alike in the earnings of the association and alike assists in bearing the burthen of losses sustained. It has what is called a capital stock. But this is only true in a modified sense. Unlike other corporations for profit, a share in a building association has, at the inception, only nominal value. Its value is expected to increase by the lapse of time and the success of the association. It is contrary to the purpose and genius of a building association that a share in it should be paid up at the time of the subscription. This is done by the payment of small dues and the crediting, at stated times, of the earnings in the way of dividends. When the aggregate dues, with the credited earnings, equal in amount the par value of a share of stock, it is paid up, and the owner, for that share, ceases to be a stockholder. He is entitled to the par value of his stock, but can no longer participate in the earnings of the association. His relation, then, becomes simply that of a creditor, until he is paid. Of course what is here said, is subject to the qualification, that no losses have been sustained. Losses are incident to the most careful management of men; they cannot be wholly avoided; though it is worthy of note that the smallness of the

losses in the management of building associations, compared with that of other monied institutions, is remarkable. Still, agents may prove unfaithful and bad loans be made. When this happens, the mutual character of the association prescribes that the burthen must be sustained by the stockholders, according to the amount of their stock; for he who participates in the benefit of a business must assist in bearing the burthen.

As before observed, borrowers and non-borrowers participate alike in the earnings of a building association. The difference between them is simply in the time at which each class is paid the par value of his shares. A borrower, before his stock is paid up, receives from the association the par value of his shares, in the nature of an advance loan. For this, he agrees to pay the premium, if any, for the privilege, the interest on the money advanced, subject to abatements to be made at stated times, and the dues on his stock until it matures. In other words, he agrees to keep up and pay out his stock, as if he were a non-borrower, in consideration of the amount being advanced to him before that time. Hence the borrower remains a stockholder and participates in all the privileges and benefits of a stockholder: has a voice in the management of the association and participates in its earnings. The latter go toward discharging his obligations arising on the loan, and to shorten the time in which he will be fully discharged therefrom. For, taking all losses into account, whenever the shares of a borrower have reached their par value by the payment of dues and the apportionment of earnings, the loan is liquidated and he ceases to be a member, as he would, if he had not borrowed at all. In other words, with his shares paid up, he discharges his obligations as a borrower. And the exact test of his right to call for a cancellation of the mortgage given to secure his obligations as a borrower, is the inquiry whether he would have been entitled to receive from the association the par value of the shares on which the loan was made, had he not become a borrower.

In this case, Mrs. Schmitt subscribed for twelve shares, and received from the association their par value, $3,000, as an advanced loan, at a premium of $240. She paid the premium, and agreed to pay the dues thereon, $6.00 per week, and interest at the rate of six per cent, subject to an annual abatement, "until such time as the weekly dues paid and dividends declared and unpaid shall amount to the sum of three thousand dollars," and all "assessments" that might be levied upon her as a member of the association. She paid the premium, the dues, $3,000, and the interest on the loan to the appointment of the receiver. These facts, standing alone, would satisfy the mortgage. But it is further found that the association is insolvent; that its capital is impaired to the extent of about thirty-one per cent, for which the receiver has made an assessment on the members, including the defendant; that the losses occurred during her membership; were caused by the payment of dividends that had not been earned, and the misapplication of moneys by the treasurer; and that she had withdrawn $995.92 of these unearned dividends, although the right to draw earned dividends was limited by the constitution to those members who had not "drawn money." Can, then, a borrower, under these circumstances, claim the cancellation of his mortgage? We think not. To do so would, as we have shown, undermine the principles upon which these associations are organized. By the terms of the constitution of the association, on the cancellation of the mortgage, the borrower ceases to be a member, and all liability to it is at an end. We see no reason why the remaining members should be left to bear all the burthen, resulting from losses, for which they are no more to blame than she is. It is wholly unlike a savings society where the borrower is not a member or otherwise interested in its business. Having no voice in the management nor interest in the earning of the society, the borrower and it sustain the simple relation of debtor and creditor. Here, as shown, the borrower is also interested as a creditor. The loan is for no definite period of time. It depends upon the management of the association, in which he continues as a member and has a voice. It is in view of the relation of the borrower to the association and the possibility of losses, that the mortgage stipulates that, in addition to the specific conditions mentioned, the borrower shall pay all "assessments" that may be levied on him. The fourth section of the twelfth article of the Constitution, on which much stress is laid, simply expresses what would be true in a safely conducted association. It does not include nor apply to the case where there are no earnings, and losses have to be met and borne. This was wisely provided for in the mortgage. It was a matter about which the parties could and have contracted. There is no suggestion of fraud or mistake in its execution, and their rights must be determined by its stipulations, conforming as they do to the equity and justice of the case. She has received from the association, in the way of unearned dividends, a sum greater than the assessment that has been made on her.

But it is insisted that Mrs. Schmitt and the other members were not parties to the suit in which the receiver was appointed and that he had no power to make the assessment and it is not binding upon them. This objection is without weight. It is not necessary that the members should, as individuals, have been made parties to that suit. They were parties in their corporate name and capacity, and, for the appointment of a receiver, that was sufficient. We will presume that the receiver was duly appointed, as there is nothing to the contrary. As receiver, it was his duty to collect the assets and wind up the affairs of the association. This could only be done by ascertaining the loss and making an assessment on the members to meet it. It was simply a matter of calculation, involved no matters of personal confidence, and could, therefore, be made by the receiver as well as by the members themselves or their chosen agents. Moreover, these had been displaced by the appointment of the

receiver, and could not act in the premises.

It is, however, found that a large number of members, borrowing and non-borrowing, who were such during the time the losses occurred, had withdrawn prior to the time the association went into the hands of a receiver. This does not affect the question here. In the absence of bad faith, such persons as had, according to the constitution and by-laws of the association, withdrawn and ceased to be members, cannot again be brought into the association for the settlement of losses. *Wagerien* v. *Aspell*, 47 Ohio St. 250, 261. The withdrawal being an executed transaction, can only be recalled by the association, and a remedy had, in conformity to the rules of equity jurisdiction.

It follows, as we think, that *the judgment of the Circuit Court, dismissing the petition of the receiver, should be reversed*, and judgment entered upon the findings as prayed for in the petition.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

City of FINDLAY, *Plff. in Err.*,
v.
John W. PERTZ *et al.*

(66 Fed. Rep. 427.)

1. Forty days after the expiration of the trial term may be allowed by the court at such term for filing a bill of exceptions.

2. A bill of exceptions embodying the charge and immediately following it stating that one of the counsel said "the defendant excepts," with the ground of exception, including a refusal to charge as requested and an exception to the charge as delivered, sufficiently shows that exceptions to the charge were seasonably taken.

3. The right of a city to rescind a sale to it because a commission was paid to its officer through whom it was made, is not affected by the fact that the seller did not know that the city was ignorant of the double relation of such officer and supposed that he would give the city credit for the commission.

4. A contract for the sale of property to a city through one of its officers who receives a commission from the other party for effecting it, is illegal and void both at common law and under Rev. Stat. § 6909, declaring it a penal offense for any public officer, agent, servant, or employé to be directly or indirectly interested in any contract for the purchase of any property of the state, county or municipality.

5. A city, upon discovering that its agent was paid a commission upon a sale to it, may either repudiate or ratify and affirm the contract, as it elects.

6. The use by a city of gas separators sold to it for two months after discovering that its agent was paid a commission upon the sale, is not so conclusive of ratification of the sale as to take that question from the jury.

7. Ratification of a sale to a city, notwithstanding a commission paid to its agent by the seller confirms it, subject to the warranties made, and that the city may, when sued for the purchase price, recoup to the extent of any damage sustained by the breach of any warranty.

(February 25, 1895.)

ERROR to the Circuit Court of the United States for the Northern District of Ohio to review a judgment in favor of plaintiffs in an action brought to recover the price of certain gas separators alleged to have been sold and delivered by the plaintiffs to the defendant city. *Reversed.*

Statement by **Lurton**, *Circuit Judge:*

The facts necessary to be stated to an understanding of the legal questions to be decided are substantially these:

The plaintiff in error is a municipal corporation of the state of Ohio. It owned and operated a plant for the distribution of natural gas to consumers within the city. This plant was under the control of an arm of the city government called the "board of gas trustees," composed of five members, elected annually by the qualified voters of the city. That board had authority to employ a superintendent, whose duty it was to maintain and operate the plant, make all necessary improvements and repairs, collect the dues from consumers, and render all other necessary services, under direction and supervision of the board of gas trustees, as might be required for a successful operation of a natural gas system. The duties of the superintendent were such as to require an expert in the boring and management of gas wells and in the safe and economical distribution of the gas to consumers. The position was that of an employé of the city government, and was one involving expert knowledge and a considerable degree of trust and confidence. The defendants in error were partners, doing business under the firm name of Pertz & Stewart, at Kokomo, Ind., and as such were patentees and manufacturers of a machine called an "automatic separator." These machines were adapted to be attached to the orifice of a natural gas well and purported to separate the oil or water which came to the surface intermingled with the gas and were represented to operate automatically. This firm had in their service one Melvin M. Brooks, who acted as their agent in Indiana for the sale of their separators, upon a commission. In the spring of 1890, this agent went into the Findlay, Ohio, oil field, for the purpose of selling separators for the said Pertz & Stewart. While in that field as the agent of defendants in error, he was chosen superintendent of the gas plant owned and operated as aforesaid by the city of Findlay. July 12, 1890, Brooks wrote to defendants in error a letter

NOTE.—In respect to the conflict of interests or double capacity of officers contracting with themselves, see *note* to Tippecanoe County Comrs. v. Mitchell (Ind.) 15 L. R. A. 520.

See also 45 L. R. A. 420.

concerning separators for use on the city wells. That letter is not produced by them. Mr. Stewart states that the letter was one of inquiry as to how the separators would work on oil wells. The answer to that letter was dated July 16, 1890, and was in these words: "Pertz & Stewart, Manufacturers of Automatic Gas Separator and Drip.

"Kokomo, Ind., July 16, 1890.

"Mr. M. M. Brooks, Findlay, Ohio—Dear Sir: Your favor of the 12th received. We will be glad to furnish you any number of separators you may desire. You may connect them to a well producing oil with the gas, and rest assured that they will separate the oil just as readily as the water; but, when you desire to connect to a well producing oil, please so state in your order, for the reason that we make the valve a little larger for oil than we do for water. We sell them with the same guaranty for separating oil as we do for water. Hoping to hear from you soon,

"Yours very truly, Pertz & Stewart."

The board of gas trustees, upon representations of Brooks, authorized him to purchase for the city of Findlay three of these automatic separators. This was done by a letter dated July 22, 1890, in these words:

"Findlay, Ohio, July 22nd, 1890.

"Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please ship us at once to Stewartsville, Hancock County, Ohio, 3 separators for oil and gas, and 1 for water and gas. Stewartsville is on the Nickel Plate Railroad.

"Yours truly, The City Gas Works."

This letter was written by Brooks, and defendants in error admit that, when received, they recognized it to have been written by him.

August 11, 1890, Brooks ordered sixteen other separators, by letter in these words:

"Findlay, Ohio, August 11th, 1890.

"Messrs. Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please ship to Stewartsville, Ohio, *via* Nickel Plate R. R., 10 automatic separators, and to Van Buren 6 of the same. The latter is a station on the Toledo, Columbus & Cincinnati R. R., a short distance north of Stewartsville. If you cannot ship the entire order at once, please ship to Stewartsville first. I think that oil is the . . . likely to come first in these wells. I examined the ones sent, but can't detect any difference in them.

"Truly yours,

"The City Gas Works,

"By M. M. Brooks, Supt."

On September 7, 1890, Brooks again made an order for thirteen additional machines, by the following letter:

"Findlay, Ohio.

"Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please ship separators as follows: 5 to Stewartsville; 8 to Findlay. I had discovered the error in your invoice of Aug. 22d and had it corrected. Please send them forward as soon as possible.

"Truly yours, M. M. Brooks, Supt."

The first three separators were billed at $105 each, and on September 12, 1890, a remittance in full of bill was made by the following letter:

"Findlay, Ohio, September 12, 1890.

"Pertz and Stewart, Kokomo, Ind.—Gentlemen: Inclosed find New York Exchange No. 87,568, for three hundred and fifteen dollars, same being on account. Please acknowledge receipt of same.

"Respectfully yours,

"The City Gas Works,

"Per C. K. Beach, Sec'y."

As these separators were delivered, they were attached to the gas wells operated by the gas trustees, by their superintendent, Melvin M. Brooks. November 1, 1890, defendants in error rendered an account for the 29 separators which had been ordered by the letters of August 11th and September 7th. This account was in these words and figures:

"Kokomo, Ind., November 1, 1890.

"City Gas Works, Findlay, Ohio, In Account with Pertz & Stewart, Proprietors of John W. Pertz Automatic Separator.

Aug. 20.	To Mdse.		$315 00
" 22.	"		630 00
" 23.	"		105 00
Sept. 4.	"		630 00
" 16.	"		840 00
" 22.	"		525 00
			$3,045 00

"Please remit. Unless otherwise advised, will draw for $1,050 on the 10th inst. Please honor draft, and oblige."

To this the following reply was made:

"Findlay, Ohio, November 6, 1890.

"Messrs. Pertz & Stewart, Kokomo, Ind.—Gentlemen: Please do not draw on us. We note you have billed the separators at the gross price. Please send credit memoranda of the discount by return mail. We understand the discount is ten per cent on a sale of four. We presume a greater discount will be allowed on the number we have purchased. Your reply by return mail will oblige,

"Yours respectfully,

"The City Gas Works,

"Chas. K. Beach, Secy."

The gas trustees denied that they had authorized the purchase of the twenty-nine separators ordered by the letters of Brooks above cited, and, suspecting that the price charged was excessive, began to make inquiry. Brooks, when approached on the subject, said $105 was the net price, and that no commission or discount was allowed; upon being pressed about the matter and confronted with evidence that a discount or commission had been allowed other purchasers, admitted that he was the agent of Pertz & Stewart, and that they had allowed him a commission of $10 on each of the separators purchased for the city of Findlay. He admitted that he had received $30 as commission on the three separators bought by direction of the trustees, and offered to turn it over to the city. He admitted that he would receive $290 on the other purchases, and proposed that these commissions should be credited to the account against the city. Upon these admissions he was immediately discharged from his position.

November 17, 1890, the defendant in error

wrote the following letter, and inclosed a new account, crediting thereon the commissions due to Brooks:

"Kokomo, Ind., November 17, 1890.

"City Gas Works, Findlay, Ohio, in Account with Pertz & Stewart, Proprietors of John W. Pertz Automatic Separator and Drip.

1890.

July 26.	8 separators, at $105....	$315 00		
Aug. 20.	3 " " "	315 00		
" 22.	6 " " "	630 00		
" 23.	1 " " "	105 00		
Sept. 4.	6 " " "	630 00		
" 16.	8 " " "	840 00		
" 22.	5 " " "	525 00		$3,360 00
Sept. 12.	By N. Y. Exchange	$315 00		
Nov. 13.	By M. M. Brooks.....	30 00		
Nov. 13.	By each $10.00 Com. on 29th Sept.....	290 00		635 00
	Balance.....			$2,725 00

"Pertz & Stewart,
"Manufacturers of
Automatic Gas Separator and Drip."

"Kokomo, Ind., November 17, 1890.

"City Gas Works, Findlay, Ohio—Gentlemen: Inclosed please find statement of your account to November 17, 1890. We received letter from Mr. Brooks the 15th, under date of November 13th, inclosing $30.00 commission, paid him on three separators that you had paid for September 12. Mr. Brooks requests us to place the same to the credit of the City Gas Works, and also the $10.00 commission on each of the twenty-nine separators not yet paid for, which request has been complied with, as you will notice in statement. There seems to have been some misunderstanding between Mr. Brooks and the company or gas works concerning the $10.00 commission on separators. Hoping the matter is satisfactorily adjusted, we are,

"Yours very truly,
"Pertz & Stewart.
"By Stewart."

To this the gas trustees replied, under date of November 18, 1890, as follows:

"Office of the City Gas Works. Superintendent.

"Findlay, Ohio, November 18, 1890.

"Messrs. Pertz & Stewart, Kokomo, Ind.—Gentlemen: Yours of November 17 received, saying you have a letter from Mr. Brooks on the 15th inst., dated 13th inst., returning to you $30.00 commission, paid by you to him on three separators that we had paid for September 12, and that, at Mr. Brooks' request, you place the $30.00 to the credit of the City Gas Works, and that you also credit us with the $10.00 commission on each of the twenty-nine separators not yet paid for, all at the request of Mr. Brooks. Your dealings with Mr. Brooks were wholly unauthorized by us, and without our knowledge, and we have determined that we have no contract whatever with you, and will in no way recognize any indebtedness to you. Whatever contract you made with Mr. Brooks you can look to him alone for settlement. We cannot now permit you by your letter of the 17th inst. to make any contract with us, and desire you to distinctly understand you never had any contract with this board, and we have no present intention of any with you. You no doubt realize the fraudulent character of your dealings with Mr. Brooks so far as this board is concerned, as we judge from your letter. The separators you sent to Mr. Brooks are subject to your order here, so far as we are concerned in the matter, but you must at once take care of them at your own expense. We will see to the disconnecting of such as are attached to wells, but will have no further care of them. The account you inclose us will not be paid, as we owe you nothing whatever. We demand that you return to us the $315.00 sent you on September 12, as the same was sent you under a mistake. As to the fact of our being indebted to you, if it is not returned, we shall take legal steps to collect it by attachment on the separators you have here. You understand we base our action and claim on the ground of fraudulent contract between you and Mr. Brooks.

"Yours, etc.,
"Board of Gas Trustees,
"J. G. Hull, President."

January 19, 1891, suit was begun by defendants in error in the circuit court of the United States for the Northern district of Ohio for the sum of $2,725, with interest, being the balance due as per account rendered November 17, 1890, and above set out. The pleading was, under the Ohio Code practice, a petition, answer, and reply. The answer of the city of Findlay set up the following defenses: (1) That the superintendent of the City Gas Works, Melvin M. Brooks, was secretly the agent of the plaintiffs, Pertz & Stewart, and that they had illegally and fraudulently procured him to procure for them a contract for the sale of their separators by promising to him a commission on each separator sold. (2) That the defendant was absolutely ignorant of the dual agency of the said Brooks, and in reliance upon him as its sole and exclusive servant and employé, and in reliance upon his representations as to the usefulness and value of the separators sold by plaintiffs and as to the necessity for purchasing same, had authorized him to contract for three of said machines. (3) That said Brooks, without authority, had ordered twenty-nine other separators, and had placed them upon various gas wells belonging to defendant, without the knowledge of defendant. (4) That defendant had not discovered the fact that said Brooks was at the same time acting for both buyer and seller until in November, 1890, and that, upon that discovery, it had discharged him from its service, and repudiated the entire transaction, and notified plaintiffs that the said separators were subject to their order, and demanded a return of the $315 paid them for the three separators ordered with its consent. (5) It alleged, in addition, that the said Brooks represented that said separators would effectually separate either oil or water from gas, and would automatically eject the water or oil thus separated, and were reasonably worth $105 each, but that said machines were not capable of doing such work as represented, or doing it automatically, and were of no practical value. (6) This answer concluded with a prayer that the petition might be dismissed.

and that defendant have judgment for $815, and for other proper relief. The reply to this answer admitted that Brooks had acted as their agent in Indiana, and that, in 1890, he went to the Findlay oil fields for the purpose of selling separators; that the first they heard from him was when they received from him the orders heretofore set out. They admitted that they had sent him a commission on the separators first ordered. They say that they did not know that the gas trustee of Findlay were ignorant of the relations between Brooks and the plaintiffs, and supposed the commissions allowed Brooks "would eventually be credited to the city." They insist that they acted in good faith, and without collusion or purpose to defraud defendants; that the invariable price of the separators was $105, with an allowance of $10 on each sold through their agents; that, at the request of Brooks, they had finally credited the city with the commissions he had earned. They further insisted that the said separators were attached to the gas wells at the time the defendants repudiated the contract, and that defendants had continued to use them, and were using them when suit was begun; that the use which had been made of them had made them unmarketable by wear and exposure, and that they could not be disposed of except at a considerable sacrifice. There was a jury, and verdict for the full amount claimed by defendants in error. From the judgment thereon, a writ of error was sued out by the city of Findlay, and errors have been assigned upon the charge and for refusal to charge as requested.

Before Taft and Lurton, *Circuit Judges*, and Severens, *District Judge*.

Mr. **Jason Blackford** for plaintiff in error.

Messrs. **Harvey Scribner** and **Blacklidge, Shirley & Moon** for defendants in error.

Lurton, *Circuit Judge*, delivered the opinion of the court:

1. The objection that the bill of exceptions was not filed during the term is not well taken. During the term at which the judgment was rendered, and on the 19th of September, 1893, leave was granted to file a bill of exceptions within forty days. By an order made December 13, 1893, it was recited that a bill of exceptions had been allowed and signed and filed on the 24th of October, 1893. This was within the time allowed by the order made during the trial term, and was entirely within the power of the court to permit.

2. The objection that the bill of exceptions does not show that exceptions to the charge of the court were taken before retirement of the jury is equally groundless. The charge is made a part of the bill of exceptions, and follows the evidence, being preceded only by a request made for a peremptory charge for plaintiff, and by two requests for special charges by defendant. Immediately following the charge there follows: "Mr. Blackford [one of the attorneys representing the plaintiff in error]: The defendant excepts," etc. Then follows the ground of exception including the refusal to charge as requested and exceptions to the charge as delivered. We think it sufficiently appears that exceptions to the charge were seasonably taken. The learned trial judge took from the jury all consideration of the defenses presented by the plaintiff in error, and instructed them that the only issue for their determination was to determine the reasonable market value of these separators when delivered. As the proof was uniform that the patentees and makers had but one price, and that they were to be obtained only from them and at their price, the instruction was equivalent to a peremptory instruction for the full amount of the account sued on. This view of the court seems to have been in a large part due to the evidence tending to show a continued use of these machines after the discovery of the alleged dual relation occupied by its superintendent, Melvin M. Brooks. He seems also to have attached great weight to the fact that the defendants in error had not especially induced or procured Brooks to influence this particular sale. The latter consideration seems to us not at all important. There was evidence tending quite strongly to establish the fact that defendants in error regarded Brooks as having acted for them in procuring the order forwarded by him for these separators.

In support of the defense there was evidence: First. That Brooks had acted as their (Pertz & Stewart's) agent on commission for a long time before going to the Findlay gas district, and that he had gone into the Findlay district for the purpose of continuing the sale of these separators. Second. The separators delivered to the city were all billed at $105 each, and no discount or credit was proposed, allowed or mentioned as due to the city by virtue of the relation its superintendent bore to them. Third. They remitted to Brooks personally a commission on the first order, and gave the city no notice of this fact, and held themselves liable to Brooks for commissions on his subsequent orders, as soon as their account was paid. Fourth. When the city discovered the commission allowed its superintendent, and when that superintendent directed the defendants in error to allow the city, a credit for these commissions, then and only then did they propose such a credit.

Another undisputed fact is that Brooks concealed his relation to the sellers, and concealed his receipt of a commission, and, when confronted with the charge, utterly denied that he had been allowed any commission or discount on the sale or that the separators could be bought with a discount off the market price. The answer suggested by defendants in error to all this was that the sellers did not know that the buyer was ignorant that its agent was likewise the agent of the sellers, and supposed that eventually this double agent would give the buyer for whom he bought, the benefit of the commission paid him by the sellers for whom he sold. This defense is absolutely frivolous. Undoubtedly there are circumstances under which the

same person may act as the agent of two distinct principals and in regard to transactions and dealings between the principals. As said by Campbell, *J.*, in *Adams Min. Co.* v. *Senter*, 26 Mich. 76: "The authority of agents may, where no law is violated, be as large as their employers may choose to make it," etc. "There can be no presumption that the agent of the two parties will deal unfairly with either. And when they both deliberately put him in charge of their separate concerns and there is any likelihood that he may have to deal with the rights of both in the same transactions, instead of lessening his powers, it may become necessary to enlarge them far enough to dispense with such formalities as one man would use with another, but which could not be possible for a single person to go through with alone." It is most obvious that in all such cases of a double agency it is absolutely essential that both principals shall know of and assent to the dual character. *Capener* v. *Hogan*, 40 Ohio St. 208; *United States Rolling Stock Co.* v. *Atlantic & G. W. R. Co.* 34 Ohio St. 450, 32 Am. Rep. 380; *Bell* v. *McConnell*, 37 Ohio St. 400, 41 Am. Rep. 528; Mechem, Agency, § 67.

The evidence we have recited, to say the least of it, strongly tended to establish the fact that Brooks understood himself to have an arrangement with the defendants in error by which he would be allowed personally a commission on each separator which he, as an employé of the plaintiff in error, should buy from the defendants in error, and it tends with equal force to establish the fact that the defendants in error recognized that Brooks was personally entitled, under an existing arrangement with them, to demand and receive the same commission he would have earned by a like sale to any other customer. There was, therefore, evidence entitling the plaintiff in error to go to the jury upon the defense of fraud invalidating the contract of sale.

Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. This principle is founded upon the plainest principles of reason and morality, and has been sanctioned by the courts in innumerable cases. "It has its foundation in the very constitution of our nature," says *Judge* Dillon, "for it has authoritatively been declared that a man cannot serve two masters, and is recognized and enforced wherever a well-regulated system of jurisprudence prevails." 1 Dill. Mun. Corp. § 444. "An agent cannot be allowed to put himself in a position in which his interest and his duty will be in conflict." Leake, Cont. 3d ed. 409. The tendency of such agreement is to corrupt the fidelity of the agent, and is a fraud upon his principal, and is not enforceable, "even though it does not induce the agent to act corruptly." "It would be most mischievous to hold that a man could come into a court of law to enforce such a bargain on the ground that he was not, in fact, corrupted. It is quite immaterial that the employer was not damaged." Wald's Pollock, Cont. 245, 246, *note* citing *Harrington* v. *Victoria Graving Dock Co.* L. R. 3 Q. B. Div. 549, and other cases. *Taussig* v. *Hart*, 58 N. Y. 425; *United States Rolling Stock Co.* v. *Atlantic & G. W. R. Co.* 34 Ohio St. 450–460, 32 Am. Rep. 380; *Smith* v. *Sorby*, L. R. 3 Q. B. Div. 552; *Young* v. *Hughes*, 32 N. J. Eq. 372; *Yeoman* v. *Lasley*, 40 Ohio St. 190. Such agreements are a fraud upon the principal, "which entitle him to avoid a contract made through such agency." Leake, Cont. 409; *Panama & S. P. Teleg. Co.* v. *India Rubber Gutta Percha & Teleg. Works Co.* L. R. 10 Ch. 526. "Where there are a principal, an agent and a third party contracting with the principal, and cognizant of the agent's employment, and there are dealings between the third party and the agent which gives the agent an interest against his duty, then the principal, on discovering this, has the option of rescinding the contract altogether." Wald's Pollock, Cont. 247. "Any profit made by an agent in the execution of his agency must be accounted for to the principal, who may claim it as a debt for money received to his use. A gratuity given to an agent for the purpose of influencing the execution of his agency vitiates a contract subsequently made by him, as being presumptively made under that influence; and a gratuity to an agent, after the execution of the agency, must be accounted for to his principal; as in the case of a servant employed to make payments accepting discounts or presents from the creditor." Leake, Cont. 409. The same author says: "If an agent stipulates with a contractor for a commission upon the work to be done for his principal, he must account for the commission, and it is good ground for his dismissal." Page 410; *Boston Deep Sea Fishing Ice Co.* v. *Ansell*, L. R. 39 Ch. Div. 339; *Stoner* v. *Weiser*, 24 Iowa, 434; *Bell* v. *Bell*, 8 W. Va. 183; *Moore* v. *Mandlebaum*, 8 Mich. 433. The principle which prevents an agent from contracting with himself, or from entering into any agreement which gives him an interest conflicting with his duty, applies more strongly to the officers, servants, and agents of a municipal government than to private parties. 1 Dill. Mun. Corp. § 444.

Brooks, as we have already stated, was an employé of the city of Findlay. This Pertz & Stewart knew. The letter heads and his official signature fully advised them that he was the agent of a public corporation. Now, if with this knowledge, they dealt with the city of Findlay, knowing the relation which he bore to them, they knew that his interest in making a sale for them conflicted with his duty and fidelity as a public agent. The agency of Brooks for the city was one which required expert knowledge, and involved a considerable degree of trust and confidence. His duty was to give to the public service the full benefit of a disinterested judgment and the utmost fidelity. Any agreement or understanding by which his judgment or duty conflicted with his private interest was corrupting in its tendency. We know of no more pernicious influence than that brought

about through a system of commissions paid to public agents engaged in buying public supplies. Such arrangements are a fruitful source of public extravagance and peculation. The conflict created between duty and interest is utterly vicious, unspeakably pernicious, and an unmixed evil. Justice, morality, and public policy unite in condemning such contracts, and no court will tolerate any suit for their enforcement.

The forcible language of *Mr. Justice* Field, in speaking for the court in *Providence Tool Co.* v. *Norris*, 69 U. S. 2 Wall. 45, 17 L. ed. 868, and repeated in *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 274, 26 L. ed. 545, is quite as applicable to the debauchery of the agent of a municipal corporation as it was when the interests of the Federal government were sought to be affected by the same kind of pernicious influence. In the case cited the learned justice said, concerning such contracts: "Considerations as to the most efficient and economical mode of meeting the public want should alone control in this respect the action of every department of government. No other consideration can lawfully enter into the transaction so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other element into the transaction is against public policy. That agreements like the one under consideration have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public services and to unnecessary expenditures of the public funds. . . . All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." *Oscanyan* v. *Winchester Repeating Arms Co. supra.*

This principle of public policy finds full recognition in section 6969 of the Revised Statutes of Ohio, by which it is provided that any public officer, agent, servant, or employé who, while acting as such public officer, agent, or employé, shall become directly or indirectly interested in any contract for the purchase of any property for the state, county, or municipality, shall be guilty on conviction of a penitentiary offense. This statute has been construed as applying to the agents, officers, and employés of towns, villages, and cities of the state, and as a prohibition upon all contracts between such a municipality and an agent or servant interested therein. *Doll* v. *State*, 45 Ohio St. 445.

The contract or arrangement between defendants in error and Brooks, the servant of the plaintiff in error, was no more illegal after this statute than it was under common-law principles before the statute. What was the effect of that arrangement or contract on the contract with plaintiff in error? We must distinguish between the bargain for a commission between the defendants in error and the agent of the city, and the contract between the two principals. The first was clearly illegal and incapable of enforcement; the latter was, on its face, altogether within the contracting power of the parties, was free from any immorality, and altogether legitimate. The means by which the city may have been induced to enter into it was the vicious element in the trade. The board of gas trustees had no intention to deal with Brooks or any one else incapacitated under the Ohio statute, or under principles of public policy, from contracting with the city. That board was wholly ignorant of the secret arrangement between its agent and the persons with whom it proposed to bargain. Neither that board nor the city council knew of the double agency of Brooks. Undoubtedly, upon the authorities we have already cited, the city, upon discovery of the dealings between its agent and the defendants in error, had a right to repudiate the contract, and sue for damages sustained by the fraud. So, upon the other hand, if the buyer had been a private party or a business corporation, the fraud might be waived, and the contract affirmed, notwithstanding the corruption of the agent through whom it had been made. But it has been pressed upon us that, inasmuch as the agent corrupted was a public agent, the contract made through his corruption was absolutely void and incapable of ratification, and that no subsequent conduct of the plaintiff in error in retaining and using the machines bought can furnish a basis upon which the guilty party can maintain a suit founded upon the corrupt contract. It seems to us that this argument confounds the corrupt agreement between the agent of the city and the other principal with the contract between the principals. There can be no question about the ratification of the arrangement for a commission. No one pretended to act for the city in bargaining for or receiving an illicit commission. "The principle of ratification only applies where the agent had professed to contract for the person who afterwards ratifies." Leake, Cont. 391.

The question we have to deal with is this: Can the city, notwithstanding the surreptitious dealing between its agent and the seller, waive the fraud as a private individual might and ratify the purchase? This is not a purchase of property from an agent or officer of the city. Neither is it a purchase of property in which any such agent or officer has an interest. It is simply a case of where an agent for the purchase of property from one capacitated to deal with the city, is given a gratuity, reward, or commission by the seller, which tended to give that agent an interest conflicting with fidelity to his principal. Upon this discovery of the improper inducement operating upon its agent, the city had a right to repudiate the purchase and return the property bought. This right it might exercise without regard to any actual injury it had sustained, and without regard to the effect of the allowance of the commission upon

the integrity of its agent. *Harrington* v. *Victoria Graving Dock Co.* cited above, and *Lister* v. *Stubbs*, L. R. 45 Ch. Div. 1. Under such circumstances, a contract, neither immoral nor prohibited, between private parties, would not be incapable of affirmance and enforcement by the principal who had been defrauded. The innocent principal would have an option to affirm or avoid it, on discovery of the facts. The authorities upon this are clear and numerous. Wald's Pollock, Cont. 247; Leake, Cont. 409.

The learned trial judge was of opinion, and so instructed the jury, that, upon discovery of the improper dealing with its agent, the city might repudiate or affirm the contract as it should elect. We entirely agree with him in this. The contract it made was neither *malum in se* nor *malum prohibitum*. No question of public policy is involved by a ratification of the bargain. That involves no affirmance or adoption of the corrupt agreement for illicit commissions. Upon the contrary, it would have the right to hold the agent liable as for money had and received to its use. It might go still further and sue the seller for the fraud and recover all damages consequent upon an improper dealing with the buyer's agent. It would be no answer to a suit by the city for a breach of the contract, as to the automatic operation of these separators, to say that the agent of the plaintiff had been corrupted by the defendant, and induced to make the contract through improper considerations. The buyer, not being a party to the corruption of its own agent, has the undoubted right to enforce the contract. Clearly, the court would not be aiding in the enforcement of an illegal or corrupt contract if the city was not *in pari delicto* and the agreement in itself was unobjectionable. The fact that unlawful means were adopted to induce a contract which is lawful itself and capable of being lawfully performed, does not, of itself, make the contract unlawful as to the innocent party, nor does any principle of public policy forbid the enforcement thereof by the defrauded principal. The unlawful means by which the seller induced the buyer to deal with him is a matter collateral to the principal agreement. We recognize the general rule that money or property paid or delivered on an unlawful agreement cannot be recovered back. That principle, as stated by *Lord* Mansfield, in *Holman* v. *Johnson*, 1 Cowp. 343, is this: "The principle of public policy is this: '*Ex dolo malo non oritur actio.*' No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for, where both are equally in fault, '*potior est conditio defendentis.*'"

"The test for the application of this rule is whether the plaintiff can make out his case otherwise than through the medium and by the aid of an illegal transaction to which he was himself a party." Wald's Pollock, Cont. 332.

This principle has no application here. The city was not a party to any illegal or unlawful or immoral agreement. If it were a plaintiff suing upon a breach of warranty contained in the contract in question, it would not be obliged to make out its case "through the medium and by the aid of any illegal transaction to which it itself was a party." The contract between the city and the sellers of these chattels was neither *malum in se* nor *malum prohibitum*. It is, therefore, enforceable by either party, unless the unlawful dealings between the agent of one of the parties and the other principal is a ground for rescission. If the contract was one which the city could have lawfully made or authorized in the first instance, then it is one which, if made by an unauthorized agent or through the fraud of its agent, to which the other party was alone privy, it may ratify upon full knowledge of all the facts. *State* v. *Buttles*, 3 Ohio St. 309. The case last cited affords an interesting instance of the power of a principal to ratify an act of an agent wholly unauthorized, and which the agent was by law prohibited from doing. Certain agents for the state of Ohio had loaned the state's money, and taken a bond therefor, payable to them as agents for the state. The lending of the state's money was prohibited under a penal statute. The state, through its legislature, ratified this unlawful act, and sued at law on the bond. The opinion was by Ranney, *J.*, who, among other things, said that the state had a perfect right to waive the wrong and adopt the contract made in her name: "If, when adopted, the consideration upon which it was made, or its performance by the other party, is found to be illegal or immoral, it will no sooner be enforced for her than for the most obscure citizen; but, if it then stands without objection in both these particulars, it is no defense to say she was wronged by her agents, when they assumed, without authority, to act in her name. That is a matter between her and her agents. The option whether she will make herself a party to their acts, and be bound by the contract they have made, belongs to her, and not to those who have not and could not have been injured. In short, any contract that an individual or body corporate or politic may lawfully make, they may lawfully ratify and adopt, when made in their name without authority; and, when adopted, it has its effect from the time it was made, and the same effect as though no agent had intervened. The state could lawfully have loaned this money, and the defendant's testator could lawfully have bound himself to repay it. If the contract has been ratified and adopted by the state, in judgment of law, the state did loan the money, and the defendant's testator did promise the state to repay it." *State* v. *Buttles*, 3 Ohio St. 322, 323.

The case of *Milford* v. *Milford Water Co.* 124 Pa. 610, 8 L. R. A. 122, has been cited as entertaining an opposing doctrine. Rightly

understood, it has no very forcible bearing upon this case. A statute of the state absolutely prohibited any municipality from entering into any contract in which members of the city council were concerned, and made participation in such a contract by members of the city government a penal offense. The city council contracted with a water company for a supply of water for a term of years. A majority of the council constituted a majority of the directors of the water company. Subsequently, when the council contained none of the directors of the water company, rents were paid, and use of the water continued. The water company relied upon this as a ratification, and sued for other rents. It was held that the contract was void and incapable of ratification. The case seems to stand upon the principle that the party to be held by ratification must be capable, not only of doing the act at the time it is ratified, but at the time the act ratified was done. Wald's Pollock, Cont. 108; *Cook* v. *Tullis*, 85 U. S. 18 Wall. 338, 21 L. ed. 936. "Ratification relates back to the original making of the contract, and confirms it from that time." Leake, Cont. 393. The town was incapable of making a contract with that water company when it was made, and while it might, at the date of ratification, have made a new contract, it was held incapable of confirming the old one.

We do not agree with the trial judge that the evidence of ratification, after full discovery of the fraud, was so clear as to leave no issue for the jury. The city did, by letter, repudiate the agreement, and notify the sellers to remove the machines. This it had a clear right to do. But it is said that, while the city said it would not be bound by the bargain, its acts in retaining and using them thereafter was inconsistent with rescission, and amounted to ratification. Undoubtedly, the subsequent retention and use of these machines was evidence tending to contradict the letter repudiating the purchase. *Dodsworth* v. *Hercules Iron Works* (Feb. 5, 1895) 66 Fed. Rep. 488. In the case last cited, a like repudiation of an agreement for failure of machinery to comply fully with precedent conditions was held to have been rendered nugatory by subsequent conduct. But, in that case, there was a subsequent continued use for more than two years, in the ordinary course of the buyer's business, which was held such clear evidence of an intention to accept as to leave no issue of fact for the jury. The city could not be held estopped by ratification until after full discovery of the fraud. A mere suspicion was not enough to put it to an election. *Mudsill Min. Co., Limited* v. *Watrous*, 9 C. C. A. 415, 61 Fed. Rep. 163. The letter of November 18, 1890, was written as soon as any satisfactory evidence of the improper dealing with its agent came to its knowledge. There was evidence tending to show that between that date and the bringing of this suit (January 16, 1891) the city had continued to use at least some of these machines. Such use would, of course, be evidence of an intention to affirm a contract otherwise avoidable for fraud. But this use was for less than two months, and falls, in that respect, far short of a like retention and use held to be conclusive in *Dodsworth* v. *Hercules Iron Works*, which we have before cited, and was not an act determining the intention to ratify so conclusively as to leave no question for the jury. Slight acts of use will not bar rescission. Bigelow, Frauds, 484, 485. In a case of this kind, where a public municipality has been defrauded, there ought to be, where mere acts are relied upon as evidence of ratification, such clear evidence of an intentional exercise of the right of ownership as would be inconsistent with any other theory than that of an intention to waive the right of rejection. The question of ratification should have been submitted to the jury.

Finally, if the city is found to have ratified the contract, it would operate as a confirmation of the trade, as originally made. If representations were made by Brooks as to the automatic operation and general capacity of these machines to perform the work needed, and thus induced the purchase, these representations, in case a right to rescind is found to have been waived, may be treated as warranties made by the agent of defendants in error. Ratification operates as an adoption of the entire agreement and all of its parts. If the sale was upon a guaranty, or under representations amounting to a warranty, ratification confirms it subject to the guaranties of warranty, and the buyer may, when sued for the purchase price, recoup to the extent of any damage sustained by breach of the contract with respect to any warranty concerning the capabilities of the machine. The case of *Dodsworth* v. *Hercules Iron Works*, heretofore cited, controls this aspect of the case.

For the error indicated, the judgment must be reversed.

MICHIGAN SUPREME COURT.

LAKE SHORE & MICHIGAN SOUTHERN R. CO., *Appt.*,
v.
City of GRAND RAPIDS *et al.*

(103 Mich. 374.)

1. The special exemption of a railroad from taxation by its charter does not extend to lines which it operates under a lease and which were organized under the general laws of the state.

2. A tax on a railroad "in lieu of all other taxes" does not exempt it from assessments for local improvements.

3. The sale of the freight house and a portion of the right of way and tracks of a railroad, although at its terminus, cannot be

NOTE.—See, on the subject of the above case, the recent *note* to Chicago, M. & St. P. R. Co. v. Milwaukee (Wis.) 28 L. R. A. 249.

29 L. R. A.

See also 44 L. R. A. 716.

sustained as a mode of collecting an assessment for local improvements.

(November 7, 1894.)

APPEAL by complainants from a decree of the Superior Court of Grand Rapids refusing to enjoin defendants from enforcing an assessment for street improvement by sale of complainant's property. *Reversed.*

The facts are stated in the opinion.

Mr. **Francis A. Stace,** with *Messrs.* **C. E. Weaver** and **Fitzgerald & Barry,** for appellant:

Complainant, as now organized, is taxable only under the provisions of the charter of the Michigan Southern Railroad Company (Laws 1846, p. 170) and the act under which that company and the Northern Indiana Railroad Company were consolidated. Laws 1855, p. 300.

State Treasurer v. *Auditor General*, 46 Mich. 224.

The provision of the charter exempts the property and effects of the complainant "from all and every other tax, charge or exaction by virtue of any laws of this state now, or hereafter to be, in force, except penalties by this act imposed."

The words, "tax, charge, or exaction" cover every kind of assessment which can be made under the taxing powers of the government.

Olive Cemetery Co. v. *Philadelphia*, 93 Pa. 129, 39 Am. Rep. 732; *Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *McMasters* v. *Com.* 3 Watts, 292.

Assessments have uniformly been regarded and treated as taxes, and the power to make such assessments is referred to the power of taxation.

Hoyt v. *East Saginaw*, 19 Mich. 39; *Mots* v. *Detroit*, 18 Mich. 495; *Whitney* v. *Hudson*, 69 Mich. 189; *Lyon* v. *Grand Rapids*, 80 Mich. 253; *Grand Rapids School Furniture Co.* v. *Grand Rapids*, 92 Mich. 564; *Davies* v. *Saginaw*, 87 Mich. 439; *Auditor General* v. *Maier*, 95 Mich. 127; *Big Rapids* v. *Mecosta County Supvrs.* 99 Mich. 351.

The words in a charter, "shall not be subject to taxes and assessments," are held to exempt the corporation from assessments for opening, curbing and flagging a street.

State v. *Newark*, 36 N. J. L. 478, 13 Am. Rep. 464. See also *Codman* v. *Johnson*, 104 Mass. 491; *Blake* v. *Baker*, 115 Mass. 188; *LeRoy* v. *East Saginaw City Railway*, 18 Mich. 234, 100 Am. Dec. 162; *Brightman* v. *Kirner*, 22 Wis. 54.

The charter of the complainant is a contract made by it with the state, and the state cannot, by any subsequent legislation, change its terms without the consent of the complainant.

New Jersey v. *Yard*, 95 U. S. 104, 24 L. ed. 352; *Dartmouth College Trustees* v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629.

Under the general railroad laws of this state, the complainant cannot be taxed for municipal improvements of this character.

The per centage directed to be paid to the state treasurer "in lieu of all other taxes" precludes the levying of the assessment in question.

St. Paul & P. R. Co. First Div. v. *St. Paul*, 21 Minn. 526; *St. Paul* v. *St. Paul & S. C. R. Co.* 23 Minn. 469.

A railroad is a public highway and the land occupied by it and used solely for its franchises, is taken and used for public use and it is against public policy to tax one public highway for the support of another.

Philadelphia v. *Philadelphia, W. & B. R. Co.* 33 Pa. 41; *Junction R. Co.* v. *Philadelphia* 38 Pa. 424; *Worcester* v. *Western R. Corp.* 4 Met. 564; *State* v. *Middle Twp. Collector*, 38 N. J. L. 270; *Detroit Union R. Depot & Station Co.* v. *Detroit*, 38 Mich. 347.

A railroad is an entirety and cannot be cut up and taxed and sold for taxes in parcels.

2 Rorer, Railroads, 1499, § 14; *Detroit* v. *Detroit City R. Co.* 76 Mich. 421; *Hackley* v. *Mack*, 60 Mich. 591; *Applegate* v. *Ernst*, 3 Bush, 648, 96 Am. Dec. 272; *Georgia* v. *Atlantic & G. R. Co.* 3 Woods, C. C. 434; *Porter* v. *Rockford, R. I. & St. L. R. Co.* 76 Ill. 561; *Big Rapids* v. *Mecosta County Supvrs.* 99 Mich. 351; *Worcester County* v. *Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *Polk County Sav. Bank* v. *State*, 69 Iowa, 29; *New York & H. R. Co.* v. *Morrisania Trustees*, 7 Hun, 652.

The land being occupied by complainant solely in the exercise of its franchises is not susceptible of benefit by the paving of the street.

Philadelphia v. *Philadelphia, W. & B. R. Co., Junction R. Co.* v. *Philadelphia*, and *New York & H. R. Co.* v. *Morrisania Trustees, supra; New York & N. H. R. Co.* v. *New Haven*, 42 Conn. 279, 19 Am. Rep. 534; *State* v. *Jersey City*, 36 N. J. L. 56; *Illinois Cent. R. Co.* v. *Decatur*, 1 L. R. A. 613, 126 Ill. 92; *Bridgeport* v. *New York & N. H. R. Co.* 36 Conn. 255, 4 Am. Rep. 68.

Mr. **William Wisner Taylor** for appellees.

Long, J., delivered the opinion of the court:

On April 24, 1891, the common council of the city of Grand Rapids determined, by resolution, to pave a part of West Bridge street, including the part which passes the complainant's railroad and freight house. The pavement was constructed, and on January 11, 1892, the common council designated the district benefited, which included the north 100 feet of complainant's premises, and assessed complainant for benefits therefor the sum of $846.50, the premises being valued at $1,500. From this assessment complainant appealed to the common council, on the ground that its lands were not liable to assessments for such improvements. This claim was denied by the common council, and the assessment was confirmed on March 21, 1892. The assessment was to be paid in five annual installments. The first was not paid, and the land was sold by the city marshal for the amount of the tax and costs of sale, on November 4, 1892. The second installment not being paid, it was returned by the treasurer to the city clerk. The city charter provides (title 6, §§ 33, 41) for the execution of a deed by the mayor at the expiration of one year from date of sale. This bill was filed September 29, 1893, for the purpose of vacating the assessments as illegal, on the ground that the complainant is not liable to assessments for this municipal street improvement, and

that its premises are not benefited or susceptible to benefit thereby, and to enjoin the mayor from executing a deed on the first assessment, and the marshal from selling on the second. The defendants demurred generally to the bill. The court sustained the demurrer and dismissed the bill. The contentions of the complainant are (1) that, under the special acts of the legislature by which it is incorporated, it cannot be assessed nor taxed for municipal street improvements; (2) that, under the general railroad law, it cannot be assessed nor taxed; (3) that the charter of the city of Grand Rapids does not authorize the assessment of such tax on the lands of complainant used and operated in the exercise of its franchise; (4) that the lands of complainant so used are not susceptible of benefit from a street improvement, and for that reason cannot be assessed.

The Michigan Southern Railroad Company was originally organized under a special charter. Laws 1846, p. 170. By its charter it is provided: "The said company shall pay to the state, on demand, an annual tax of one half of one per cent upon the capital stock paid in, including the five hundred thousand dollars of purchase money paid or to be paid to the state, until the first day of February, 1851, and thereafter an annual tax of three fourths of one per cent upon its capital stock paid in, including the five hundred thousand dollars purchase money aforesaid, and also upon all loans made to said company for the purpose of constructing said railroad, or purchasing, constructing, chartering or hiring of steamboats authorized by this act to be held by said company, which tax shall be paid in the last week in January in each year to the state treasurer, and the property and effects of said company, whether real, personal or mixed, shall, in consideration thereof, be exempt from all and every other tax, charge or exaction by virtue of any laws of this state now or hereafter to be in force, except penalties by this Act imposed." Afterwards, in the year 1855, an Act was passed by the legislature to authorize the Michigan Southern Railroad Company to consolidate with the Northern Indiana Railroad Company. Laws 1855, p. 300. This Act contains the following provision: "The said corporation to be organized by virtue of this Act shall continue subject to the same rate of tax as though such consolidation should not take place, and the amount of its capital and loans hereafter upon which such taxation shall be paid shall be such portion of the whole of its capital and loans as is actually employed in the state of Michigan." It is contended that the words "tax, charge or exaction," employed in the statute, cover every kind of assessment which can be made under the taxing power of the state, and that, under this special Act by which complainant was incorporated, it cannot be assessed nor taxed for municipal street improvement. The Act of 1846, for the organization of the Michigan Southern Railroad Company, also provided for the sale of the Southern Railroad, and for the right of the newly organized company to purchase it. The new company was authorized to build a road from the city of Monroe, passing through Petersburg, Adrian, Hillsdale, thence to Coldwater, and thence to Lake Michigan, on the line theretofore established as the line of the Southern Railroad by the state, or anywhere further southward than said line; and also from the junction of the Tecumseh branch with the Southern Railroad, to pass through the villages of Tecumseh and Clinton, to the village of Manchester in the county of Washtenaw. The Michigan Southern Railroad was to construct and put in operation its road from Hillsdale to Coldwater within four years, and from Coldwater to St. Joseph river within four years, and from St. Joseph river to Niles within twelve years, and within three years put in operation the Tecumseh Branch to the village of Jackson, along the line of railroads formerly authorized to be constructed by the Jacksonburg & Palmyra Railroad Company. The act further provided that the line of railroad thus completed should constitute a continuous line of railroad from the waters of Lake Erie, in the city of Monroe, to Lake Michigan. The scope of the Act, therefore, was to build a line of railroad across the state from east to west, through the several places named, and to complete the branch from Tecumseh to Jackson. It was this company, organized to construct and operate this road, to which the Act of 1846 applies. The Act of 1855 authorizes the Michigan Southern Railroad Company to consolidate with the Northern Indiana Railroad Company, but in no manner changed the rate of taxation. *State Treasurer* v. *Auditor General*, 46 Mich. 224. Afterwards, the consolidated company organized under the name of the Lake Shore & Michigan Southern Railway Company. Thereafter the complainant company leased or otherwise acquired the control of the railroad extending from White Pigeon, St. Joseph county, to the city of Grand Rapids, and has since operated it in its own name. It was no part of its original line, and it is not disputed that the portion from Kalamazoo to Grand Rapids was originally known as the "Gardner Road," and was organized under the general law of this state.

Whatever the rights of the complainant company may be under the Act of 1846 as to taxation, that Act cannot be made applicable to this leased road, it being organized under the general railroad law. The exemption from taxation under the Act of 1846 was a special privilege granted to the Michigan Southern Railroad Company, but it cannot be extended to such lines as that company might thereafter lease and operate, which were organized under the general railroad laws of the state. In fact, the rule seems to be much narrower than this; that is, that the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to. In a note to Cooley on Taxation, 2d ed. p. 212, it is said: "This statutory rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, not to be extended beyond the exact and express requirement of the grants construed *strictissimi juris*." In *Memphis*

L. R. R. Co. v. *Berry*, 112 U. S. 609, 28 L. ed. 837, it appears that the railroad company, exempt from taxation, had attempted to transfer its franchises to another corporation, which therefore claimed the exemption, and filed its bill to restrain taxation. The bill was dismissed, the court saying: "The exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor." No such intention can be found in the Statute of 1846.

It is claimed, however, that, under the general railroad law of this state, this property cannot be made liable for local improvements of this character. It is provided by the general railroad law (How. Anno. Stat. § 3360) that a tax shall be paid by every railroad company to the state treasurer, based upon a percentage of the gross income of the company, and that "the tax so paid shall be in lieu of all other taxes upon the properties of such companies, except such real estate as is owned and can be conveyed by such corporation under the laws of this state and not actually employed in the exercise of its franchises and not necessary or in use in the proper operation of its road." It is contended that the words "in lieu of all other taxes" preclude the levying of such assessment for local improvements. We are satisfied that this contention cannot be sustained. As said by *Mr. Justice* Cooley: "It is a very just rule that, when an exemption is found to exist, it shall not be enlarged by construction. On the contrary, it ought to receive a strict construction; for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that, unless the privilege is limited to the very terms of the statute, the favor would be extended beyond what was meant." Cooley, Taxn. 2d ed. p. 205. Speaking of local assessments, the learned author says, on page 207: "The most striking illustration of the rule of strict construction of exemptions is seen in the case of special assessments for local improvements, such as the paving and repair of streets, etc. It is almost universally held that a general exemption from taxation will not extend to such assessments. In the leading case, the words of the exemption were that no church or place of public worship should be taxed by any law of this state. Upon this the court remarked: 'The word "taxes" means burdens, charges or impositions put or set upon persons or property for public uses, and this is the definition which *Lord* Coke gives of the word "talliage" (2 Inst. 232); and *Lord* Holt, in [*Brewster* v. *Kidgell*], Carth. 488, gives the same definition, in substance, of the word "tax." The legislature intended by that exemption to relieve religious and literary institutions from these public burdens, and the same exemption was extended to the real estate of any minister, not exceeding in value $1,500. But to pay for the opening of a street in the ratio of the benefit or advantage derived from it is no burden. It is no "talliage" or "tax," within the meaning of the exemption, and has no claim upon the public benevolence.'" *Judge* Dillon, in his work on Municipal Corporations, speaking of the strictness with which these statutes are construed, says: "Although an assessment is in the nature of a tax, and is authorized by or is a branch of the taxing power, yet a general statute exempting certain property—for example, churches—from taxation 'by any law of the state' does not exempt it from liability for a street assessment." *Re Improvement of Nassau Street*, 11 Johns. 77. It was held in *State* v. *Newark*, 27 N. J. L. 185, that a railroad charter exempting the company, in consideration of the payment of a certain tax, from "any other or further tax or imposition upon it," does not exempt it from liability for an assessment upon houses and lots owned by it, and benefited by the opening and widening of a street; but the corporation cannot, for such a purpose, be assessed without reference to the special benefit conferred upon property owned by it, and such an assessment would be, in fact, a tax from which it is exempt. See also, *New York, N. H. & H. R. Co.* v. *New Britain*, 49 Conn. 40; *Ludlow* v. *Cincinnati Southern Railway's Trustees*, 78 Ky. 357. But *Judge* Dillon says (sec. 778): "Aside from the rule of strict construction which applies to exemptions from taxation, the cases cited in this and in the previous section will show that there is, in their ordinary use, a recognized difference between the words 'tax' and 'assessments,' and that the one does not always include the other. Thus, a constitutional provision that taxation shall be equal and uniform throughout the state does not apply to local assessments upon private property to pay for local improvements. So, a provision of the constitution of a state which requires 'the rule of taxation to be uniform,' in connection with another provision that 'it shall be the duty of the legislature to provide for the organization of cities, and to restrain their power of taxation, assessments,' etc., so as to prevent abuses in assessments and taxation, is construed not to apply to special assessments by municipal corporations made by authority of the legislature for local improvements,"—citing *Weeks* v. *Milwaukee*, 10 Wis. 186. It is evident that the great weight of authority upholds the doctrine that assessments for local improvements are not within the general exemption from taxation. Under the general railroad law of this state, the taxes mentioned are such burdens, charges or impositions put or set upon persons or property for public uses; and this law has no reference to special assessments for local improvements in the ratio of the benefit or advantage to be derived from them. It is apparent from the statements in the bill that certain benefits are derived to this property by the improvements made. The proportion of these benefits are determined by the local officers.

But a more serious question is raised by counsel for complainant. It is insisted that the mode of collection of the tax fixed by the charter cannot be adopted and carried out as against the complainant, a railroad corpora-

tion. The proceedings prescribed by the charter for the collection of the taxes are as follows: After the assessment roll has been made and confirmed by the common council, it shall be delivered to the city clerk or the treasurer of the city. Ninety days after the receipt of the assessment roll, the treasurer shall return it to the city clerk, with the list of the real estate on which the assessment has not been paid, stating the amount of the tax and collection fees on each parcel, and the names of the persons to whom assessed. Within thirty days after the return of such list, the clerk shall cause the list to be published in a newspaper, with a notice of sale. The marshal shall attend the sale, and act as auctioneer. If no person bids the amount of the assessment, the lands shall be struck off to the city of Grand Rapids. No bids for less than the assessment, fees, and expenses, with interest, shall be received; and the land may be redeemed within one year on payment of the amount for which it was sold, with interest from date of sale, at 25 per cent. If not redeemed, the mayor shall execute a deed to the purchaser. The city is empowered to hold, occupy, enjoy, use and possess, lease, incumber, and convey lands bid off to it at such sales as fully and completely as a natural person. At the time of this assessment, no other means were provided by the charter for the collection of such assessments. It is claimed by counsel that a railroad is an entirety, and cannot be cut up and taxed and sold for taxes in parcels; that such a proceeding would result in a destruction of the franchises, and destroy the availability of the road to the public, who are entitled to its benefits as a means of transportation. In *Detroit* v. *Detroit City R. Co.* 76 Mich. 421, it was said: "But these tracks are only special adaptations for a particular use of the surface of the public highways; and, under our laws concerning levy and sale on execution, each track would be sold as a whole to the bidder for the shortest term of years to collect taxes for the use of it. The right to use the tracks is inseparable from the franchise, and, it not being taxable as land, it should properly be taxed as an entirety to the corporation." In *Hackley* v. *Mack*, 60 Mich. 591, it was said: "We have no law that we have yet discovered, and certainly none has been pointed out to us, which authorizes the sheriff to levy upon the track or roadbed of a railway, even against the corporation. If any levy can be made upon the property of the company, aside from such goods and chattels as may be found and seized and taken into custody by the sheriff, it is only on the franchise of earning tolls, as provided by the corporation laws." In *Applegate* v. *Ernst*, 8 Bush, 648, 96 Am. Dec. 272, the court said: "The railroad, from one end to the other, is an entirety, and as a whole only may be subject to taxation or coercive sale. Fragmentary taxations or sales might be unjustly vexatious and injurious to the owners, pervert the destination of the road, and disturb the public use and interest. To avoid such evils and absurdities, the law treats a railroad and all its appurtenances as one entire thing, not legally subject to coercive severance or dislocation. In that consolidated character it must be taxed for state revenue, and cannot be a fit subject for taxation by the separate counties through which it runs." In the case of *Georgia* v. *Atlantic & G. R. Co.* 3 Woods, C. C. 434, Fed. Cas. No. 5,351, *Mr. Justice* Bradley, speaking in reference to a tax levy made on the depots, freight houses, passenger houses, and offices of the company for taxes due the state, says: "It cannot be supposed that the legislature, in authorizing its construction, and granting peculiar franchises for its operation and use, ever intended that execution creditors might levy upon parcels of it, and cut it up into sections, and destroy it as a great public thoroughfare. Such a proposition is preposterous. Suppose a mile of the road should be levied on and sold. Would the purchaser have the right to fence it in, and take up the rails and cross-ties, and plant it, and thereby destroy the railroad? Could this be done without contemning the power of the state by which it was created and made a public highway? We think not." In *Porter* v. *Rockford, R. I. & St. L. R. Co.* 76 Ill. 561, it was held that, if a railroad was to be assessed at all, it must be as an entirety. These cases arose under a claimed power of taxation by the state or counties, or attempted liens under executions, and not for local assessments; but the reasoning against sales for local assessments is equally applicable where the attempt is made to collect by sale of the roadbed. or, as in this case, the freight house, roadbed, and right of way. It is said, however, that this was a terminal of the road, and the rights of the public could not be affected by sale of such terminal. We cannot accede to this. The freight houses and terminal of right of way and tracks might seriously affect the business of the company and the rights of the public. In *New York & H. R. Co.* v. *Morrisania Trustees*, 7 Hun, 652, assessment was made upon a part of the roadbed of plaintiff for benefits in opening a street. Proceedings were had to set aside the assessment; and it was held that the trustees could not sell the entire roadbed, nor any lands necessarily used by it for the purpose of its franchise. The case was, however, ruled as coming within section 50, chapter 277, Laws 1864, defining and limiting the powers of the trustees.

It is suggested, though not strenuously contended, by counsel for defendants, that though no sales may be made of the real estate assessed, for the purpose of paying this tax, yet the assessment against the property is valid, and may now be collected from the personal property of the defendant, under and by virtue of the amendment to the city charter in 1893, contained in title 6, section 10, Local Acts 1893. That section provides: "At the time of the delivery of the assessment roll to the city treasurer, the mayor shall attach his warrant thereto commanding him to collect the assessment therein contained, together with the fees hereinbefore prescribed, within ninety days from the date thereof; and further commanding and authorizing said treasurer, when he may deem it

necessary so to do, to levy and collect the same by distress and sale of any personal property upon such premises belonging to the premises, chargeable to such assessment." Just what personal property there may be upon such premises, belonging to the premises chargeable to said assessment, it is difficult to perceive; or just what this provision means, is difficult of ascertainment. If there were a general clause in the charter authorizing the collection from the personal property of the corporation, we could see no difficulty in enforcing the collection, as we are of the opinion that though the lands and premises assessed cannot be sold for the tax, for the reason before stated, yet the assessment for the local improvement is valid. The only question in this case is the mode of collection. Whether there is any law under which the city can now proceed for the enforcement of the payment of the tax is doubtful. None has been pointed out, and it may need further legislation on the subject to enable the city to collect.

The decree of the court must be reversed, and decree entered here in favor of complainant, setting aside the sales of the premises, and releasing the levies under the tax warrant as to the other years. The assessments for benefits will not be disturbed, but will stand as valid and subsisting assessments upon the properties for the improvements thus made. The relief granted is without prejudice to the defendant to proceed to the enforcement of the assessment in such mode as it may deem best.

Montgomery, J., did not sit. The other Justices concurred.

Rehearing denied.

MISSOURI SUPREME COURT.

STATE of Missouri, *Respt.*,
v.
Charles C. BISHOP, *Appt.*

(.....Mo.....)

1. A labor union may be protected by appropriate state legislation in the use of a label for the designation of articles manufactured by its members and use of the label prohibited to persons other than members of the union or persons who employ such members.

2. Labels, symbols or advertisements adopted by any association or union of workingmen as a trade-mark to distinguish articles manufactured by their members from those manufactured by other persons are protected by Laws 1893, p. 260, when they are adopted in accordance with its provisions.

NOTE.—*Protection of trade union labels or trade-marks.*

I. *In general.*
II. *Contents of label.*
III. *Effect of statutes.*

I. *In general.*

The leading cases on the question of the right of a trade union, such as a cigar makers' union, to protection in the exclusive use of a label which it adopts, have been reported in this series. The cases in the courts of last resort have generally but not quite unanimously agreed in denying that a trade-union label could be protected as a trade-mark on goods which did not belong to the union but were manufactured by the members of the union. But quite a large number of lower court cases have sustained such labels. In the case of Allen v. McCarthy, 37 Minn. 349, the court was equally divided on the question.

But in Cigar Makers' Protective Union No. 98 v. Conhaim, 3 L. R. A. 125, 40 Minn. 243, the court, by a bare majority, decided that a cigar makers' union was not entitled to protection in the use of the trade-mark.

To the same effect were the decisions in Weener v. Brayton, 8 L. R. A. 640, 152 Mass. 101, and McVey v. Brendel, 13 L. R. A. 877, 144 Pa. 235.

In Schneider v. Williams, 44 N. J. Eq. 391, a suit by three members of a cigar makers' union on behalf of their fellow members, as well as themselves, to restrain the use or imitation of their alleged trade-mark, was denied, because they did not show any property in the label or mark, or any application of it to goods actually on the market of which the complainants were the owners or in which they traded.

But in Carson v. Ury, 5 L. R. A. 614, 39 Fed. Rep. 777, it was held that while the label of the cigar makers' union was not a valid trade-mark, the fraudulent use of such label by a person who had no right to it was held to be a wrong which equity could prevent at the suit of a member of the union who was actually selling cigars of his own manufacture with such label thereon, and whose business was injured by the fraudulent use of the label by the defendant.

In Weener v. Brayton, *supra*, the suit to enjoin an alleged unlawful use of a cigar makers' trade-mark was brought by officers and members of the union, but there was no allegation that the plaintiffs were themselves, on their own account or with others, manufacturers or dealers in cigars as a business, or even actually employed by others in their sale or manufacture, or that the union of which they were members and officers was engaged in any business of that description, or that they had applied the label to any vendible commodity of which they were the owners or manufacturers, or in which they dealt. For this reason the court denied the applicability of the principle on which the injunction was granted in Carson v. Ury, saying, "whether, if the bill had contained allegations similar to those which were found in the case of Carson v. Ury (*supra*), it might have been maintained, we have no occasion now to consider."

In McVey v. Brendel, *supra*, it was said that the plaintiffs represented neither the cigar makers' international union, the alleged owners of the label, nor the officer whose name appeared upon it, but a subordinate local organization which did not devise or register the label, and did not claim to own it. The decision was that the local union could not maintain a bill to protect the label which belonged to the national union, but the court went further and declared that the national union was not a trader, manufacturer or dealer so as to be entitled to protection in the use of a trade-mark.

In Bloete v. Simon, 19 Abb. N. C. 88, a complaint by members of a cigar makers' union on behalf of

See also 39 L. R. A. 211, 508; 43 L. R. A. 86, 858.

3. A statute providing for the protection of trade-marks adopted by associations or unions of workingmen is not void as class legislation or as granting special privileges or immunities.

4. Exclusive ownership of a label need not be alleged in an information under a statute making it a misdemeanor to vend or keep for sale goods upon which any forged imitation or counterfeit label shall be placed to represent the goods as those of some other person, association or union of workingmen.

5. Proof of guilty knowledge is necessary to sustain a conviction under Act of 1893, p. 260, making it a misdemeanor to have for sale goods bearing counterfeit labels representing that they were made by a certain person, association or union of workingmen.

(May 21, 1895.)

APPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction convicting him of selling cigars with a counterfeit label, contrary to the provisions of the statute. *Reversed.*

The facts are stated in the opinion.

Mr. **Eugene McQuillin,** for appellant:

The label of the Cigar Makers' International Union of America is not a trade-mark, and is, therefore, not entitled to protection under the laws of Missouri relating to the registration and piracy of trade-marks.

McVey v. *Brendel*, 13 L. R. A. 377, 144 Pa. 235; *Weener* v. *Brayton*, 8 L. R. A. 640, 152 Mass. 101; *Schneider* v. *Williams*, 44 N. J. Eq. 391; *Carson* v. *Ury*, 5 L. R. A. 614, 39 Fed. Rep. 777; *Trask Fish Co.* v. *Wooster*, 28 Mo. App. 408; *Liggett & Myers Tobacco Co.* v. *Sam. Reid Tobacco Co.* 104 Mo. 53.

Because, 1. The cigars are not "manufactured or prepared" by the union as an organization.

Mo. Laws, 1893, § 1, p. 260.

(a) The union is not a manufacturer or dealer in cigars, or engaged in trade or commerce of any kind; and the right to a trade-mark cannot exist as a mere abstract right, independent of, and disconnected from, a business. It is not property as distinct from, but only as incident to, the business.

Cigar Makers' Protective Union No. 98 v. *Conhaim*, 3 L. R. A. 125, 40 Minn. 243; *St. Louis Piano Mfg. Co.* v. *Merkel*, 1 Mo. App. 305; *Skinner* v. *Oakes*, 10 Mo. App. 45.

(b) There is and can be no trade-mark in labor, either at common law or under the Missouri statute.

2. It does not point out the source and origin of the cigars, the place of manufacture, the name of the manufacturer or dealer, nor the name of the maker.

Filley v. *Fassett*, 44 Mo. 168, 100 Am. Dec. 275; *Liggett & Myers Tobacco Co.* v. *Sam. Reid Tobacco Co. supra.*

3. Our statute does not protect labels, etc., as such, but only such names terms, devices, etc., as may be adjudged to be trade-marks. It is designed to protect "trade-marks" as contradistinguished from mere names, terms, devices and labels.

Mo. Laws, 1893, § 1, p. 260; *Alden* v. *Gross*,

themselves and their associates for an injunction against the wrongful use of a label on goods not manufactured by the union was sustained against demurrer. The court says: "We have admitted in the case at bar ownership by plaintiffs of the trade-mark or label as designating the cigars made by them and their associates; the general recognition of such trade-mark as guaranteeing that fact; the sale, limitaton, and use of that trade-mark by defendant with fraudulent intent to induce purchasers to believe that the cigars sold had been made by the plaintiffs, whereas they had not been so made; and irreparable damage to plaintiffs therefrom." But it does not appear whether plaintiffs were the owners of or dealers in any goods on which such label was properly used, or whether they were merely employed by others in manufacturing. It would seem that their right to sue was sustained solely on the ground that they represented the union and not on the ground that they were manufacturers or dealers in cigars on which the label was used.

In Strasser v. Moonelis, 23 Jones & S. 197, a similar decision was made. The complaint alleged that plaintiffs were several cigar makers and members of the Cigar Makers' International Association, while the answer alleged that the plaintiffs were not manufacturers in a proprietary sense, or in any right of proprietorship and had no right of property, possession, or control in cigars made by its alleged members or otherwise. And in an affidavit read on a motion to continue an injunction, the defendant said that the plaintiffs were working cigar makers and that neither they nor the union had any factory or made any cigars except as workmen for others, and transacted no business or trade in cigars as makers, dealers or otherwise, but the court said: "I am of the opinion that the plaintiffs being members of a cigar makers' international union had an interest in the proper use of the labels of the union, which might, upon sufficient grounds, be protected by injunction against the inequitable use of those labels." This was the language of the opinion at general term affirming the order of Dugro, *J.*, at special term. In his opinion, which is included in the report, he says: "It needs no deep study to perceive that the laborer has the same valuable interest in the good-will of his labor as a manufacturer has in the good-will of his trade." He also says it is needless to discuss the question whether the label constitutes a trade-mark or not, as the right to its exclusive use may be sustained, although it fail to be a trade-mark, as the property right in the label is entitled to the protection of equity on the same principle as that upon which courts protect trade-marks and good-will.

The court of appeals in dismissing an appeal from an order granting a preliminary injunction in the above case on the ground that this was a discretionary matter which could not be reviewed, said that the denial of any proprietary interest by the plaintiffs in the cigars made and the allegation that their pecuniary interests were not affected by the use of the labels, presented a serious question of law which the court was not prepared to determine in this preliminary proceeding, and in the absence of findings of fact showing the particular grounds upon which the judgment was based. Strasser v. Moonelis, 108 N. Y. 611.

The right of a cigar makers' union to the exclusive use of its label has also been sustained in several other lower court decisions which do not seem to have been reported in law reports. In Moe v. Alter (Ohio C. P., Lucas County), as reported in the Cigar Makers' Official Journal of February, 1888, an injunction was allowed in favor of the plaintiffs, suing for themselves and other members of the union, against defendant's use of the label of the Cigar Makers' International Union, or any imitation thereof, or interfering with the rights of the

25 Mo. App. 123; *Trask Fish Co.* v. *Wooster*, 28 Mo. App. 408; *Snodgrass* v. *Welle*, 11 Mo. App. 590.

4. The right to use the label in question is not a property right, without which there can be no trade-mark.

(a) It is a mere personal privilege contingent upon membership in the union.

(b) Its object is simply to indicate membership in the union; when membership ceases, the personal privilege, the right to use the label, ceases.

Cigar Makers' Protective Union No. 98 v. *Conlain*, 3 L. R. A. 125, 40 Minn. 243.

5. There is no exclusive use in the label.

Rogers v. *Taintor*, 97 Mass. 291; *Chadwick* v. *Covell*, 6 L. R. A. 839, 151 Mass. 190; *Weener* v. *Brayton*, 8 L. R. A. 640, 152 Mass. 101.

The Act of 1893 is illegal and void against the public policy of the state of Missouri, productive of oppression, illegal conspiracies, combinations and boycotts.

McVey v. *Brendel*, 18 L. R. A. 877, 144 Pa. 235.

The Act of 1893 is unconstitutional, is class legislation.

The Cigar Makers' International Union of America not being composed exclusively of citizens of Missouri, cannot, under our laws relating to the registration of trade-marks, acquire any rights in said label as against citizens of Missouri.

State v. *Hagen*, 6 Ind. App. 167.

The information is insufficient because it fails to aver exclusive ownership of the label in question in the organization known as the Cigar Makers' International Union of America.

United States v. *Braun*, 39 Fed. Rep. 775.

Mr. **R. F. Walker**, *Atty-Gen.*, for respondent:

It was held in Indiana, under a statute which limited the use of a label to citizens of that state, that a label may be adopted and registered by a trade union (the same as the one named in this proceeding) to indicate work done by those belonging to it, and although not a technical trade-mark, it will be protected in equity against those attempting to fraudulently use it without right.

Ind. Laws, 1891, p. 317; *State* v. *Hagen*, 6 Ind. App. 167.

It has been held in Illinois, in construing a statute similar to the Missouri law now under consideration, that the punishment of imitators or counterfeitors of trade-marks may be provided for under an act to protect associations, unions of workingmen and persons in their labels, trade marks and forms of advertising.

Cohn v. *People*, 23 L. R. A. 821, 149 Ill. 486.

A term, name or device may be protected as a trade-mark by an express statute.

Falkinburg v. *Lucy*, 35 Cal. 52, 95 Am. Dec. 76.

The rule that a trade-mark must indicate origin and ownership does not require the proprietor's name or place of business to accompany the device, symbol or design.

Peurrung v. *Compton*, 6 Ohio C. Ct. Rep. 488.

A statute which gives the right to a trade-

union and its members or branches in the use of such label. It was found that the Cigar Makers' International Union had the sole and exclusive right to the use of the label.

In Renkert v. Bamberger (Ohio C. P., Hamilton County), as reported in the Cigar Makers' Official Journal of April, 1887, a similar injunction was granted in favor of plaintiffs suing for themselves and other members of the local union at Cincinnati. The court said: "It is not necessary that the plaintiffs have an exclusive right in the label. If they have a common property right with others the wrong done to them by the defendant is entire—at least so far as the right to an injunction goes. If the number of the members of the union is so great as that they cannot all be brought into court then the officers of the union can sue. . . . They say there is no property right here because the makers of cigars do not sell them and cannot have a property right in a label affixed to them. They claim that the label is only an incident to the cigars. That might be so if it was separate from the cigars and never applied to them at all. It is admitted that the union cigars are better than others. Suppose a union working together makes a large quantity of excellent cigars, sells them to a dealer, and he agrees to put its label on them. He disposes of them readily and at a profit to himself. Does not the label have a value? Yet the cigars belong to the dealer and the label to the union. If other dealers make an inferior cigar and sell them under a counterfeit label would it not injure the business of the unions and impair the chances of employment and of getting good wages? Therefore, while there may be no property right in the bare label which the court would be bound to protect yet when attached to an article of merchandise there might be separate interests which the court might protect. The fraud in this case is of the worst kind. It is like a counterfeit bill. The general public have such an interest in suppressing it that the court might almost do it on a mere information. The demurrer is overruled."

In Todd v. Brener (Chancery Division Toronto, Canada,) as reported in the Cigar Makers' Official Journal of March, 1891, the union was held to be within the provisions of the Trade-mark and Design Act (R. S. C. chap. 63) and entitled to relief under the Trade-mark and Offenses Act, section 23 (R. S. C.), and an injunction was granted, against the contention of the defendant that there was no ownership in the plaintiffs of the label as a trade-mark and that the Trade-mark and Design Act applies only to those who manufacture or sell, and that this association cannot be classed or described as manufacturers or vendors of cigars, but merely employés of manufacturers and vendors. The court said that if identity of proprietorship in the mark and the article to which it was affixed, or if identity in the quality of the goods were required to passport it as such, the plaintiffs had no cause of action because the international union neither manufactures or owns cigar labels, etc. The court said further: "It is admitted, however, that the association consists wholly of cigar makers, and, as I understand it, the word 'maker' means 'manufacturer,' and the word 'manufacturer' means 'maker,' or one who works raw material into wares suitable for use, or one who employs workmen for manufacturing; it includes both. In my opinion these cigar 'makers' are cigar 'manufacturers,'" etc. And further, "The conclusion I have come to is, that these plaintiffs, and the members of this association in behalf of whom these plaintiffs sue, have a property right in this label or trade-mark, and are entitled to apply to the court to interfere by injunction."

In Cigar Makers' Union No. 1 of Baltimore v. Link (Balt. C. Ct.), as reported in the Cigar Makers' Official Journal of November, 1886, *Judge* Phelps

mark in a label adopted by any person, association or union of workingmen, is not a local or special law granting special privileges, immunities or franchises, because it is not limited to associations of any particular class of persons.

Cohn v. *People*, 28 L. R. A. 831, 149 Ill. 486.

This court will presume that sufficient evidence was introduced to support the finding of the trial court.

State v. *Fritterer*, 65 Mo. 423.

When an inference of guilt can be reasonably drawn from the evidence, the verdict will not be disturbed on the ground of insufficiency of the testimony.

State v. *Banks*, 118 Mo. 117.

Burgess, J., delivered the opinion of the court:

Defendant was convicted and fined $100 in the St. Louis court of criminal correction under an information filed against him in said court by the assistant prosecuting attorney, charging him with having sold a box of cigars to one David Kreyling, on June 26, 1894, upon which there was a counterfeit label of the Cigar Makers' International Union of America, contrary to and in violation of an Act of the general assembly of the state of Missouri entitled "An Act to Repeal Sections 8569, 8570, 8571, 8572, 8573, 8574, 8575, 8576, 8577, of the Revised Statutes of 1889, Entitled 'Trade-Marks,' and to Enact eight new Sections in Lieu thereof." Laws 1893, p. 260. The case is in this court on defendant's appeal.

Sections 1 and 4 of the Act under consideration are as follows:

"Section 1. Any Person may Adopt a Trade-Mark—To be Recorded. If any mechanic, manufacturer, association or union of workingmen, or other person, shall wish to adopt any particular name, term, design or device as his or their trade-mark, to designate, make known or distinguish any goods, wares or merchandise by him or them manufactured or prepared, he or they may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take the acknowledgment of deeds, and file the same for record in the office of the secretary of state, by leaving two copies, counterparts or fac-similes thereof, with the secretary of state; said secretary shall deliver to such mechanic, manufacturer, association or union of workingmen, or other person, so filing the same, a duly attested certificate of the record of the same, for which he shall receive a fee of one dollar; such certificate shall, in all suits and prosecutions under this Act, be sufficient proof of the adoption of such label, trademark or form of advertisement, and of the right of such mechanic, manufacturer, association or union of workingmen, or other person, to adopt the same. No label, trademark or form of advertisement shall be recorded that in any way resembles or would probably be mistaken for a label or trademark already of record."

"Sec. 4. Penalty for Keeping or Selling

granted an injunction in favor of the local union against unauthorized use of the union label. Since the opinion is an interesting one and is not found in other law reports, it is here quoted at length as follows:—

"There can be no doubt as to the right of the plaintiffs to maintain a proper bill, suing as well in their own behalf as in behalf of numerous other parties associated with them in a common interest. (Smith v. Swormstedt, 57 U. S. 16 How. 302, 14 L. ed. 948). The doctrine of representation so plainly applies, that the defendant's counsel conceded, in argument, that his demurrer could not be sustained either upon the ground that the International Cigar Makers' Union was a voluntary association unincorporated or that all its numerous members, amounting to several thousands, were not parties by name.

"Conceding that the plaintiffs have a standing in court, do they show such a property interest in themselves and their associates in the subject-matter as is entitled to the recognition and protection of a court of equity? Is this label and the right to use it a subject of property at all? It is objected that the parties drawing the benefit of the label are not manufacturers, but employés or laborers, not owners of the article upon which the label is permitted to be affixed, but simply hired to make it. And it is, therefore, contended that they and their label are not within the established principles which govern courts of equity in the application of the law of trade-marks and labels, heretofore exclusively applied, it is said, to the protection of the invested capital of manufacturers and merchants.

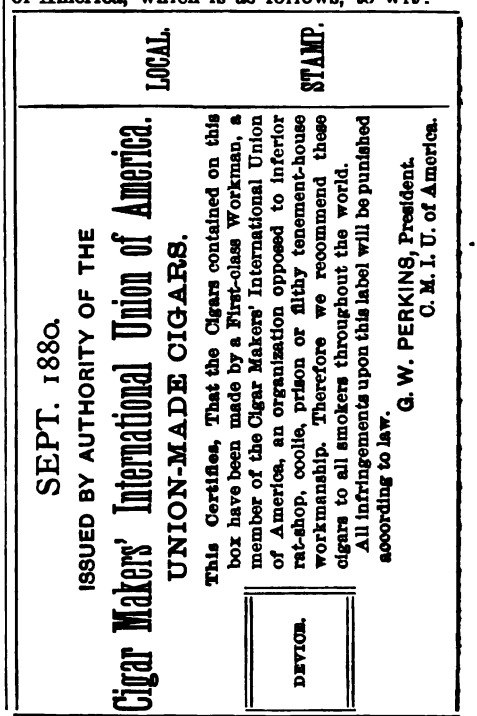
"Although the point thus raised is a novel and interesting one, but little difficulty should be found in disposing of it upon principle. The idea of property is necessarily a progressive one and is capable of development corresponding to the changes in the relations of men in a growing society. 'Distinct properties,' says Puffendorf, 'were not settled at the same time, nor by one single act, but by successive degrees, not in all places alike, but property was gradually introduced, according to either the condition of things, the number and genius of men required, or as it appeared requisite to the common peace.' Lib. 4, chap. 4, §§ 6, 14. It has been justly observed that the rules attending property must keep pace with its increase and improvement and must be adapted to every case. Millar v. Taylor, 4 Burr. 2340. The essentials of property are a 'distinguishable existence in the thing claimed as property, and an actual value in that thing to the true owner.' *Ibid.*

"The bill claims that the object and effect of this label, as used by the plaintiffs and their associates, is to increase the value of their labor by increasing the demand for it as members of the union. That is, in substance, what they claim, and at this stage of the case must be taken as true. It will not be denied that every freeman has a property right in his own labor, whether present or prospective. From this broad general principle it is easy to develop the particular proposition, that an association of men who combine for the purpose of increasing, by legitimate means, the general demand for their common labor, have a property right in whatever lawful instrumentality they can succeed in creating and controlling for that purpose.

"To apply the test already mentioned, if such an instrumentality has a distinguishable existence, if it has an actual value to those claiming to be its owners, it is property. The fact that this label in this case is valuable to the plaintiffs and their associates is admitted by the demurrer. The defendant has sought to appropriate it and by that

Goods with False Brand. Any person, persons, association or union of workingmen or body corporate or politic, who shall vend or keep for sale any goods, wares, merchandise, compounds or preparations upon which or in connection with which any forged, imitation or counterfeit label, brand, stamp, wrapper, imprint, engraving, bottle or trademark shall be placed, affixed or used, and intended to represent the said goods, wares, implements, merchandise, compounds or preparations as the genuine goods, wares, implements, merchandise, compound, or preparation of any other person or persons, association or union of workingmen, or body corporate or politic, knowing the same to be imitation or counterfeit, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment in the county jail not less than one month nor more than twelve months, or both, and shall also be liable in a civil action to the person or persons, association or union of workingmen, or body corporate or politic, whose goods, wares, implements, merchandise, compounds or preparations is imitated or counterfeited, or whose label, stamp, wrapper, engraving, imprint, bottle, or trademark is imitated, forged or counterfeited, placed, affixed or used, for all damages such person or persons, association or union of workingmen, or body corporate or politic, may or shall sustain, both by virtue of the loss of profits and the damage done to the reputation of the said genuine article, goods, wares, implements, merchandise, compound or preparation, by reason of any of the acts in any section of this chapter mentioned, and may be restrained or enjoined by any court of competent jurisdiction from doing or performing any of the acts herein mentioned."

The only objection to the information is that it does not aver exclusive ownership of the label in question in the Cigar Makers' Union. Defendant was a dealer in cigars in the city of St. Louis, and on the 26th day of June sold to one David Kreyling a box of cigars, upon which there was a counterfeit label of the Cigar Makers' International Union of America, which is as follows, to wit:



act has demonstrated that the label is at all events worth stealing. It is true that it is not tangible property, like a trade-mark, or a good-will, and as readily distinguishable. Browne, Trade Marks, § 521, etc. It is not the corporate property of a corporation but the common property of a voluntary association, in which all its members have a common interest.

"A voluntary association can own property in a certain sense just as well as a partnership. Mears v. Moulton, 30 Md. 140. Notwithstanding no precedent can be found among the reported cases in the highest courts of England, or this country, it seems sufficiently clear upon principle that the device of the label which the union has originated as its instrumentality for the purpose indicated and which the demurrer admits has effectually accomplished its object in the increasing demand for the labor of the members and thereby increasing the value of their labor, it is a property right of the union in which all the members have a common interest.

"If the combination for that purpose be legitimate, and the label itself as used be a lawful instrumentality and contains no fraudulent misrepresentation, the label is entitled to the recognition of a court of equity as a property right, and any fraudulent imitation of it will be suppressed. Counsel for defendant was not understood as contending either that the union itself was an unlawful combination, or that the label in question was an unlawful device. He did contend, however, that the label contains a misrepresentation of fact, in stating that the cigars under it were made by 'a first-class workman.'

"The argument is, that these labels are put upon each box of cigars made by a union workman, without discrimination, and that it is not possible, in the nature of things, that all the members of union are first-class workmen. But this argument goes outside of the bill, and it is the nature of a 'speaking demurrer.' There is nothing in the bill from which it may be legitimately inferred that the statement in the label was, in point of fact, untrue in any particular, and there is certainly no presumption that the statement is substantially untrue in general.

"The attempt has been made to deny that the defendants' label is a counterfeit throughout, even to the signature. It was, in fact, admitted in argument that if the plaintiffs and those they represent could be held to have a property right in the label, then the defendants' label was a clear infringement. It follows from the foregoing views that the plaintiffs, upon the face of the bill, are entitled to an injunction, and the demurrer will, therefore, be overruled."

In Maher v. Iowa Fruit & Produce Co. (Dist. Ct. of Iowa, Polk County) as reported in the Cigar Makers' Official Journal of April, 1891, a temporary injunction was granted restraining the defendants from using labels in imitation of union labels, or from selling cigars bearing such imitations. In this case two of the defendants had purchased imi-

The label of which the one introduced in evidence was a counterfeit, was duly registered. Said union was a voluntary, unincorporated association of cigar makers, having members and lodges or branches in the various states of the Union and Canada; was not a dealer or manufacturer in cigars; nor was its object trade or commerce, but merely for the purpose of promoting the intellectual, moral and social qualities of its members. A member of the union has the right to use the label, but no other person has, except those who or firms which employ members of the union in the capacity of cigar makers or packers, who are also permitted to use the label so long as they employ members of the union. The label is not the exclusive property of citizens of the state of Missouri, but the right to use it is shared alike by all persons, members of the union, and by them who employ union men. At the time of the sale of the box of cigars, defendant stated that the label thereon was the genuine label of the union, and there was no evidence tending to show that he knew to the contrary.

The first contention is that the label of the Cigar Makers' International Union of America is not a trade-mark, and is, therefore, not entitled to protection under the law quoted. It may be conceded that the label is not what is generally understood by law writers to be a technical trade-mark, because it does not pretend or intimate that the cigars are owned, prepared or manufactured by the union as an organization, or that, as such union, it has any interest or property therein, nor by what particular firm or person the cigars to which it may be attached were manufactured; the only right conferred on members of the organization and firms which employ members of the union in the capacity of cigar makers or packers being to use the same, the object and purpose being to designate the cigars thus labeled from cigars manufactured by persons other than members of the union. The same label was held not to be a valid common-law trade-mark in *McVey* v. *Brendel*, 144 Pa. 235, 13 L. R. A. 877; *Weener* v. *Brayton*, 152 Mass. 101, 8 L. R. A. 640; and by a divided court in *Cigar Makers' Protective Union No. 98* v. *Conhaim*, 40 Minn. 243, 3 L. R. A. 125. In *Weener* v. *Brayton* it was said: "The right to a trade-mark cannot exist as a mere abstract right, independent of and disconnected from a business. It is not property as distinct from, but only as incident to, the business. It cannot be transferred except with the business, may be sold with it, and ordinarily passes with it." The law not only protects the owner in the use of a technical trade-mark, but it protects him in the use of other insignia, by label, symbol or otherwise, which he may attach to merchandise to distinguish it from all other articles of merchandise in the market; and this protection may be had by injunctive proceedings at the instance of a member of an unincorporated association which has adopted a label, purporting to be issued by the association, to be placed on boxes of merchandise made by members of the association who have the sole right, under their articles of association, to use the same, against any person not authorized to make use thereof, and who is making fraudulent use of such label. *Carson* v. *Ury*, 39 Fed. Rep. 777, 5 L. R. A. 614, and authorities cited. If, then, the unlawful use of the label under consideration could be restrained by injunctive proceedings instituted by a member of the union against a competitor in business using the label without authority, it would seem to follow, as a sequence, that the state, by appropriate legislation, might protect the use of such label, and prohibit its use by persons other than members of the union or persons who employ

tation labels and used some of them, but on protest of members of the union had destroyed the remainder. Subsequently they purchased cigars from Pennsylvania bearing what they supposed were genuine union labels, but which were in fact imitations, and the court held that neither ignorance nor good faith excused the use of such labels. See also Bulens v. Newman, *infra*.

In Hudson v. Bed-Rock Cigar Company (Circuit Ct. of Kansas, Dist. No. 1), as reported in Cigar Makers' Official Journal of June, 1887, a temporary injunction previously granted restraining defendants from using label of the union, was made permanent, against the contention of defendants that the union was an illegal organization and had no right to the label. The court said: "Even admitting that the union is not a legal organization, I cannot help but recognise the union label as their trade-mark; and no one has a right to counterfeit it in any way, so as to mislead the public, or to use it on any cigars not made by members of the organization."

In Meyer v. Haak (Scott County Dist. Ct., Iowa), as reported by the Cigar Makers' Official Journal of February, 1889, the court granted an injunction on the application of the plaintiffs for themselves and others. Defendants, besides claiming an estoppel which the court did not pass upon, contended that the label was simply and purely a trade-mark and that the protection allowed by law to trade-marks was confined to dealers and manufacturers; that the plaintiffs were only workmen and not owners of the cigars they made; and that the union had no goods on the market in competition with defendant; and that plaintiffs being neither manufacturers nor dealers, had no such proprietary interest in the label as to warrant interference of court. The court held the label was the property of the union, and it had the right to say to whom and under what circumstances and for what purposes it should be delivered and used.

In Perkins v. Roedel (Buffalo Super. Ct.), as reported in the Cigar Makers' Official Journal of September, 1894, an injunction was granted restraining defendants from using, or furnishing to be used by others, imitation or counterfeit labels, and from putting up and selling cigars not made by union men, in boxes bearing union trade-mark or imitation of it. Defendants were ordered to surrender for destruction all counterfeits or imitations of labels then in his possession.

In Gailbreath v. Phillipson (14th Jud. Dist. Ct., Dallas County, Texas), as reported in the Cigar Makers' Official Journal of April, 1891, an injunction was granted on application of plaintiffs for themselves and others, restraining defendant from using union labels or imitations thereof, other than upon or in connection with cigars made by members of the union.

As supporting the right of a cigar makers' union to the exclusive use of its label, a brief in Strasser v. Moonelis, 23 Jones & S. 208, cites Frantz v. Miller (unreported) Dwyer, J. (Ohio Super. Ct.) of which we have found nothing elsewhere.

members thereof in the manufacture and sale of cigars. Certainly, no personal rights or principles of public policy are violated by such legislation, and this is true even though the legislature may have used the word "trade-mark" in the sense that it is ordinarily understood and used by text-writers and defined by judicial decisions.

In *People* v. *Fisher*, 50 Hun, 552, the defendant was convicted, under a statute of the state of New York, of counterfeiting and imitating a trade-mark, and affixing the same to an article of merchandise in violation of the statute. The trade-mark was devised by the Cigar Makers' International Union of America, and is the same one involved in this controversy. In that case it was held "that the members of the organization might lawfully devise, as they had done, a trade-mark label to designate the products of their labor, and that a person counterfeiting and imitating such trade-mark, and affixing the same to an article of merchandise, not the product of the labor of members of the union, was properly convicted of the offense of counterfeiting and imitating a trade-mark." In the course of the opinion it is said: "The only recognized indication of a trade-mark is the source, origin, or ownership of the article of merchandise on which it is placed. *Caswell* v. *Davis*, 58 N. Y. 223, 17 Am. Rep. 233. This means that the mark is calculated to distinguish the articles which bear it from those of other makers or vendors. It need not indicate any particular person as maker, manufacturer or vendor, or give the name or address of either. When the mark has become recognized by purchasers as a distinctive designation of a particular maker, manufacturer or seller of a certain quality of goods, it will be sufficient indication of the origin or ownership, within the rule requisite to its protection as such, although purchasers may not, from the works or otherwise, be able to tell who is the particular maker or seller of the article. *Godillot* v.

It also appears from the report in the Cigar Makers' Official Journal of March, 1891, that injunctions were granted in Martin v. Reinhardt, Michigan (Grand Rapids Super. Ct.), and Weis v. Gunst (Circuit Ct. Multnomah County, Oregon) restraining use of union label or imitations thereof, but the report is only a memorandum of the fact of the decision.

In Strauss v. Scheinman (Circuit Ct. Chancery, Wayne County, Ohio), as reported in Cigar Makers' Official Journal of June, 1895, an injunction was granted on bill of complaint taken as confessed by defendant and upon proof of complaint taken in open court, enjoining use by defendant in any way of union label on cigars manufactured by him.

An injunction in favor of the treasurer of the International Union was also sustained in the case of Stirmel v. Berriman (Circuit Ct. of Cook County, Ill.), and another in favor of Gaddes and all members of the Pawtucket, R. I., Union v. Waterhouse, a dealer in cigars, for using a counterfeit label. These decisions are announced in the Cigar Makers' Official Journal of November, 1896.

Another kindred decision announced in the Cigar Makers' Official Journal of February, 1898, is that of an injunction against Samuel Poska a dealer in Chinese made cigars, granted in favor of the Sacramento Cigar Makers' Union to compel him to remove a sign displaying the words: "First International Union Shop of Sacramento" "only union men employed," and bearing a fac simile of the stamp of the Cigar Makers' International Union of America. The court required him to refrain "from exhibiting or causing to be exhibited, the stamp or label above described, or any fac simile thereof, in any store or public place used as a cigar store, and used by or under the control of defendant, without first obtaining the permission of said union to exhibit it."

II. *Contents of label.*

In McVey v. Brendel, 13 L. R. A. 877, 144 Pa. 235, another point decided was that the clause in the label declaring that the organization was opposed to inferior, rat shop, coolie, prison, or filthy tenement house workmanship, showed a purpose to do harm to non-union men and would prevent equity from protecting the label.

A different view of this feature of the case was taken in Cohn v. People, 23 L. R. A. 821, 149 Ill. 486, which disapproved McVey v. Brendel, *supra*, on this point and regarded this clause in the label as a mere assurance to customers that the cigars bearing that label were not the product of such filthy establishments, and not as saying in effect that all non-union cigars belonged to the classes described.

To similar effect it is said in State v. Hagen, 6 Ind. App. 167, in respect to this clause in the label and the construction put upon it by McVey v. Brendel, "we do not think, however, that the language is fairly susceptible of the construction put upon it,—that it is an open attack on the products of all other laborers and a characterization of their products as unfit for use . . . to construe this language by innuendo, as claimed by appellee, is to hold every intendment against the association, and we see no reason for doing this in favor of those who it is admitted have no moral rights to use the label."

So in Strasser v. Moonelis, 28 Jones & S. 197, where such label was invoked, the court refused to deny an injunction on the ground that the object of the union was illegal or against public policy, but without discussing that clause which was regarded as objectionable in McVey v. Brendel.

Likewise disapproving of McVey v. Brendel, *supra*, on this ground and agreeing with Cohn v. People, is the common pleas decision in Cigar Makers' Protective Union v. Lindner, 3 Ohio Dec. 244, 2 Ohio N. P. 115, where it is said "the label announces the organization to be opposed to inferior goods of certain classes, classes known to the trade as inferior. This is essentially its position if it favor superior goods. This should be its position. . . . The statement that the organization is opposed to inferior, rat shop, coolie, prison, and filthy tenement house workmanship is the statement of a policy, a policy that we think lawful."

III. *Effect of statutes.*

In a considerable number of states, statutes similar to the Missouri Act upheld in the above case have been enacted. And in several states these statutes have now been before the courts. In Cohn v. People, 23 L. R. A. 821, 149 Ill. 486, such a statute giving the right to a trade-mark in a label adopted by "any person, association or union of workingmen" is held constitutional, denying that it is a local or special law granting special privileges, immunities or franchises, since it is not limited to associations of any particular class of persons. The case further decides that the title of the Act to protect associations, unions, etc., in their labels, trade-marks and forms of advertising, is sufficient to uphold a provision in the Act for the punishment of those who counterfeit such trade-

Harris, 81 N. Y. 268; *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946, 39 Am. Rep. 286. Abstractly and apart from its application and use, a trade-mark has no recognized ownership. Its value is in its employment in marking the goods upon which it is placed. This gives it the character of property. It is, then, a symbol of reputation or goodwill. *Derringer* v. *Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Bradley* v. *Norton*, 33 Conn. 157, 87 Am. Dec. 200." In *Cohn* v. *People*, 23 L. R. A. 821, 149 Ill. 486, defendant was convicted under the statute of Illinois for using on boxes of cigars sold by him a counterfeit of the label of the "Cigar Makers' International Union of America;" and it was held that punishment of imitators or counterfeiters of trade-marks was properly provided for under the laws of that state under which the conviction was had. See, also, *State* v. *Hagen*, 6 Ind. App. 167.

The question then recurs, Was the defendant guilty of a misdemeanor, under the statute, if he knowingly placed a counterfeit label of the Cigar Makers' International Union of America on the box of cigars sold by him to the witness Kreyling? In a recent decision by the St. Louis court of appeals in the case of *State* v. *Berlingheeiner* (not yet reported) it was held that the label in question was not protected by the Act of 1893, and that a conviction thereunder for knowingly placing a counterfeit of the label upon a box of cigars, and then selling the cigars, could not be upheld. The decision is predicated upon the fact that, prior to 1893, the statute was designed alone for the protection of foreign and domestic trade-marks, and that nothing was added thereto by the repeal of certain sections and the enactment in lieu thereof of sections 1 and 4, *supra;* in other words, that the law was not so amended as to include a label like the one in question. Prior to that time, the statute law was only intended for the protection of foreign and domestic trade-marks. *State* v. *Gibbs*, 56 Mo.

marks. This case was one of a prosecution for violating the statute.

In Ohio, the Act of March 30, 1892, likewise provided that unions or associations of workingmen might adopt a label, mark, name, brand or device for the products of the labor of its members, which label might be registered and protected by injunction in a suit by the union or association. In Cigar Makers' Protective Union v. Lindner, 3 Ohio Dec. 24, 2 Ohio N. P. 114, suit for an injunction was brought by an unincorporated association of cigar makers which had adopted a label for cigars made by its members and complied with the requirements by registration. The court without discussing the constitutionality of the statute enforces it by granting an injunction.

In Coyle v. Haight (Ohio, Stark C. P.) as reported in the Cigar Makers' Official Journal of September, 1890, the action was brought by the plaintiffs for themselves and other members of the union against the defendant for the use of close imitations of the union label. The defendants demurred. It was contended by defendants that the label was not a legal trade-mark, and that, if it was, the plaintiffs had no proprietary interest in the property. That neither the international nor local unions were engaged in manufacture or trade, or formed for that purpose, and that the members of the unions were not engaged in business together but that their business interests were distinct and separate. They also claimed that "the right to adopt a trade-mark, label, or device does not exist in laborers and employés, but in the manufacturers." The court said: "Is not the laborer as justly entitled to the protection of his skill, as the manufacturer to the protection of his wares? Has not the laborer as much interest in his labor, in its protection, in getting the best possible price for the articles he manufactures?" The court states that this matter has been set at rest by Ohio Laws, vol. 87, p. 141, granting such rights to such organizations.

The case of People v. Fisher, 50 Hun, 552, was a case of a prosecution under N. Y. Penal Code, § 364, making it a misdemeanor to counterfeit or imitate a trade-mark, or affix a trade-mark known to be false or counterfeit to any article of merchandise. The contention of the defendant was that the label of the cigar makers union could not be treated as a trade-mark because of the lack of any proprietary right in its relation to the merchandise upon which it was affixed in respect either to the workmanship or ownership of such merchandise, and that neither the maker, owner or seller was indicated by the label. But the court held that the Cigar Makers' International Union might have a trade-mark label entitled to protection, and that this label had features which might properly characterize it as a trade-mark as it purported to be issued by the Cigar Makers' International Union of America and was subscribed by the name and title of the person described as its president and, when issued for use, had upon it the stamp of the local union. See further quotation from this case in the main case of STATE v. BISHOP.

The penalty under New York Laws of 1893, chap. 219, for using a counterfeit label on goods, was recovered in Bulena v. Newman, 10 Misc. 460, in an action by members of a local branch of the Cigar Makers' International Union from the seller of a box of cigars with a counterfeit label thereon, although he believed the label to be genuine. The union label had been adopted pursuant to the Act of New York, Laws of 1889, chap. 385, which provides for the adoption and protection of trade union labels.

In State v. Hagen, 6 Ind. App. 167, an indictment under the Indiana Act of 1891, p. 317, for unauthorized use of the union label on cigars was not sustained because the statute giving the right to the exclusive use of trade-marks, labels, etc., to any firm, person, corporation or voluntary association, expressly limited this right to "citizens of the state" who were also entitled to the exclusive use of the label. This statute did not, therefore, by its terms cover the case of a label adopted by the International Cigar Makers' Union, since the exclusive use of that label did not belong to citizens of the state. As to the propriety of such a statute the court says: "The moral and equitable right of such a union to such protection as is here claimed seems to have been very generally conceded and, in recognition of this right, laws have been passed in numerous states to accomplish the results." The court regarded the law as defective but said the remedy rested with the supreme legislative body of the state and not with the judiciary.

The case of STATE v. BISHOP, like all the other cases in which these statutes have been construed, sustains the validity of such legislation. In a considerable number of states, similar laws have been enacted but not yet passed upon or brought into question before the courts.

But with the courts thus far agreed in upholding such statutes, it seems practically certain that trade unions are to be generally protected in their trade-marks or labels. R. A. R.

133. While all statutes pertaining to crimes and their punishments should be strictly construed, and nothing left to intendment, they should not be so construed as to thwart the evident will and intention of those who enacted them, when that intention is plainly and fairly deducible from the law itself. When that is done in this case, we can but conclude that the purpose and intent of the legislature was to amend the law so as to protect, and that it does protect, labels as trade-marks when adopted by associations or unions of workingmen to make known and distinguish goods, wares and merchandise manufactured or prepared by them from those manufactured or prepared by other persons, unions or associations. Wherever the law was amended, it was so as to include "association or union of workingmen," which is very persuasive, at least, that the purpose was to protect them in any label, advertisement or symbol that they might adopt as their trade-mark. Moreover, under the Law of 1889, a trade-mark was required to be recorded in the office of the recorder of deeds of the county where the goods, wares and merchandise were manufactured; while, by the Act of 1893, it is required to be recorded in the office of secretary of state, whose certificate is made proof of the adoption of such label, trade-mark or form of advertisement, and of the right of such association or union of workingmen to adopt the same. The law, as amended, expressly conferred upon any association or union of workingmen a right that they did not possess under the statute before; that is, the right to adopt as a trade-mark a label such as the one in question. Our conclusion is that the act not only embraces technical trade-marks, but that it includes any label, symbol, or advertisement which may be or has been adopted by any "association or union of workingmen" as a trade-mark, in accordance with its provisions; hence our disapproval of the case last cited.

It is next contended that the Act of 1893 is unconstitutional, is class legislation, and in violation of section 53, article 4, of the State Constitution, which inhibits the legislature from "granting to any corporation, association or individual any special or exclusive right, privilege or immunity." We are unable to see the force of this contention. It is well-settled law, in this state at least, that a statute relating to persons or things as a class is a general law. *State* v. *Herrmann*, 75 Mo. 340; *State* v. *Tolle*, 71 Mo. 645; *Lynch* v. *Murphy*, 119 Mo. 163. The law does not relate to particular persons or things of a class, but embraces within its provisions all associations or unions of workingmen, and clearly does not fall within the inhibition of the constitution. *Cohn* v. *People*, *supra*.

A further contention is that the information is insufficient because it fails to aver exclusive ownership of the label in question in the organization known as the Cigar Makers' International Union of America. No such averment seems to be required under the law, which makes it a misdemeanor for any person, persons, association or union of workingmen or body corporate or politic, to vend or keep for sale any goods, wares, merchandise, compounds, or preparations upon which or in connection with which, any forged, imitation, or counterfeit label shall be placed, affixed, or used, and intended to represent the said goods, wares, and merchandise as the genuine goods, wares, implements and merchandise of any other person or association or union of workingmen. The information is in the language of the statute and is well enough.

A final contention is that the state failed to prove guilty knowledge upon the part of the defendant; that is, that, at the time he sold the box of cigars containing a counterfeit label, he knew the label to be counterfeit. This contention is not without merit. The record before us is barren of proof as to guilty knowledge on the part of defendant, in the absence of which he was not guilty of any offense under the law, which expressly provides that the label must have been used knowing it to be an imitation or counterfeit.

For failure of proof in this regard, *the judgment is reversed*, and the cause remanded.

All concur.

MINNESOTA SUPREME COURT.

Annie FUNK, Admx., etc., of Henry Funk, Deceased, *Respt.*,
v.
ST. PAUL CITY R. CO., *Appt.*

(.....Minn.....)

***1. Chapter 13 General Laws 1887, provides that every railroad corporation owning and operating a railroad** in this state, shall be liable for damages sustained by an agent or servant by reason of the negligence of any other agent or servant. *Held*, that this law is not applicable to a street railway corporation, although its line is operated by cable.

2. Where the language of a statute is in any manner obscure or of doubtful meaning, we may recur to the history of the time when it was enacted, and seek in that history for the mischief and defect which the statute was intended to remedy; and when the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt, and the object and remedy in view.

3. Where there are several material issues tried and the verdict is a general one, it

*Headnotes by BUCK, J.

NOTE.—The decision that the meaning of the word "railroad" in a statute must be restricted to railroads of the ordinary kind and exclusive of street railways is in agreement with that in Thompson-Houston Electric Co. v. Simon (Or.) 10 L. R. A. 251. See, also, other cases cited by counsel in the report of the above case.

29 L. R. A.

See also 30 L. R. A. 626.

cannot be upheld if the trial court gave the jury an erroneous charge upon any one of the issues.

(June 27, 1895.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling a motion for a new trial after verdict in favor of plaintiff in an action to recover damages for the killing of plaintiff's intestate by negligence of defendant's employés. *Reversed.*

The facts are stated in the opinion.

Messrs. **Munn, Boyesen & Thygeson,** for appellant:

Chapter 13 of the Laws of 1887 should receive a strict construction and should not be held to apply to a case unless it clearly falls within the peculiar hazards and dangers of railroading.

Lavallee v. *St. Paul, M. & M. R. Co.* 40 Minn. 249; *Johnson* v. *St. Paul & D. R. Co.* 8 L. R. A. 419, 43 Minn. 222.

The word "railroad" as used in the Fellow Servant Law, chap. 13 of the Laws of 1887, does not mean "street railway."

Carli v. *Stillwater Street R. & Transfer Co.* 28 Minn. 373, 41 Am. Rep. 290; *Newell* v. *Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303; *Williams* v. *City Electric Street R. Co.* 41 Fed. Rep. 556; *Front Street Cable R. Co.* v. *Johnson*, 11 L. R. A. 693, 2 Wash. 112; *Thompson-Houston Electric Co.* v. *Simon*, 10 L. R. A. 251, 20 Or. 60; *Louisville & P. R. Co.* v. *Louisville City R. Co.* 2 Duv. 178; *Detroit* v. *Detroit City R. Co.* 56 Fed. Rep. 867; *Byrne* v. *Kansas City, Ft. S. & M. R. Co.* 24 L. R. A. 693, 61 Fed. Rep. 605; *Freiday* v. *Sioux City Rapid Transit Co.* (Iowa) 26 L. R. A. 246; *Sears* v. *Marshalltown Street R. Co.* 65 Iowa, 742.

Statutes which are not inconsistent with one another, which relate to the same subject-matter, are *in pari materia* and should be considered together and effect given to them all, although they contain no reference to one another and were passed at different times.

23 Am. & Eng. Encyclop. Law, p. 311.

In construing a given act the meaning of words or terms as used therein may be gathered from the construction of other acts *in pari materia*, in which such words or terms were also used.

23 Am. & Eng. Encyclop. Law, p. 316; *Reiche* v. *Smythe*, 80 U. S. 13 Wall. 162, 20 L. ed. 566.

Where two acts are *in pari materia*, a word used in a certain sense in the first act will be presumed to have been used in the same sense in the subsequent one, unless there be something in the context or the nature of things that a different meaning is intended.

County Seat of Linn County, 15 Kan. 379.

In order to understand the subject-matter, scope and object of an enactment of the legislature, the interpreter must ascertain what is the mischief or defect for which the prior law had not provided.

23 Am. & Eng. Encyclop. Law, p. 336, par. 1; *Taylor* v. *Taylor*, 10 Minn. 107; *Green* v. *Graves*, 1 Dougl. (Mich.) 351; *People* v. *Columbia County Supvrs.* 48 N. Y. 130; *United States* v. *Union Pac. R. Co.* 91 U. S. 72, 23 L. ed. 224.

Messrs. **Willrich & Lambert** for respondent.

Buck, J., delivered the opinion of the court:

The material and difficult question for us to determine is whether chapter 13 of the General Laws of 1887, in regard to damages arising by reason of a fellow servant, is applicable to the case under consideration. That law reads as follows: "Every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant thereof, without contributory negligence on his part, when sustained in this state."

The defendant is the St. Paul City Railway Company, and in the complaint it is described as the Seventh Street Cable Line in the city of St. Paul, which said line of cable railway extends from Wabasha street eastward to a point on Dayton's bluff, in said city, and that the cars and grip-cars running thereon are operated by means of a cable, which cable runs in a conduit underneath the tracks of the car line. It is also alleged that the plaintiff's intestate was a plasterer by trade and employed by the defendant to plaster the inner walls of the conduit through which the cable runs, and that, while so engaged, he was killed, wholly through the negligence of the defendant. The jury returned a verdict in favor of the plaintiff for the sum of $2,500, and the defendant appealed. The defendant is a street railway corporation, but whether it is included in the term "railroad" as used in the Law of 1887 is a debatable question. The common understanding of the word "railroad" is that it is a graded road or way on which rails of iron or steel are laid for the wheels of the cars to run upon, carrying heavy loads usually propelled by steam. Railroads, in a rude form, were in use as early as 1676, but it was not until 1829 when successful experiments in the use of locomotives were made, that they first began to be extensively constructed, and it is only within recent years that another class of railroads, namely, those laid down in the streets of towns and cities, have become very numerous.

Judge Robertson, in *Louisville & P. R. Co* v. *Louisville City R. Co.* 2 Duv. 175, says "A railroad is for the use of the universal public in the transportation of all persons, baggage and other freight. A street railway is dedicated for the more limited use of the local public for the more transient transportation of persons only within the limits of the city. In a more technical sense, therefore, a street railway is not a railroad. A 'railroad' and a 'street railroad' or way are in both their technical and popular import as distinct and different things as a road and a street or as a bridge and a railroad bridge, and it has been authoritatively adjudged that the simple term "bridge" means a viaduct in a road dedicated to the common use, and that the qualified phrase 'railroad bridge' means a viaduct constructed for the use of railroad transportation." This decision was made in

1865 and involved the construction to be given to a provision in a railroad charter which provided that no other railroad should be constructed between two named points in a city, the court holding that such provision did not prohibit the construction of a street railway between the points named.

Perhaps it may be conceded that, technically speaking, the term "railroad" would include a street railway so far as its road-bed is made of iron or steel rails for wheels of cars to run upon, but where there is doubt about the true meaning of the word or term used in the law, the legislative intent is not to be determined from that particular expression, but from the general legislation upon the same subject-matter. It is claimed by appellant's counsel, and not denied by the counsel for the respondent, and such we believe the fact to be, that on February 24, 1887, when the general law of that year was passed, there were no cable or electric street railways in existence in this state. If so, what was the legislative intent in using the word "railroad" in the Law of 1887, to be deduced from the whole or from part of the statute taken together, upon the subject of railroads?

When the words of a statute are not explicit, the intention is to be collected from the context, from the occasion and necessity of the law, from the mischief felt and the object and remedy in view.

Potter's Dwarr. Stat. 195, *note 18*.

What was the mischief felt which resulted in the passage of this law? Was it a danger known or one unknown? Was it a danger then felt or realized, or one that might possibly arise in the future? We must assume that it was dealing with and acting upon existing facts within its knowledge.

Of course, if the thing was so entirely free from ambiguity and broad enough to include unknown things which might spring into existence in the future, they would be deemed to come within and be subject to the evident meaning of the terms used. Following this line of thought, we quote the case of *Proprietors of Bridges over Rivers Passaic & Hackensack* v. *Hoboken Land & Imp. Co.* 68 U. S. 1 Wall. 116, 17 L. ed. 571, in which *Mr. Justice* Miller uses this language: "It does not follow that when a newly invented or discovered thing is called by some familiar word which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. . . . The track on which the steam cars now transport the traveler or his property is called a road, sometimes, perhaps generally, a railroad. The term 'road' is applied to it, no doubt, because, in some sense, it is used for the same purpose that roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it, from any previous use of the word 'road.' So we call the enclosure in which passengers travel on a railroad, a coach; but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely, if ever, called coaches. It does not, therefore, follow, that when a word was used in a statute or a contract seventy years since that it must be held to include everything to which the same word is applied at the present day."

And where the language of a statute is in any manner obscure or of doubtful meaning, we may recur to the history of the time when it was enacted and seek in that history for the mischief and defect which the statute was intending to remedy. In the case of *United States* v. *Union Pac. R. Co.* 91 U. S. 72, 23 L. ed. 224, the court said: "Courts, in construing statutes, may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provision in it." See also *Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533; *Aldridge* v. *Williams*, 44 U. S. 3 How. 24, 11 L. ed. 476; *Preston* v. *Browder*, 14 U. S. 1 Wheat. 120, 4 L. ed. 51.

But if we assume that, at the time of the passage of the Law of 1887, the history of street-cars was generally known and their use, method of operation and dangers therefrom well understood, can it be fairly and reasonably held that it was a legislative intent to apply the term "railroad" to street railways? It is a matter of common knowledge that street-cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. A street-car is generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the road-beds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard and danger of personal injury to railroad employés arise from operating their trains. There is no such danger in operating street railways, whatever may be the motive power, because they do not carry freight. Especially is the danger in coupling their cars entirely absent. They get their business from the street usually, in populous cities, where passenger travel is the only business carried on. Street-cars do not usually run beyond the city limits and none beyond the state boundary. The words in the Law of 1887 make a railroad corporation operating the railroad in this state liable for damages "when sustained within this state." They undoubtedly aim at the railroads operated by steam where their lines extended beyond the jurisdiction of the state. It is true these restrictive words would include railroads operated by steam wholly within the state, but they were inserted to prevent the bringing of suit where the injury was sustained upon railroads out of this state, but where the lines of the same railroad came within the boundary of our own state. Hence the words "when sustained within this state" evidently referred to railroads operated by locomotives, and it was such railroads the legislature had in contemplation when this term was used. Through our territorial and state legislation, the term "railroad" has acquired a definite and well-understood

meaning, and it has never been understood to include street railroads. It is usually applied to the ordinary steam railroad of commerce, and when there has been legislation in regard to street railways they have been so designated.

In Elliott on Roads and Streets it is said that "the distinctive and essential feature of a street railway, considered in relation to other roads, is that it is a railway for the transportation of passengers and not of freight. As we employ the term and desire it to be understood, it excuses the idea of the carriage of freight, for we do not believe that a railroad over which heavily laden freight trains are drawn can be considered a street railway." We consider the words "railroad" and "railway" as synonymous, and that they are generally used interchangeably, as this court has heretofore decided in *State* v. *Brin*, 30 Minn. 522.

If, in the future, street railways shall be used for carrying freight, as they undoubtedly will be, with all of its attendant hazards and dangers, it will be within the province and discretion of the legislature to make the Law of 1887 applicable to street railways, or if, before that time, it considers the application of that law to the present method of operating street railways a necessary, wise and judicious one, it can do so by such specific and definite terms that there can be no need of construction or interpretation.

If we were to hold that the term "railroad," in the Law of 1887, applied to street railways because the word is broad enough to cover all roads constructed of iron or steel rails for wheels of cars to pass upon, we see no reason why it should not be so construed whenever found in the other legislation of this state. This would require street railways to build depots and waiting rooms for passengers, for there is just as much reason to make the word "railroad" applicable in this respect as to personal injury cases. This is but one of the very many instances where, by the use of the word "railroad," the company is required to perform certain duties to which it cannot reasonably be said that the meaning of such words includes street railways. To so construe in such instances would lead to confusion and be a palpable violation of the legislative intent.

The respondent claims that there is sufficient evidence to justify the finding of the jury without reference to the Fellow Servant Act of 1887. The verdict was a general one, and this court cannot say whether the jury based its finding upon the ground that the death of Henry Funk was caused by the negligence of a fellow servant or not. It may be that the jury founded their verdict upon the erroneous instruction of the court that the defendant would be liable for the negligence of a fellow servant under the Law of 1887.

There were several issues tried, and where there was such an erroneous instruction in regard to a vital one, it cannot be disregarded by this court upon the ground that possibly the jury might have founded their verdict upon some other issue. As to whether the defendant was guilty of negligence in operating its railroads, we express no opinion. That issue can be determined in a new trial, which must be granted, by reason of the erroneous ruling of the court below upon the question we have discussed.

The order appealed from is reversed.

Mitchell, *J.*:

In concurring in the foregoing opinion, my only excuse for adding anything is the importance of the question involved. The question is wholly one of legislative intent. Did the legislature intend to include street railroads within the provision of the Act? In its original literal sense the word "railroad" means a road with rails upon it upon which wheels of carriages or vehicles run. In this sense it would, of course, include street railroads. But according to the common, popular usage, the word "railroad," without any qualifying or explanatory prefix, is generally understood as referring exclusively to ordinary commercial railroads used for the transportation of both passengers and freight, and whenever street railroads are referred to, the word "street" is prefixed. This is also a general legislative use of the words. In all legislation of this state I have found no Act (unless this be an exception) in which the word "railroad" or "railway," standing alone, was not evidently intended to be applied exclusively to ordinary commercial railroads. Neither have I found an Act (unless this be an exception) which has reference to street railroads in which the word "street" was not prefixed. I do not claim that there might not be a law enacted where it would be evident, from its subject-matter and object, that the word "railroads" was intended to include street railroads. But, in my opinion, this is clearly not such a case. The occasion for enacting this law was the peculiar risks incident to the operation of railroads, and especially those resulting from negligence of fellow servants. The remedy sought to be obtained was better protection to railroad employés from those peculiar hazards. The peculiar conditions which we consider to require peculiar legislation for the protection of employés engaged in the operation of railroads are too familiar to require repetition. Generally, it may be stated that the most cogent ones were the high rate of speed at which trains were run, the great momentum acquired by long and heavy trains where an accident to one car is liable to wreck the entire train, the peculiar dangers incident to the operation of freight trains, that the roads are often built upon an embankment or trestle where an accident would be peculiarly dangerous, the danger of collisions owing to the fact that numerous trains are operated over the same tracks, the vast number of employés of different grades engaged in different lines of work, many of whom are necessarily personally unknown to the others. The mere fact that steam was used as a motive power was not, in itself, either the occasion or the justification for the enactment of the law established for railroad companies, and subjecting them to liability for the negligence of its servants. If one of these com

panies were to substitute electricity for steam as its motive power, it would be still subject to the provisions of the Act. In the case of street railroads, whatever be the motive power, the peculiar conditions above referred to either do not exist at all or, at most, only in a very modified degree. This is a fact of such common knowledge that it need not be more than stated. The question is not whether the legislature had the power to place street railroads in the same class with ordinary commercial railroads, but whether they have, in fact, done so. The difference in conditions affecting the risks to which employés are exposed is sufficiently substantial to authorize the legislature to make the law applicable to ordinary commercial railroads alone, and furnishes, in my judgment, ample reason for concluding that they so intended, and that they used the word "railroad" in its ordinary and peculiar sense, and in the sense in which they themselves had generally used it in other statutes. It may be said that in the case of some other line of railroad exceptionally situated, the conditions involving dangers to employés might be exactly similar, both in kind and degree, to those existing on some lines of street railway. It is difficult to conceive of such a case. But it is sufficient answer to the suggestion that it simply shows that a classification of this sort, like everything else human, cannot be wholly perfect, and that, in a case which is marked by substantial characteristics in varying degrees, it will often happen that those of one member may scarcely differ at all from those of some members of another class. But the line must be drawn; and if the difference in conditions generally existing between ordinary commercial railroads and street railroads is substantial, that is all that constitutional rules require as a basis of classification. Neither can I see any middle ground between excluding all street railways from the operation of the Act, and including them, that would be maintainable on principle or capable of convenient practicable application.

CENTRAL TRUST CO. of New York, *Respt.*, v. John J. MORAN *et al.*, *Appts.*

(36 Minn. 183.)

***1. Under Gen. Laws 1868, chap. 56, §§ 1-3** (Gen. Stat. 1878, chap. 34, §§ 71-73) a railroad, with its rolling stock, and personal property properly belonging to the road and appertaining thereto, is in favor of mortgagees under mortgages or deeds of trust executed and recorded pursuant to those sections, one property, the different items of which cannot, as to such mortgagees, be levied on separately. The remedy of creditors, in such a case, against the road, its rolling stock and appertaining personal property, must be against it as an entirety, and not against its several parts.

2. In such a case the mortgagees may have injunction to restrain a levy on a part of the property.

3. Courts may, in proper cases, grant injunctions in substance mandatory; that is, requiring some act to be done.

4. A court may, under Gen. Stat. 1878, chap. 66, title 11, grant in a proper case, a temporary injunction, mandatory in substance; but it ought not be done, except under peculiar circumstances, and where it is clear the plaintiff will have a final decree, and the court can impose such conditions that the defendant shall sustain no detriment.

5. Execution on a judgment of the state court issued and was levied by the sheriff. Afterwards, the judgment was removed by writ of error to the Supreme Court of the United States, and a stay bond was executed. *Held*, that an action, the purpose of which is, in effect, to vacate the levy, does not interfere with the jurisdiction of the Federal court.

(Collins and Buck, JJ. dissent.)

(January 12, 1894.)

APPEAL by defendants from an order of the District Court for Ramsey County awarding an injunction to restrain the enforcement of a judgment recovered against the Eastern Railway Company, on whose property plaintiff held the mortgage. *Affirmed.*

The facts are stated in the opinion.

Messrs. **O. W. Baldwin** and **J. M. Martin** for appellant.

Messrs. **Young & Lightner** for respondent.

Gilfillan, *Ch. J.*, delivered the opinion of the court:

The first and most important question in the case is whether, as against the mortgagees in a railroad mortgage or deed of trust covering the railroad, its rolling stock, and personal property, an execution can be levied on an item of the rolling stock, say a locomotive, and the property sold to satisfy the execution. In the absence of any statute on the subject, there has been much diversity of decision, some courts (notably, the Supreme Court of the United States) basing their decisions that the levy cannot be made on the proposition that the rolling stock is part of the realty,—fixtures, as it were; others, of which *Susquehanna Canal Co.* v. *Bonham*, 9 Watts & S. 27, 42 Am. Dec. 315, is an instance, arriving at the same result upon considerations of public policy, because the road and its appurtenances are necessary to the exercise of the franchises granted by the state; and others holding that the levy can be made, the same as upon the personal property of any other owner. It is difficult to conceive of rolling stock, which one day may be running on the road of its owner, and the next on some other road, perhaps hun-

*Headnotes by GILFILLAN, *Ch. J.*

NOTE.—In respect to the sale of railroad property under execution, see also Stewart v. Wheeling & L. E. R. Co. (Ohio) *post*, p. 438, and the *note* to Brady v. Johnson (Md.) 20 L. R. A. 737.

As to the power of equity to grant mandatory injunctions, see *note* to Moundsville v. Ohio River R. Co. (W. Va.) 20 L. R. A. 161.

See also 39 L. R. A. 711.

dreds of miles away, as real estate or as fixtures, though, no doubt, the legislature may clothe it with some of the legal attributes of that kind of property; and while considerations of public policy may be attributed to the legislature, as a reason for its acts, we do not think they would justify a court in applying to the kind of property in question any other than the rules applied to other property, real or personal, at common law. We shall assume, therefore, that, but for the statute, the rolling stock covered by a railroad mortgage might be levied on as other mortgaged personal property may be.

The statute applicable to the case is Gen. Laws, 1868, chap. 56, §§ 1–8; the same being sections 71–78, chap. 34, Gen. Stat. 1878. The first section authorizes railroad companies to mortgage or execute deeds of trust of the whole or any part of their property and franchises to secure money borrowed by them for the construction and equipment of their roads. The second section authorizes to be included in such mortgages or deeds of trust property, both real and personal, to be afterwards acquired. The last section has a more direct bearing on the question involved, and reads: "Said mortgages or deeds of trust shall be recorded in the office of the register of deeds of each county through which the road mortgaged or deeded may run, or wherever it may hold lands, and shall be notice to all the world of the rights of all parties under the same; and for this purpose and to secure the right of mortgagees or parties under deeds of trust so executed and recorded, the rolling stock and personal property of the company properly belonging to the road and appertaining thereto, shall be deemed a part of the road, and said mortgages and deeds so recorded shall have the same effect, both as to notice and otherwise, as to the personal, as to the real estate, covered by them. In determining the effect of this Act, it is proper to refer to the facts, for they are part of the history of the state, that it was passed in the infancy of railroad construction in the state, when it was the state's public policy to encourage and promote such construction, and when it was known—indeed, was as certain as a mathematical demonstration—that such construction could be done only by railroad companies borrowing money for the purpose on mortgages of their roads and property. These considerations are to be borne in mind as probable reasons influencing the legislature in those parts of the Act apparently intended to strengthen the security of the mortgages. That the section above quoted means something more than merely to provide what shall be notice of the mortgagee's rights, is evident. Had that been the only purpose, the section would have ended at the semicolon. The remainder would have been superfluous. The provision that the rolling stock and personal property properly belonging to the road, and appertaining thereto, shall be deemed a part of the road, has no tendency to give notice of the rights of mortgagees; and it must have been inserted for the purpose specified in it, to wit, "to secure the right of mortgagees or parties interested under deeds of trust." How could it secure, or tend to secure, their rights, except by placing that property on a different footing from other personal property on which there is a chattel mortgage? If that property remains just as though that provision were not in the Act, and on the same footing with personal property generally, and subject to the same incidents and liabilities, then the provision does not add anything to the security, and is nugatory. Assuming, as we have done, that by the rule of the common law the movable property of a railroad company is like the personal property of any other person, and that any piece of it may, by levy and sale, be separated from the other property of the company, we can conceive of no other purpose of a provision that movable property shall "be deemed a part of the road" but to change that rule, and to make the road, with its rolling stock and personal property proper and necessary for its operation, one property, like the different parts constituting one machine, and inseverable, so far as the rights of mortgagees are concerned. Giving this meaning to the provision, it adds to the mortgagees' security. Giving it any other, it does not. It needs no argument to show that the mortgagees' security would be, so far as the movable property is concerned, precarious, if each item of it is liable to be levied on, sold, and separated from the road to which it appertains. To prevent this was the purpose of the clause making the property part of the road.

The diversity in decisions we have referred to turned on the proposition that the personal property is, or that it is not, part of the road; those courts which hold it to be part of the road, either as part of the realty, or as fixtures or appendages, all agreeing that it cannot be separately levied on, and only those holding it not part of the road deciding that it may be. As it is not to be supposed that the legislature intended, in passing the Act referred to, to deny adequate remedies to unsecured creditors of railroad companies, whose property is under mortgage, we would hesitate to arrive at the above construction of it, even though apparently required by its terms, if we did not see that with that construction the remedies of such creditors, though affected, are not really impaired. They can still levy their execution on any real estate not part of the road, or upon any personal property not rolling stock, nor "properly belonging to the road and appertaining thereto," that is, property not properly and necessarily used in operating the road. Their remedy against the road, and what properly appertains to it, must, as to the mortgagees, be against it as an entirety, and not against the several parts of it. If their executions are returned unsatisfied, a very sharp remedy is afforded by Gen. Stat., 1878, chap. 76, and other adequate remedies are readily suggested. That these mortgagees may maintain a suit for an injunction to prevent acts tending to disperse the property, there can be no doubt. They have no adequate remedy in an action at law. As they are not entitled to the immediate

possession of the property, but only to have it kept together, they cannot maintain replevin. To put them to an action for damages would be really requiring them to accept, to the extent of the damages recovered, payment of the mortgage before it is due. But a mortgagee may always, by injunction, restrain any wrongful acts, the effect of which will be to impair his security. The injunction ordered in the case was interlocutory, and to enjoin the defendants (other than the railway company) from further depriving the company of the possession or use of the property, or from interfering with the taking possession thereof by the company. It really required the defendants to do an affirmative act, to wit, allow the company to retake the property levied on. That courts of equity may issue injunctions in effect mandatory is now well settled, though they have been chary in exercising the power, so much so as to usually put the injunction in the prohibitory form. As said by the vice chancellor in *Great North of England, C. & H. Junction R. Co.* v. *Clarence R. Co.* 1 Colly. Ch. Rep. 507, on a motion for an interlocutory injunction: "That injunctions, in substance mandatory, though in form merely prohibitory, have been and may be granted by the courts, is clear. This branch of its jurisdiction is not fit to be exercised without particular caution, but certainly is one fit and necessary under certain circumstances." See also, *Lane* v. *Newdigate*, 10 Ves. Jr. 192; *Greatrex* v. *Greatrex*, 1 De G. & S. 692; *Evitt* v. *Price*, 1 Sim. 483; *Broome* v. *New York & N. J. Teleph. Co.* 42 N. J. Eq. 141; *Whiteman* v. *Fayette Fuel-Gas Co.* 139 Pa. 492,—all cases of interlocutory injunctions, mandatory in substance. Where the complaint makes a case for a final injunction, mandatory in substance, we do not see why, under Gen. Stat., 1878, chap. 66, title 11, a temporary injunction, similar in effect, may not issue, if the continuance of the state of things brought about by the defendant's alleged wrongful acts will produce injury to the plaintiff. The administration of justice would be defective, if the court could not, in a proper case, restore the *status quo* pending the action. The power, however, ought not to be exercised, except under peculiar circumstances, and where it is clear the plaintiff will have a final decree for a mandatory injunction, and where the court may impose such conditions upon the issuance of the writ as that the defendant shall sustain no detriment. In this case, the circumstances were such as to justify the exercise of the power. The complaint, no allegation of which was denied on the motion, shows a right to a final decree, and the court required such security from the plaintiff as to insure that defendants will suffer no harm.

There is nothing in the point that the court is interfering with the jurisdiction of the Supreme Court of the United States. The property was not in possession of its officers, nor held under its process. The sheriff, and the writ of execution issued from the state court, did not become the officer and writ of the supreme court, by the issuance of a writ of error from that court, with a stay bond upon the judgment, after the levy by the sheriff. The effect of the stay bond was to prevent further proceedings to enforce the judgment.

Order affirmed.

Collins and Buck, JJ., dissenting:

We dissent from that part of the foregoing opinion in which it is held that, as against the mortgagees in a railroad mortgage or deed of trust covering the railroad rolling stock and personal property, an execution issued upon a judgment against the company cannot be levied upon an item of the rolling stock, say a locomotive, and the interest of the debtor therein sold to satisfy said execution. This conclusion of a majority of the court is squarely and exclusively placed upon a construction of section 73, chapter 34, Gen. Stat., 1878. Said section was originally section 3, chapter 56, Gen. Laws, 1868. The sole intent and purpose of the chapter last referred to were, we think, clearly indicated by its title, which was, "An Act to authorize railroad companies to execute mortgages or deeds of trust and to provide for the recording of the same." The first section authorized the issuance and sale of bonds to obtain money with which to construct and equip the roads, and the execution of mortgages or deeds of trust upon the property or franchises of the railroad companies to secure said bonds. The second section provided that said mortgages or deeds might include and cover not only the present property of the companies, but property, both real and personal, afterwards acquired. The difference of opinion now existing between the members of this court grows out of the construction to be placed upon section 3 (sec. 73), already quoted in full in the majority opinion. The first part of this section provides that these mortgages or deeds shall be recorded in the office of the register of deeds of each county through which the road mortgaged or deeded may run, or in which it has lands. As to this class of mortgages or deeds, this part of the section was simply a change from an existing statute (Gen. Laws, 1867, chap. 58), which provided for the recording of railroad mortgages and deeds of trust in the office of the secretary of state. It fixed the place or places of record for such instruments in the offices of the register of deeds of the several counties wherein the real estate was situated, as was required in case real property was mortgaged or deeded by other corporations or by private individuals. This provision was followed in the section by this language: "And for this purpose and to secure the rights of mortgagees or parties interested under deeds of trust," rolling stock and personal property of the company properly belonging or appertaining to the road "shall be deemed a part of the road." For years prior to the enactment of this statute, and at that time, there had been, and was, much difference of opinion in the courts as to the real character of rolling stock, and whether, when the rights of mortgagees and trustees were involved, it should be regarded as part of the road,—some courts calling it "fixtures," and others "real estate,"—or

should be regarded as personal property. We do not see that any part of chapter 56 covered that open question until the language now being considered was used. Had it, and that which followed, been omitted, we are quite sure that the controversy as to the character of rolling stock, and as to whether a mortgage or trust deed upon the same should be filed as a chattel mortgage, to render it valid as against subsequent mortgagees, creditors, and purchasers in good faith, might easily have arisen. In our opinion, this or similar language was essential, and was simply intended to set this question at rest. It had the effect to fix the character of rolling stock and other personal property for but one purpose,—that indicated by the title of the Act,—for the purpose of recording and placing a mortgage or trust deed thereon upon a different footing from the ordinary chattel mortgage, with respect to filing. As the majority opinion rests upon a construction of that part of the section we have just referred to, we need not consider the concluding paragraph of the section.

We observe what has been said in the main opinion concerning the precariousness of the mortgagees' security, if each item of the mortgaged movable property were liable to be levied on, sold, and separated from the road to which it appertains; and we have also noticed what has been suggested as the proper course or remedy for a creditor to pursue, in case an execution issued upon a judgment against a railroad company is returned unsatisfied. After many years' observation we are unable to recall a single instance in which mortgagees of railway property have been unable to take care of themselves, and to adequately protect their interests, whenever their rights were jeopardized or their securities impaired. A levy and sale of rolling stock, although resulting, probably, in very little to the creditor, might be annoying to the mortgagee, but it would not render the mortgage lien more precarious than would a levy and sale of a common farm wagon on which there was a mortgage. It seems to us that this point is fully answered by saying that a sale upon execution of mortgaged property does not deprive the mortgagee of his lien. Such sale may be made and is always subject to the rights of a mortgagee. Gen. Laws, 1883, chap. 60, § 1.

It is true, as urged in the majority opinion, that the judgment creditor of a corporation may have a remedy in case an execution in his favor is returned unsatisfied, under the provisions of Gen. Stat., 1878, chap. 76, § 9. He may sequestrate its property, and have a receiver appointed. But this section applies only to corporations organized under the laws of this state, and is, at best, a very cumbersome and protracted proceeding. It is not readily available to the ordinary creditor. Other remedies may be suggested as within reach, but we fear they will be found impracticable. That they have been found insufficient in other states is evidenced by the fact that in the year 1870 it became necessary, in the state of Illinois, to adopt constitutional amendment providing "that rolling stock and all movable property belonging to railway corporations shall be considered personal property and liable to execution and sale in the same manner as personal property of individuals, and that the legislature shall pass no laws exempting any such property from execution and sale." This same provision has since been ingrafted into the fundamental law of the states of Arkansas, Missouri, Nebraska, Texas and West Virginia.

In conclusion, we say that a statute, the purpose and scope of which are so clearly expressed in its title as the one in question,—being merely to authorize the execution of mortgages and deeds of trust, and to provide for the record thereof,—ought not to be construed, in the absence of apt words, so as to deprive a creditor of a common-law remedy to collect a judgment. The result here is that a purpose not indicated by the title to the Act, and wholly foreign to that title, is given to it. Had the legislature itself, in express language, made the exemption now read into section 8 by the court, the title would have failed to express the subject of the legislation. Certainly, there is nothing in it to intimate that the legislature designed to prohibit a seizure and sale upon execution of the interest of the railroad mortgagees in and to rolling stock and other personalty, nor was it so claimed by respondent's counsel, when presenting their case.

We think the order appealed from should be reversed.

SOUTH CAROLINA SUPREME COURT.

John S. FAIRLY, *Respt.*,
v.
WAPPOO MILLS, *Appt.*

(.....S. C.....)

1. **Evidence of custom and usage is not admissible** to explain or vary the terms of an express contract whether written or verbal, unambiguous in its terms, unless to show the meaning of certain terms used in the contract which have by well-established custom or long usage acquired a meaning different from that which they primarily bear.

2. **Liability for brokerage upon a contract** for the sale of a certain quantity of a commodity, "seller paying brokerage at 10 cents per ton," cannot be reduced by proof of a custom to pay brokerage only on the amount actually delivered.

3. **The right of a broker to commissions** on a contract, the signature of which he has procured, is not affected by the fact that, as agent for the buyer, he subsequently seeks to procure from the seller some modification of the terms of sale.

NOTE.—For effect of failure to procure a license for business on the validity of a contract made in such business, see also *note* to Buckley v. Humason (Minn.) 16 L. R. A. 422.

See also 37 L. R. A. 509; 38 L. R. A. 143; 45 L. R. A. 510; 46 L. R. A. 181.

4. That a purchaser was not able to fulfill his contract so as to entitle the broker to commissions on the sale, is not shown by an allegation that an extension of time for payment after the first draft was due, was requested because the purchaser was not able to pay it "at that time."

5. The burden is on the seller to show the purchaser's inability to carry out his contract in order to avoid the payment of the broker's fees where he accepted him without any misrepresentation or suppression of knowledge by the broker as to the purchaser's financial ability.

6. The recovery of commissions by a broker is not prevented by failure to procure a license under an ordinance imposing a penalty for such failure where the object of the ordinance was simply to enforce payment of a tax.

(May 30, 1895.)

APPEAL by defendant from a judgment of the Common Pleas Circuit Court for Berkeley County in favor of plaintiff in an action brought to recover commissions upon the sale of certain fertilizer which plaintiff had sold for defendant. *Affirmed.*

The plaintiff complaining of defendant alleges as follows:

"First. That the plaintiff is a broker in the city of Charleston, state of South Carolina, carrying on a brokerage business in fertilizers, phosphate rock, and similar products, and was so at the times hereinafter mentioned, and that the defendant, Wappoo Mills, was, at the times hereinafter mentioned, and now is, a corporation created by and under the laws of the state of South Carolina, and having its principal office and place of buiness in the county of Berkeley. Second. That the plaintiff, as such broker, sold for account of said defendant, on June, 5, 1890, 2,000 tons dissolved bone to the Caddo Fertilizer Company, the brokerage on which, at the accustomed rate agreed upon, was $200, and was to be paid by the defendant. That the plaintiff has received from the defendant $68 on account of said brokerage, but the balance of $132 is still due and unpaid, although demanded of the defendant. All of which will more fully appear on reference to the broker's memorandum of sale, bill, and account heretofore rendered defendant, and copies of which are hereto annexed, as Exhibits A, B, C, and made part of this complaint. Wherefore, the plaintiff demands judgment against the defendant in the sum of $132 and costs."

Exhibit A, referred to in the complaint, is as follows: "Charleston, S. C., June 5th, 1890. Sold for account of Wappoo Mills, of Charleston, S. C., to the Caddo Fertilizer Co., of Shreveport, La. (2,000) two thousand tons dissolved bone, guaranteed minimum analysis (13½) thirteen and one-half per centum available phosphoric acid, in bulk, f. o. b. cars here, at ($9.85) nine and $\frac{85}{100}$ dollars per ton of 2,000 lbs. Terms: Sight draft against B/L. Shipments: Four hundred tons per month during September, October, November and December, 1890, and January, 1891. Seller paying brokerage at 10 cents per ton. Accepted (Fire, storm, and other unforeseen events excepted). Wappoo Mills, C. C. Pinckney, Jr., Pres't. Accepted. Caddo Fertilizer Co."

The defendant, the Wappoo Mills, answering the complaint herein, for a first defense, says: "(1) That it admits the allegations made in the first paragraph of the complaint herein. (2) That it denies each and every allegation of the second paragraph, except as is specifically admitted in this paragraph. (3) This defendant admits that the contract of sale attached to the complaint as Exhibit A, and made a part thereof, was brought about by the plaintiff; but this defendant alleges that there existed at the date thereof a custom in this business to pay brokerage or commission only on the amount of stuff actually sold and delivered under such contract.

For a second defense, this defendant alleges: "(1) That some time in the early part of the year 1890 the plaintiff, representing the Caddo Fertilizer Company, offered to purchase from the defendant, for said company, 2,000 tons of dissolved bone. That the defendant agreed to sell the said 2,000 tons dissolved bone to the Caddo Fertilizer Company upon the following terms, and no other, that is to say, for the price of $9.85 per ton of 2,000 lbs., f. o. b. cars, Charleston; terms, sight draft against bill of lading; shipments, 400 tons per month during September, October, November and December, 1890, and January, 1891; seller paying brokerage at 10c. per ton, fire, storm and other unforeseen events excepted. (2) That about the time designated for the first shipment of 400 tons of dissolved bone, the plaintiff, still representing the Caddo Fertilizer Company, requested the defendant not to ship the said 400 tons, which, according to the terms of sale, ought to have been shipped at that time. (3) That about the time designated for the second shipment of 400 tons the plaintiff, still representing the Caddo Fertilizer Company, requested the defendant not to ship said 400 tons, which ought to have been shipped at that time. (4) That about the time designated for the third shipment of 400 tons, viz. some time in November, 1890, the plaintiff, still representing the Caddo Fertilizer Company, requested the defendant to ship to the Caddo Fertilizer Company a cargo of dissolved bone, by vessel, for the price of $9.50 per ton f. o. b. vessel. That the defendant shipped by vessel 684.21 tons dissolved bone to said company, drawing upon them, at the request of the plaintiff, at thirty days, for the purchase money for same. (5) That when the said draft became due and payable the plaintiff, still representing the Caddo Fertilizer Company, urged the defendant to renew and extend the said draft for sixty days longer, for the reason that the Caddo Fertilizer Company was not able to pay the first draft at that time. That this defendant, having negotiated said first draft, was compelled to take up same, and accept the note of the Caddo Fertilizer Company, payable at sixty days. (6) That shortly after the failure of the Caddo Fertilizer Company to pay the said first draft the plaintiff, still representing the said Caddo Fertilizer Company,

requested the defendant to send another shipment of dissolved bone to said company, but this defendant, considering the said agreement of sale broken, by reason of the several breaches hereinabove mentioned, refused to make the desired shipment. (7) This defendant therefore alleges that the entire amount of dissolved bone sold by it to the Caddo Fertilizer Company, as above set forth, is 684.21 tons, and admits that the plaintiff herein became entitled to a brokerage thereon of $68.43. But this defendant further alleges that, of this brokerage, the sum of sixty-eight dollars has already been paid to the said plaintiff, at his request, and that there remains due to the said plaintiff on the said transaction the sum of forty-three cents, which said sum of forty-three cents this defendant has always been willing, and is now willing, to pay.

For a third defense to the alleged cause of action, this defendant alleges: "(1) That in pursuance of the power in them vested by an Act of the general assembly passed December 17, 1881, and entitled 'An Act to authorize the city council of Charleston to impose a license tax on all persons engaged in any business, trade or profession, in the city of Charleston,' the city council of Charleston on the 23d day of December, A. D. 1889, enacted a law entitled 'An ordinance to regulate licenses for the year 1890,' requiring all persons, firms, or corporations engaged in, or intending to engage in, any trade, business or profession therein mentioned to obtain, before January 20, 1890, a license therefor, and imposing a penalty for each offense on those who should carry on such business, trade or profession without first taking out the required license. (2) That the plaintiff herein, the said John S. Fairly, failed to obtain, during the year 1890, the proper license prescribed by said ordinance for the business conducted by him."

"An ordinance to regulate licenses for the year 1890 provided:

"Section 1. That every person, firm, company or corporation engaged in, or intending to engage in, any trade, business or profession hereinafter mentioned, shall obtain on or before the 20th day of January, A. D. 1890, a license therefor, in the manner hereinafter prescribed. Every person, firm, company or corporation commencing business after the said 20th day of January, A. D. 1890, shall obtain a license therefor before entering upon such trade, business or profession.

"Sec. 3. If any person or persons shall exercise or carry on any trade, business or profession, for the exercising, carrying on or doing of which a license is required by this ordinance, without taking out such license as in that behalf required, he, she or they shall, for each and every offense, be subject to a penalty not exceeding $100, as may be adjudged by the recorder or court trying the case. And the same shall be entered up as a judgment of the court, and execution shall issue against the property of the defendants as for the collection of other taxes and penalties.

"Class 5.

1.	Brokers, pawn, each	$300 00
2.	Brokers, stock and other personal property and real estate at private sale, each	75 00
3.	Brokers, ship	50 00
4.	Brokers, street	50 00"

Townsend, *P. J.*, delivered the opinion of the lower court as follows:

"In June, 1890, John S. Fairly, a broker doing business in Charleston, S. C., sold for Wappoo Mills, a South Carolina corporation having its office and chief place of business in Berkeley county, 2,000 tons of dissolved bone, to the Caddo Fertilizer Company, of Shreveport, La. The copy of the broker's contract, made a part of the complaint, shows that the sale was 'for account of Wappoo Mills,' and that the 'seller paying brokerage at ten cents per ton.' Fairly sent in his bill for $200 brokerage, as per the memorandum of sale, but the defendant would pay only $68, disputing the balance. The plaintiff then sued for the balance, $132, and to the complaint the defendant filed a lengthy answer. Plaintiff's counsel gave written notice that on the trial they would move to strike out the respective defenses (first, second and third) of the answer, on the ground that they did not constitute grounds of defense or counterclaim; and that they would ask for judgment by default if all the defenses were so stricken out. Code, § 174; *Mobley* v. *Cureton*, 6 S. C. N. S. 69. The demurrer came on to be heard at the trial; and the simple question is, admitting the truth of all the facts set out in the answer, do they constitute any valid defense or counterclaim to the plaintiff's claim for brokerage? No counterclaim is set up, so that we are only to deal with defenses. Three defenses are set up. The answer admits that the broker made the contract sued on, but states that—First, there is a custom in the fertilizer trade by which brokerage is only allowed on such stuff as is actually delivered on the contract; second, that only 680 tons were delivered, as the terms of the contract were subsequently modified by the parties; and, thirdly, Fairly had no license, as required by the license ordinance of the city of Charleston, for the year 1890, and therefore the contract he made was unlawful, illegal and void, and he could not sue for and recover his brokerage for making it. If the making of the original contract is admitted, as it is in the answer, then none of these defenses are good, even if they are all true.

"First. As to the license, which seems the most serious question. It is admitted that, if the law requiring a license or other regulation of this character actually and in terms declares that the act or calling is unlawful unless and until the license or requirement is complied with, then the act or calling is prohibited, and a contract made under it cannot be sued on. If, however, there is no express and specific prohibition, then it is necessary to construe the act or ordinance, and see if the intent is to prohibit. 2 Benjamin, Sales, 526; *Harris* v. *Runnels*, 53 U. S. 12 How. 84, 13 L. ed. 903; 12 Am. & Eng.

Encyclop. Law p. 516. Now, one of the leading canons of construction in cases of this sort is the test whether or not the license or exaction is a police regulation, or 'a tax assessment for the security and collection of the revenue.' If the former, the calling itself is invalid, unless the requirement is complied with; but, if it is a 'tax for revenue,' then the act done is valid. The law does not operate on the business or calling, and affect that, but on the person, and punishes him with penalty or otherwise. *McConnell* v. *Kitchens*, 20 S. C. 436, 47 Am. Rep. 845; 2 Benjamin, Sales, 825; *Harris* v. *Runnels*, *supra; Information* v. *Jager*, 29 S. C. 445. Under such license and tax laws for 'revenue,' in cases almost identical with the present, the contract has been held valid, and the parties entitled to enforce it, and the agent to demand compensation for making it. *Ames* v. *Gilman*, 10 Met. 243; *Larned* v. *Andrews*, 106 Mass. 436, 8 Am. Rep. 346; *Mandlebaum* v. *Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, and cases last cited above. If these be the laws of construction, then what is the character of the Charleston License Ordinance of 1890? It is not pretended that it contains any provision that business conducted without license shall be illegal and unlawful until and unless a license is obtained, and, as a matter of fact, it contains no such provision. But the defendant contends it should be so construed. Now, the Ordinance of 1890 is stated in the answer to have been passed in pursuance of a power vested in the city of Charleston, by the Act of the general assembly passed December 17, 1881, entitled 'An Act to authorize the city council of Charleston to impose a license tax on all persons engaged in any business, trade or profession in the city of Charleston.' 17 Stat. at L. 582. The ordinance obtains its authority from, and is limited in its scope and intention by, the Act. Without the Act, or beyond the scope of the Act, the ordinance is void. *Charleston* v. *Oliver*, 16 S. C. 58. Now, does this Act and ordinance intend to prohibit the business or calling, or is it an Act and ordinance for 'raising a city revenue?' We are left in no doubt as to this. In a whole series of cases affecting this very question and ordinance, and others similar to it, the courts of South Carolina have held, after argument on argument, that this was a tax for the purpose of raising revenue. *State* v. *Hayne*, 4 S. C. N. S. 403; *State* v. *Columbia*, 6 S. C. N. S. 1; *Charleston* v. *Oliver*, 16 S. C. 50; *Information* v. *Oliver*, 21 S. C. 325; *Information* v. *Jager*, 29 S. C. 444. If, then, this be the construction placed on the ordinance by the highest court of the state, and it is a 'revenue tax,' the case comes distinctly under the principle of construction already pointed out, and the business is not unlawful without the license. The defendant contended that, as there was a recurring penalty in the ordinance, this showed the calling was prohibited. This, of course, is also another test adopted to ascertain the meaning of the ordinance. But this yields to the other rule, as to the 'revenue' character of the act and ordinance, so often declared by the supreme court, and need not be considered. But one clause of the ordinance itself is conclusive of this question. The defendant contends that the intention of the ordinance is as if it read, 'it shall be unlawful to engage in business unless and until a license is obtained.' Now, the ordinance grants a license for the year 1890. The license for 1889 expired December 31st, 1889. Section 1 provides that 'all engaged in business . . . shall obtain a license on or before the 20th January, 1890.' They are allowed until January 20th to do so. But, if the construction of the defendant be adopted, then all the business transactions in Charleston between January 1, 1890, and January 20, 1890, were unlawful and illegal and void, for the granting of a license afterwards could not cure them. This construction courts could not adopt. The plain meaning of the ordinance is otherwise. It says parties can do business lawfully, but they must pay taxes for revenue. This tax can be paid any time by January 20th, but then, after that, penalties will be laid on those parties, personally, who do not pay the tax. In addition to this, an examination of the contract and pleadings shows the seller, the Wappoo Mills, residing in Berkeley county, and the buyer, the Caddo Fertilizer Company, in Louisiana. The contract cannot be held a Charleston contract because a Charleston broker made it. It is, therefore, not affected by the Charleston ordinance, and is valid, and the broker could sue for his services. In discussing this license matter, it should also be remembered that the direct question here is not between the taxing power and the citizen, but between a broker and a customer who would avoid the payment for services by pleading the license ordinances of a city not party to the suit. The words of *Chief Justice* Shaw in *Ames* v. *Gilman*, 10 Met. 243, are singularly apposite here: 'Whatever other disabilities a person may incur, who attempts to practice law irregularly, . . . we think he does not so violate any express provision of statute as to enable one who has employed him, and had the benefit of his services, to refuse paying him a reasonable compensation.'

"The other questions, of custom and change of contract, require much less discussion. So far as the custom is concerned, the rule of law is that where there is a written contract, unambiguous in its terms, custom and usage cannot vary it. Clarke's Browne, Usages & Customs, 163, 164, 169; Edwards, Brokers & Factors, p. 149. Usage cannot control the clear and unequivocal stipulations of a contract, but will be controlled by them. Clarke's Browne, Usages & Customs, 164; *Globe Mill. Co.* v. *Minneapolis Elevator Co.* 44 Minn. 153. Now, the parties here bound themselves by a plain, written contract, in which the plaintiff, as broker, sold 'for account of the Wappoo Mills' 2,000 tons of dissolved bone, for which his compensation is to be, in the language of the contract, 'seller paying brokerage at 10 cents per ton.' This is clear and unambiguous, and no custom could vary it, and no evidence as to such custom allowed to control it. The plaintiff cites cases directly in point, in which the very question is considered, and the custom not allowed to change

the contract and rule of law: *Mordecai* v. *Jacobi*, 12 Rich. L. 548; *Bower* v. *Jones*, 8 Bing. 65; *Ware* v. *Hayward Rubber Co.* 8 Allen, 85; *Higgins* v. *Moore*, 34 N. Y. 425; *Paulsen* v. *Dallett*, 2 Daly, 40; *Cook* v. *Fiske*, 12 Gray, 493. Even if there was a custom, the parties gave the strongest evidence of departing from it by a contract in writing directly in the teeth of it, by its very terms.

"The last defense is that the principals afterwards varied the contract, and, finally, that the defendant declined to ship the entire 2,000 tons to the Caddo Company, for some reasons set out in the answer, and that the broker acted for the Caddo Company when the changes were made. An inspection of the pleading will show that the changes were the act and agreement of the principals themselves, and to suit their mutual convenience. The changes referred to were shipping by boat instead of cars, and a slight change of price to meet this variance, and some modification as to the time of shipment and mode of payment. But the principals agreed to this themselves, and the contract, in the two particulars affecting the broker, is not pretended to have been altered. The number of tons bought and sold was still 2,000 and the seller was still to pay the broker 10 cents per ton. None of the changes, therefore, affected him. It was also contended that the Caddo Company did not pay one draft at maturity, but arranged an extension with the seller, and therefore it was argued that the Caddo Company could not complete the contract. The pleading does not show that they could not complete it. And, even if it did, the broker is not responsible for that. Cases were cited to show that the broker must bring a customer not only willing, but able, to complete the contract. But this rule refers only to real estate, where specific performance is the remedy, and not uniformly held,—even as to real estate, the courts being divided. But as to personal property, where the breach of the contract sounds in damages, it has never been followed. There is, therefore, nothing in subsequent changes which is shown could have affected the broker's compensation. But with all the subsequent modifications and non-performance or otherwise, the broker has nothing to do at all, in the absence of fraud and bad faith on his part. And this is nowhere alleged. What are the duties and business of a broker, and the law as to it? 'A broker for sale is a mere negotiator or middleman between the seller and purchaser. 2 Am. & Eng. Encyclop. Law, p. 571; *Higgins* v. *Moore*, 34 N. Y. 424; *Vinton* v. *Baldwin*, 82 Ind. 102, 45 Am. Rep. 448. His duty is ended, when he brings the parties together, and furnishes a purchaser. He is then entitled to his commissions, whether the property is actually delivered and the money paid, or not. Edwards, Brokers & Factors, p. 148; *Higgins* v. *Moore*, 34 N. Y. 424; *note* to *Walker* v. *Osgood*, 98 Am. Dec. 177; 2 Am. & Eng. Encyclop. Law, p. 578, and *notes* and cases. Where he effects a contract, binding on both parties, and which may be enforced, his brokerage is earned, even if the contract be not carried out. This is no concern of his. See authorities cited above; 2 Am. & Eng. Encyclop. Law, pp. 580, 581. This law is recognized in every court, including the United States Supreme Court. In 2 Am. & Eng. Encyclop. Law, p. 580, and cases, it is summarized thus: 'Where a broker has bound the parties by authorized contract, any inability or refusal of the principal to fulfill the contract he had authorized should not affect the agent's right to compensation.' Cites *Love* v. *Miller*, 53 Ind. 294, 21 Am. Rep. 192, and numerous other cases. Among all these cases agreeing on this subject, the following are directly in point, and control the present discussion: *Love* v. *Miller*, *supra*; *Vinton* v. *Baldwin*, 82 Ind. 102, 45 Am. Rep. 447; *Cook* v. *Fiske*, 12 Gray, 493; *Paulsen* v. *Dallett*, 2 Daly, 40.

The plaintiff brought the parties together by a valid contract. He did his whole duty, and, in the absence of fraud or improper conduct, earned his brokerage. Whether the seller and buyer afterwards changed the contract in some particulars, or whether one of them—the defendant in this case—saw fit to decline to complete the same, for reasons stated in his answer, is no concern of the broker. He made the contract his principals wanted, and for which the defendant agreed to pay, and should have his compensation. Thus, carefully considered, the answer, even if admitted to be true, really shows no valid defense nor counterclaim to the plaintiff's suit. All of its three defenses are without merit on their face, and should therefore be stricken out. This being so, the plaintiff should be allowed to have judgment by default for his claim, to wit,—one hundred and thirty-two dollars and costs."

Defendant appealed on the following grounds: "First. Because the presiding judge erred in holding that the answer of the defendant contained no defense to the action. Second. Because the presiding judge erred in striking out the first defense contained in the said answer, and in holding that no custom can vary the contract set out in the complaint herein, and that no evidence as to a custom which would vary the said contract can be allowed to control the contract. Third. Because the presiding judge erred in striking out so much of the second defense set out in the answer as alleges that the plaintiff himself proposed and brought about changes in the original contract which resulted in a reduction of the amount of material sold by the plaintiff, and that he further erred in construing said defense to allege that the said changes were the acts and agreements of the principals themselves, and that they did not affect the plaintiff. Fourth. Because the presiding judge erred in striking out so much of the second defense of the answer as alleges that the party for whom the plaintiff purchased was not able to pay for the material according to the terms agreed upon. Fifth. Because the presiding judge erred in holding that the rule which requires a broker to produce a customer able, as well as willing, to complete the contract, in order to entitle him to commissions, applies only to contracts for the sale of real estate, and does not apply to contracts for the sale of personal property.

Sixth. Because the presiding judge erred in striking out from the answer the third defense therein set forth, and in not holding that the plaintiff could not recover commissions in this action, in consequence of his failure to take out his license to carry on his business as required by an ordinance of the city of Charleston, S. C., entitled 'An ordinance to regulate licenses for the year 1890.' Seventh. Because the presiding judge erred in holding that, under the said license ordinance, it was not unlawful for the plaintiff to carry on his business without first obtaining a license under said ordinance. Eighth. Because the presiding judge erred in construing the contract set out in the complaint as not made in the city of Charleston, and therefore not affected by the said license ordinance, when it is plainly alleged in the pleadings that the said contract was made in the said city of Charleston."

Messrs. **Ficken & Hughes** for appellant.

Messrs. **Smythe & Lee,** for respondent:

Usage and custom are never permitted to give the lie, as it were, to the plain, deliberate, and written contract of the parties themselves, nor could testimony be admitted to prove this.

Clarke's Browne, Usages & Customs, 163, 164, 169; Edwards, Brokers & Factors, p. 149; *Globe Mill. Co.* v. *Minneapolis Elevator Co.* 44 Minn. 158; *Bower* v. *Jones*, 8 Bing. 65; *Cook* v. *Fiske*, 12 Gray, 498; *Paulsen* v. *Dallett*, 2 Daly, 41; *Higgins* v. *Moore*, 34 N. Y. 422; *Ware* v. *Hayward Rubber Co.* 3 Allen, 86.

The broker was not responsible for the ability of the party to complete.

Love v. *Miller*, 53 Ind. 294, 21 Am. Rep. 192; *Vinton* v. *Baldwin*, 88 Ind. 104, 45 Am. Rep. 448.

With the amount delivered, change of terms and ability of purchaser to comply, the broker has nothing to do.

2 Am. & Eng. Encyclop. Law, pp. 571, 578, 580, 581; Edwards, Brokers & Factors, p. 148; *Love* v. *Miller*, *Vinton* v. *Baldwin*, *Cook* v. *Fiske*, *Higgins* v. *Moore*, *Ware* v. *Hayward Rubber Co.* and *Paulsen* v. *Dallett*, *supra*.

If the license under the ordinance is a "tax assessment for the security and collection of the revenue," then the carrying on of the calling without the license is not unlawful. The law operates on the person, not on the business.

2 Benjamin, Sales, § 825; *Harris* v. *Runnels*, 53 U. S. 12 How. 84, 13 L. ed. 903: *McConnell* v. *Kitchens*, 20 S. C. 436, 47 Am. Rep. 845; *Information* v. *Jager*, 29 S. C. 445; 13 Am. & Eng. Encyclop. Law, p. 516.

The license law has been held to be for "revenue" and the contract without license valid, and the agent entitled to compensation for making it.

Ames v. *Gilman*, 10 Met. 243; *Larned* v. *Andrews*, 106 Mass. 436, 8 Am. Rep. 346; *Mandlebaum* v. *Gregovich*, 17 Nev. 87, 45 Am. Rep. 433.

The Charleston ordinance is a provision for "raising a city revenue."

State v. *Hayne*, 4 S. C. N. S. 403; *State* v. *Columbia*, 6 S. C. N. S. 1; *Charleston* v. *Oliver*, 16 S. C. 50; *Information* v. *Oliver*, 21 S. C. 325; *Information* v. *Jager*, *supra*.

McIver, *Ch. J.*, delivered the opinion of the court:

The plaintiff brings this action to recover the amount of its commissions as a broker, agreed upon by the special contract, as he claims, upon the amount of a sale of 2,000 tons of a certain fertilizer, negotiated by the plaintiff for the defendant to the Caddo Fertilizer Company, the commissions being 10 cents per ton. The defendant, in its answer, admits the allegations contained in the first paragraph of the complaint, which, in substance, are that the plaintiff is a broker in the city of Charleston, S. C., carrying on a brokerage business in fertilizers, etc., and that defendant is a duly-chartered corporation under the laws of this state, having its office and place of business in the county of Berkeley. Defendant denies each and every allegation in the second paragraph of the complaint, except such as is specifically admitted in the answer, to wit, "that the contract of sale attached to the complaint as Exhibit A, and made a part thereof, was brought about by the plaintiff; but this defendant alleges that there existed at the date thereof a custom in this business to pay brokerage or commission only on the amount of stuff actually sold and delivered under such contract." The contract of sale thus referred to is a contract for the sale of 2,000 tons of the fertilizer mentioned, by defendant to the Caddo Fertilizer Company, upon the terms therein mentioned, among which were that the fertilizer should be delivered "f. o. b. cars here" (Charleston), and shipment to be made of "four hundred tons per month during September, October, November and December, 1890, and January, 1891. Seller paying brokerage at 10 cents per ton." This contract is dated "Charleston, S. C., June 5th, 1890," and is signed by the defendant company, through its president, and "Accepted. Caddo Fertilizer Co." The defendant, in its answer, sets up a second defense, alleging that the purchase was made by the plaintiff, "representing the Caddo Fertilizer Company," on the terms above stated; that about the time designated for the first shipment of 400 tons, the plaintiff, still representing the Caddo Fertilizer Company, requested defendant not to make said shipment; that about the time designated for the second shipment the plaintiff, still representing the Caddo Fertilizer Company, requested defendant not to make said second shipment; that about the time designated for the third shipment the plaintiff still representing the Caddo Fertilizer Company, requested defendant to ship to said company a cargo of the fertilizer, "by vessel, for the price of $9.50 per ton f. o. b. vessel," and that defendant did ship by vessel 684.21 tons of said fertilizer to the said company, "drawing upon them, at the request of the plaintiff, at thirty days, for the purchase money for same;" that when this draft became payable the plaintiff, still representing the Caddo Fertilizer Company, "urged the defendant to renew and extend said draft for sixty days longer, for the reason that the Caddo Fertilizer Company were not able to pay the draft at that time," and the defend-

ant, having negotiated said draft, was compelled to take up the same, and accept the note of the Caddo Fertilizer Company, payable at sixty days; that shortly after the failure of the Caddo Fertilizer Company to pay the first draft, the plaintiff, still representing the said company, requested defendant to send them another shipment, but defendant, "considering the said agreement broken by reason of the several breaches hereinabove mentioned, refused to make the desired shipment." The defendant therefore alleges that the entire amount of fertilizers sold by it to the Caddo Fertilizer Company is 684.21 tons, upon which, it is admitted, defendant became liable to pay the brokerage agreed upon, to wit, the sum of $68.43, all of which has been paid, except the sum of 43 cents, which defendant has always been, and is now, willing to pay. For third defense the defendant alleges that the plaintiff never obtained a license as broker for the year 1890, as required by an ordinance of the city council of Charleston. This ordinance was, by consent, incorporated in the case, and is printed in the record, and its terms will hereinafter be more particularly referred to. While we have thus endeavored to state substantially the pleadings, it will be necessary for a more full understanding of the questions involved in this appeal that the reporter should embrace, in his report of the case, copies of the complaint with the exhibit thereon, the answer and the ordinance referred to in the third defense.

The plaintiff gave notice that on the trial of the case he would move to strike out the first, second and third defenses set up in the answer, upon the ground that the allegations therein made do not state facts sufficient to constitute either a defense or counterclaim, and also for judgment by default. This motion was heard by his honor, *Judge* Townsend, who granted this motion, and held that the plaintiff was entitled to judgment by default of the amount of his claim, to wit, the sum of $132. From this judgment defendant appeals, on the several grounds set out in the record, which need not be repeated here, as they, together with the decree of the circuit judge, should be incorporated in the report of the case.

While the controversy presented by this appeal arose upon the motion to strike out the several defenses set up in the answer, it is practically nothing more nor less than a demurrer to the answer, and will be so considered. It follows, therefore, that all the facts well pleaded in the answer must be regarded as true; and the general question is, conceding the facts stated in the answer, whether they are sufficient to sustain any one or more of the defenses relied upon. Counsel for appellant, in their argument here, while conceding that the answer, in form, sets up but three defenses, yet claim that the answer really sets up four distinct defenses, inasmuch as two of them have been somewhat inartistically united together as one. We see no objection to so regarding the answer, and will, therefore, consider the several defenses as stated in the argument of counsel for appellant. The first is thus stated: "That there exists a custom in the fertilizer trade by which brokerage is only allowed on the amount of material actually delivered under a contract, whatever may be the amount named in the contract." The question raised by this defense has been before the courts of the several states, as well as those of England, in very many cases, most of which, we suppose, have been cited by the counsel in their elaborate arguments. We have examined all of the cases cited, to which we have been able to obtain access, and in the light of these authorities, without undertaking to cite all of them, we propose to consider the question which we are called upon to decide. It seems to us that the very decided weight of authority is in favor of the proposition that evidence of custom and usage is not admissible to explain or vary the terms of an express contract, whether written or verbal, unambiguous in its terms, unless to show the meaning of certain terms used in such contract, which, by well-established custom or long usage, acquired a meaning different from that which they primarily bear, for the reason that when parties, in making a contract, use terms which, by usage or custom, have acquired a certain meaning, they must, in the absence of any evidence to the contrary, be assumed to have used such terms in such acquired sense. In the absence of any authority in this state upon this question (for we do not think the case of *Mordecai* v. *Jacobi*, 12 Rich. L. 547, throws any light upon the question), we are compelled to resort to the authorities elsewhere. In *Globe Mill. Co.* v. *Minneapolis Elevator Co.* 44 Minn. 158, the question was whether the title to certain grain sold vested in the vendee. By the terms of the contract of sale the grain was sold for "cash on delivery," which had not been complied with; but vendee sought to sustain his claim by proof of a custom prevailing in that locality, whereby the title was regarded as having passed when certain things were done, whatever might be the terms of the sale agreed upon by the parties. But the court said: "A local usage cannot be proved to contradict a contract. . . . If, by the contract of sale of this wheat, it was for cash on delivery, the usage cannot make it a sale on a credit." In *Page* v. *Cole*, 120 Mass. 37, the action was to recover damages for the breach of a contract for the sale of a "milk-route," and evidence as to the meaning and effect which that term had acquired by usage prevailing in that locality was held competent. In *Walls* v. *Bailey*, 49 N. Y. 464, 10 Am. Rep. 407, the action was to recover the amount due plaintiff for plastering which he had contracted to do at so much per square yard, and it was held competent to prove that the custom was to measure the openings for windows and doors, as well as the solid walls. In that case it was said that: "Every legal contract is to be interpreted in accordance with the intention of the parties; and usage, when it is reasonable, uniform and well settled, not in opposition to fixed rules of law, *not in contradiction to the express terms of the contract* [italics ours], is deemed to form a part of the contract, and to enter into the intentions of the parties."

In *Hinton* v. *Locke*, 5 Hill, 437, the action was on a contract to pay the plaintiff so much per day for his services, and it was held competent to show that the universal custom in that locality was to count a day as ten hours. Of course, the term "day" could not be regarded as meaning twenty-four hours, and hence it was competent to show how many hours were regarded as a day. In that case, however, BRANSON, *J.*, in delivering the opinion of the court, expressly disapproves of the case of *Smith* v. *Wilson*, 3 Barn. & Ad. 728, where, upon a contract to pay so much a thousand for all the rabbits in a certain warren, it was held competent to show that in that part of the country the custom was to construe the term "thousand" as meaning 100 dozen or 1,200, because he said that would be allowing the custom to contradict the express terms of the contract. His language is: "No usage or custom can be set up for the purpose of controlling the rules of law. Nor is such evidence admissible where it contradicts the agreement of the parties." In *Ware* v. *Hayward Rubber Co.* 3 Allen, 84, the plaintiff claimed one half commissions on goods consigned to him for sale, but not sold, and turned over to consignor, basing his claim upon a custom prevailing in that locality. Held, that evidence of such a custom was incompetent. CHAPMAN, *J.*, in delivering the opinion of the court, used this language: "This being a written and express contract, the evidence offered in respect to the usage of commission merchants to charge one-half commissions when goods consigned to them in the ordinary way for sale are taken back, is not applicable to this case, for an express contract cannot be controlled or varied by usage." And this was the point upon which the case turned. In *Ford* v. *Tirrell*, 9 Gray, 401, 69 Am. Dec. 297, the action was upon a contract to build an octagon cellar wall at 11 cents per foot, and the question was as to the mode of measurement to be adopted in order to ascertain the amount of work done. The court seems to have held that, as the contract was silent as to the mode of measurement, it was competent to introduce evidence as to the custom or usage in such cases by which the mode of measurement should be determined; citing 1 Greenl. Ev. § 292. In *Barton* v. *McKelway*, 22 N. J. L. 165, the action was on a written contract for the delivery of a specified number of *morus multicaulis* trees, of not less than one foot in height, and the question was as to the mode of measuring the height of the trees. Held, that it was competent to show that it was the universal custom prevailing among dealers in such articles to measure only the ripe, hard wood, rejecting the green, immature top. The court, in its opinion, says that the true office of such evidence is "to interpret the otherwise indeterminate intention of the parties, and the nature and extent of their contract, and fix and explain the meaning of words." In *Wilcox* v. *Wood*, 9 Wend. 346, the question was as to when—at what hour—a lease from the 1st of May to the 1st of May in a succeeding year terminated; and it was held competent to show that, by universal custom, such a lease would terminate at 12 M. on the 1st of May. In *Grant* v. *Maddox*, 15 Mees. & W. 737, the court went as far as in any other case which we have examined. In that case, the action was upon a contract to pay the plaintiff for her services as an opera singer, so much per week for each week in the three years for which she engaged; and the controversy was as to whether plaintiff was entitled to receive the stipulated sum for each week during the whole of the three years, or only for each week during the theatrical season of those years. The court held that it was competent to prove a custom by which a year was regarded as only the theatrical season, and not the whole calendar year. In *Higgins* v. *Moore*, 34 N. Y. 417, the question was whether a purchaser of grain in the city of New York, negotiated by a broker, would be discharged by the payment of the purchase price to the broker. Held, that he would not, as the broker's agency terminates when he makes the sale, and he has no authority to receive the purchase money, and that evidence of any local usage in New York to the contrary was not admissible to control the general rule of law. In *Bower* v. *Jones*, 8 Bing. 65, it was held that, where there was an express agreement that the principal should be responsible for bad debts, proof that the custom of the trade was that commissions should not be allowed on bad debts could not be received, because in violation of the express terms of the agreement.

From this review of the cases cited above, as well as from the examination of others, which we have not deemed it necessary to cite, it is obvious there is not entire harmony in the decisions; but we are of opinion that the proposition laid down at the outset of this discussion is supported by the weight of authority, as well as by reason.

Our next inquiry is whether the contract which constitutes the basis of this action is of such a character as to require or warrant a resort to evidence of custom or usage in order to explain any ambiguity therein, or to interpret the meaning of terms used therein which have acquired some secondary meaning. We are unable to discover any ambiguity in the terms of the contract. The amount of the article sold and price, the times of delivery and the time and mode of payment, are all distinctly specified; and we are equally unable to discover any terms used therein which require any interpretation. We do not see, therefore, how the first defense can be sustained.

The second defense set up in the answer is thus stated in the argument of counsel for appellant: "That the plaintiff himself brought about such changes in the original contract of sale as precluded his right to commissions under it." An examination of the answer will show that this defense, as above stated, is not therein stated, for all the allegations in reference to the several changes in the terms of the contract of sale are stated to have been proposed or insisted upon by the plaintiff as agent of the purchaser, and not as broker; the language of the answer, in each instance, being that the several alterations were requested by the plaintiff, "representing the Caddo Fertilizer Company," and not

by him as broker. Now, it is conceded that the plaintiff had effected a valid contract for the sale of the fertilizers, assented to in writing by both vendor and vendee, as evidenced by the signatures of both of these parties. It seems to us that the plaintiff's connection with the matter, as broker, terminated, and he was then entitled to his commissions. If, afterwards, acting as the agent or the representative of the purchaser, the plaintiff sought to procure from the defendant some modification of the terms of the sale, we do not see how this could affect his right to commissions which had previously been earned.

The third defense set up in the answer is stated in the argument of counsel for appellant in these words: "That the customer or purchaser produced by the plaintiff was not able to pay for the material according to the terms agreed upon." In the first place, we do not find any allegation in the answer that the purchaser, the Caddo Fertilizer Company, was not able to pay for the fertilizer purchased, and there is no allegation of insolvency. The nearest approach to such an allegation is that the purchaser did not meet the draft drawn upon it when it became payable, and requested an extension "for the reason that the Caddo Fertilizer Company were not able to pay the first draft *at that time.*" (Italics ours.) This allegation does not usually or necessarily imply insolvency. *Akers* v. *Rowan*, 33 S. C. 451, 10 L. R. A. 705. And something more is necessary to establish a charge of insolvency. It only implies an inability to meet the draft at maturity, and not an inability to pay the debt, or a want of sufficient assets to do so. The case just cited shows that the interpretation placed upon the words "insolvent" and "insolvency," as used in the United States Bankrupt Act, by the Supreme Court of the United States, is not recognized here in cases not arising under such Bankrupt Act, but that those terms must be interpreted as signifying "that condition in which a debtor is found when his property is insufficient to yield a fund sufficient to pay his debts, through the agency of the process of law." It is very manifest that there is no allegation in the answer which would bring this case within the rule above stated, and hence, upon this ground, the allegations of the answer are not sufficient to sustain this third defense.

In addition to this, while it may be true, as a general proposition, that a broker, before he is entitled to his commissions, must produce a purchaser willing and able to comply with the terms of the contract of sale, yet if the purchaser produced by the broker is accepted by the seller without any misrepresentation on the part of the broker as to the financial ability of the proposed purchaser, and without the suppression by the broker of any knowledge he may have as to the financial condition of such purchaser, then the burden of proof is upon the seller to show that the proposed purchaser is not able to comply with the terms of the contract. It seems to us, after a careful examination of the cases cited upon this point, some of which we will notice below, that the true rule upon this subject is well stated in *Coleman* v. *Meade*, 13 Bush, 358, as follows: "The broker undertakes to furnish a purchaser, and is bound to act in good faith in presenting a person as such, and when one is presented, the employer is not bound to accept him or to pay the commission, unless he (the purchaser) is ready and able to perform the contract on his part according to the terms proposed; but if the principal accepts him, either upon the terms then . . . agreed upon, and a valid contract is entered into between the principal and the person presented by the broker, the commission is earned. But if, as was the case in *McGavock* v. *Woodlief*, 61 U. S. 20 How. 221, 15 L. ed. 884, the principal rejects the purchaser, and the broker claims his commission, he must show not only that the person furnished was willing to accept the offer precisely as made, but, in addition, that he was an eligible purchaser [by which we understand, was a person able to carry out the contract], and such as the principal was bound, as between himself and the broker, to accept." This distinction between a case in which the seller accepts the purchaser offered by the broker and a case in which the seller rejects such purchaser, which we think is a just and proper distinction, appears to be ignored in some of the cases, but disregarded or rejected in others. In *Kimberly* v. *Henderson*, 29 Md. 512, it was held that a broker is not entitled to his commissions unless he finds a purchaser able and willing to carry out this contract, and a sale is actually made. In that case the broker did find a purchaser, who was accepted by the seller, and the contract was actually executed; but as the contract contained a stipulation that, if either party failed to comply with the contract, he should pay to the other the sum of $1,000, and as the proposed purchaser failed to comply and paid the forfeit, the court held that the broker could not recover his commissions on the purchase price agreed upon, but only to the amount of the forfeit received by the vendor. That case is not, therefore, exactly in point. The cases of *Duclos* v. *Cunningham*, 102 N. Y. 678; *Iselin* v. *Griffith*, 62 Iowa, 668; *McLaughlin* v. *Wheeler*, 1 S. Dak. 497,—simply hold the general doctrine that a broker, before he can claim his commissions, must produce a purchaser able and willing to comply, and do not go into the question of the effect of the seller's accepting the proposed purchaser. The case of *Butler* v. *Baker*, 17 R. I. 582, in its dicta, is the strongest cited by appellant upon this point. In that case, the broker found a purchaser, and presented him to the owner of the land, who accepted him, and entered into a contract upon the terms proposed. But when the last payment was to be made, the purchaser was unable to do so, and the court held that the broker was not entitled to his commissions. The conclusion reached in that case seems to have been rested partly upon the ground that the vendor knew nothing of the financial condition of the purchaser, and was not informed as to his condition by the broker, which the court said it was his duty to do. It is also there said that the cases differ as to the question upon whom the burden of proof rests as to the financial

condition of the purchaser—some holding that the burden of proof is upon the broker, upon the ground that he undertakes to find a purchaser able and willing to buy,—and cites the cases among which we find the case of *Coleman* v. *Meade*, *supra*, which, as we have seen, does not so hold, when the vendor accepts the purchaser, but just the contrary, and then cites other cases showing that the burden of proof rests upon the vendor, concluding that portion of the opinion in these words: "It is not necessary for us to decide this question for the reason that no testimony was offered by the broker to show the purchaser's financial ability, while the defendant did offer such testimony as would justify the jury in finding that the purchaser was unable to comply with the contract." It is obvious, therefore, that the case of *Butler* v. *Baker* affords no authority as to the question of the burden of proof. In *Love* v. *Miller*, 53 Ind. 294, 21 Am. Rep. 192, it was held that, where a broker, employed for that purpose, produces a purchaser who enters into a valid contract with the owner of certain real estate for the purchase of the same, the broker has earned his commissions, notwithstanding the fact that the purchaser afterwards declines to perform his part of the contract. In that case, nothing is said as to the financial ability of the proposed purchaser. In *Vinton* v. *Baldwin*, 88 Ind. 104, 45 Am. Rep. 447, it was held that a person employed to procure a loan, for a commission, is entitled to his commission on finding a person able and willing to make the loan, although the proposed borrower afterwards declined to accept the loan. In that case, the court likened the case to that of a broker employed to sell real estate, in which case, the court said, "It is uniformly held that the commissions are earned when a purchaser is found, able and willing to buy, on the terms proposed, . . . and does not depend upon the ultimate consummation of the sale."

From this review of the authorities, and after due consideration of the reasons upon which they are based, we are of the opinion that the facts stated in the answer are not sufficient to sustain the third defense, and therefore there was no error in sustaining the demurrer to that defense.

It only remains for us to consider what is stated in the answer as to the third defense, but styled in the argument the "fourth defense." That defense, it is claimed in the argument of the counsel for appellant, raises the following question: "Can a broker who has not procured a license to do business, required by a valid city ordinance, maintain an action to recover his commissions?" It is alleged in the answer, and the demurrer admits it to be true, that the plaintiff had failed to procure a license to do business as a broker in the city of Charleston for the year 1890, during which the transaction here in question took place, as required by an ordinance passed by the city council of Charleston under the authority conferred upon said city council by an Act of the general assembly of this state. (Acts, 1881; 17 Stat. at L. 582). This Act simply invests the city council with authority to require the payment of a license fee from any person engaged in any calling, business or profession within the limits of the city of Charleston, with certain exceptions, which need not be stated, and authorizes the city council to pass such ordinances as may be necessary to carry the intent and purposes of the act into full effect. The intent and purpose of the act, as declared in its title, is to authorize the city council to impose "a license tax" on persons engaged in any business in the said city. But there is nothing in the act declaring it to be unlawful for a person to engage in any business for which a license may be required, without obtaining such license. In pursuance of the authority thus conferred, the city council of Charleston, in December, 1889, passed an ordinance (set out in the record) which provides substantially as follows: Section 1: "That every person . . . engaged in, or intending to engage in, any trade, business or profession hereinafter mentioned, shall obtain, on or before the 20th day of January, A. D. 1890, a license therefor," etc. Section 2 provides that "if any person or persons shall exercise or carry on any trade, business or profession, for . . . which a license is required by this ordinance without taking out such license . . . he, she or they shall, for each and every offense, be subject to a penalty not exceeding $100, . . . and the same shall be entered up as a judgment of the court, and execution shall issue against the property of the defendant, as for the collection of other taxes and penalties." The other provisions of the ordinance do not seem to be pertinent to the question made in this case, except that brokers are mentioned as amenable to the provisions requiring a license. It will be observed that the ordinance contains no express provision making it unlawful for a person to engage in business as a broker, but simply imposes a penalty upon a person who does not obtain a license. It is conceded, and properly conceded, that if the law requiring a license actually, and in terms, declares that the business in question is unlawful unless the requirement of a license is complied with, then the carrying on of the business without such license is prohibited, and a contract made under it cannot be enforced in a court of justice; for, as is said in one of the cases hereinafter cited, it would be "altogether anomalous, not to use any harsher term, to hold that a court of justice should enforce a contract founded upon an act which is absolutely forbidden by the lawmaking department of the government," or, as is said in another case, "it would indeed be a strange anomaly if a contract made in violation of a statute, and prohibited by a penalty, could be enforced in the courts of the same country whose laws are thus trampled upon and set at defiance." See *McConnell* v. *Kitchens*, 20 S. C. 439, 47 Am. Rep. 845, and *O'Donnell* v. *Sweeney*, 5 Ala. 468, 39 Am. Dec. 336. It seems to us, however, that even where the statute does not, in express terms, declare the act unlawful, or prohibit the carrying on of the business in question without a license, yet if it appears, from a consideration of the terms of the legislation

in question, that the legislative intent was to declare the act unlawful, or to prohibit the carrying on of the business without a license, then no contract in pursuance of such business can be enforced. In other words, the inquiry is as to the legislative intent, and that may be found, not only in the express terms of the statute, but also may be implied from the several provisions thereof. See *Harris* v. *Runnels*, 53 U. S. 12 How. 79, 13 L. ed. 901, and *Niemeyer* v. *Wright*, 75 Va. 239, 40 Am. Rep. 720. An important element which enters into the inquiry as to the legislative intent seems to be whether the license is required simply as a mode of raising revenue,—a tax, pure and simple,—and that the penalty is imposed as a means of enforcing the payment of such tax, and not for the purpose of prohibiting the business; for, while some of the cases do lay down the broad proposition that the imposition of a penalty implies a prohibition, we do not think that such is the necessary implication, as it may be imposed simply for the purpose of enforcing the payment of the license tax, and, if so, then prohibition is not to be implied. We will next notice the cases cited in the argument, which, we think, show that the weight of authority, as well as of reason, supports the views hereinbefore set forth.

The case of *Westmoreland* v. *Bragg*, 2 Hill, L. pt. 2, p. 414, is not in point, for the reason that the statute not only forbids the carrying on of the business of an apothecary without a license, but also expressly declares all contracts made by an unlicensed apothecary in the course of his business, "utterly void and of no effect." In *McConnell* v. *Kitchens*, 20 S. C. 430, 47 Am. Rep. 845, the action was upon a contract for the sale of fertilizers, which the court held illegal and void because the act regulating the sales of such articles had not been complied with, and that such act was not designed simply for the collection of revenue, but to protect the public from imposition and fraud, and hence a sale of any such article without a compliance with the requirements of the statute was illegal and void. It is obvious that the case does not apply to the case now under consideration. In *Miller* v. *Ammon*, 145 U. S. 421, 36 L. ed. 759, the action was on a contract for the sale of wine, held to be "spirituous or vinous liquor," by a person not having a license so to sell, and the court held that the contract could not be enforced. But, in that case, the ordinance of the city of Chicago requiring a license expressly forbade the sale of spirituous or vinous liquor without a license, and did not, as in this case, simply require a person engaged in such business to obtain a license. That case, therefore, differs from the case now under consideration. In *Holt* v. *Green*, 73 Pa. 198, 13 Am. Rep. 737, it was held by a divided court (Sharswood and Williams dissenting) that a commercial broker who had not procured a license as required by the act of congress is not entitled to recover his commissions upon a sale made by him. The court, in its opinion, admits that there is a conflict of authority upon the question. In *Johnson* v. *Hulings*, 103 Pa. 498, 49 Am. Rep. 131, the court simply follows *Holt* v. *Green*. *Buckley* v. *Humason*, 16 L. R. A. 423, 50 Minn. 195, simply decides that, where a statute or an ordinance duly authorized, makes a particular business unlawful for unlicensed persons, any contract made in such business by one not authorized is void. In the notes to that case a good many authorities are collected which seem to show that the weight of authority is in favor of the view that the mere requirement of a license does not make the business unlawful without such license, unless the statute or ordinance either expressly or impliedly declares the business to be unlawful, if carried on by a person without a license; and this implication may arise from the fact that the statute has in view the protection of the public health or morals, or the prevention of frauds upon the public. In the case of *Mandlebaum* v. *Gregovich*, 17 Nev. 87, 45 Am. Rep. 433, the true distinction in cases of this kind is well pointed out in the following language: "Numerous authorities are cited by respondent's counsel which announce the general doctrine 'that a penalty implies a prohibition, though there be no prohibitory words in the statute, and that the agreement in violation of the statute prohibiting or enjoining an act absolutely, or only under a penalty, cannot be enforced.' This principle is applied in all cases where the subject-matter of the contract is forbidden by the statute [citing the cases], or is in violation of a statute for the protection of the public against imposition or fraud [citing cases, but omitting the case of *McConnell* v. *Kitchens*, *supra*, which is on that line], or for the protection of the public health or morals [as in the case of sales of spirituous liquors], or where the contract is against public policy." But the court goes on to show that the contract there in question did not fall within either of those classes, and hence there was no illegality in the sale, but simply an illegality in the conduct of the seller, in not procuring a license, for which he may be subjected to a penalty, but the sale itself was not unlawful. In *Shippey* v. *Eastwood*, 9 Ala. 200, the action was on a note, to which the defense was that the note was given on Sunday, in violation of the statute forbidding the transaction of any worldly business on Sunday, with certain exceptions, and subjecting the offending party to a penalty; and it was held that the contract, made on Sunday, was void. The court does go on to say: "It has been repeatedly held that a penalty inflicted by a statute upon an offense implies a prohibition, and a contract relating to it is void, even where it is not expressly declared by the statute that the contract shall be void." But this is a mere dictum, for in that case the statute did, in express terms, forbid the making of any contract, except as excepted, on Sunday, and hence there was no necessity for implying a prohibition from the imposition of a penalty. The case of *Woods* v. *Armstrong*, 54 Ala. 150, is very much like our own case of *McConnell* v. *Kitchens*, *supra*, and falls under that class of cases mentioned in *Mandlebaum* v. *Gregovich*, *supra*, where

the sale of the fertilizers was made in violation of a statute intended to prevent imposition or fraud. The cases of *Johnson* v. *Hudson*, 11 East, 180; *Cope* v. *Rowlands*, 2 Mees. & W. 149; and *Smith* v. *Mawhood*, 14 Mees. & W. 452,—show that the true inquiry in all cases of this kind is whether the legislative intent was to declare the business unlawful, if carried on without a license, or simply to impose a penalty upon the person who engages in such business without a license. If the former, then no contract made in the pursuit of such business can be enforced; but if the latter, then it may be, and the penalty is simply for the purpose of requiring the person engaging in the business to pay the license tax imposed.

Looking at this case in the light of these authorities, it seems to us that there is nothing either in the statute, or in the ordinance passed in pursuance of such statute, which indicates an intention to declare the business of broker unlawful, if carried on without a license, but that the real object was to enforce the payment of the license tax by imposing a penalty on the person who may engage in such business without paying the license tax. The history of the Act of 1870, under which the city council of Charleston undertook to impose license taxes on certain occupations pursued within the city of Charleston, as well as that of the Act of 1881-82, above referred to, which was passed to repair the defect in the Act of 1870, may be traced in the case of *Charleston* v. *Oliver*, 16 S. C. 47, and the case between the same parties, practically, in 21 S. C. 318, and shows very clearly that the sole object of this legislation was simply to enable the city council of Charleston to impose license taxes in aid of the revenue of the city, and not for the purpose of making any business or occupation unlawful. Indeed, the very terms of the city ordinance show that it was not the object to make the business of a broker unlawful, for it expressly contemplates that the business of a broker may be lawfully carried on in the city of Charleston for a part of the year—until the 20th of January of that year—without a license, which is a clear indication that it was no part of the legislative intent to condemn the business of a broker, as contrary to the public policy of the city, and that the imposition of a penalty on a person who engages in the business of a broker after that date, without obtaining a license, was solely for the purpose of enforcing the payment of the license tax imposed on brokers, and not for the purpose of declaring such business unlawful. We do not think, therefore, that there was any error in sustaining the demurrer to what is stated in the answer as a third defense, which is, however, claimed in the argument to be a fourth defense.

Under this view, the other questions discussed in the argument, as to the place of the contract, and as to the effect of the interstate commerce law, do not arise, and need not, therefore, be considered.

The judgment of this court is that the judgment of the Circuit Court be affirmed.

WYOMING SUPREME COURT.

STATE of Wyoming
v.
Joel Ware FOSTER, Assignee, etc., of T. A. Kent.

LARAMIE COUNTY COMMISSIONERS
v.
SAME.

(.....Wyo.....)

1. The right of a state or a municipality, if any exists, to priority or preference of payment from an insolvent's estate, cannot be asserted after a general assignment for creditors, which passes the title.

2. A statute providing for a release of a claim in full by a creditor who accepts a dividend under an assignment, cannot apply to the state or a municipality, under a constitutional provision that such liability can be extinguished only by payment into the proper treasury.

3. Public moneys placed by general deposit in a bank, do not establish a trust in the estate of the banker on his insolvency, except so far as they can be traced into some specific fund or property.

NOTE.—*Priority of state or United States in payment from assets of a debtor.*

I. *Scope of note generally.*
II. *Priority of the United States.*
 a. *Upon what based.*
 b. *Constitutionality of provisions for.*
 c. *Superiority over state laws.*
 d. *Construction and scope of.*
 1. *Generally.*
 2. *Who are debtors of the United States.*
 3. *What debts are within the statute.*
 4. *What constitutes insolvency.*
 5. *Sufficiency of assignment to confer priority.*
 6. *Sufficiency of attachment to confer priority.*
 e. *When and to what it attaches.*
 f. *Nature and extent.*
 g. *Marshaling assets.*
 h. *Liability of assignee or representative.*
 i. *Subrogation of sureties.*
 j. *What amounts to a devestiture of the right.*
 k. *How asserted.*
III. *Priority of the states.*
 a. *Upon what based.*
 b. *Constitutionality of provisions for.*
 c. *Nature and extent.*
 d. *To what indebtedness it applies.*
 e. *Subrogation of surety making payment.*
 f. *When it attaches and how devested.*
IV. *Priority of claims for taxes.*

I. *Scope of note generally.*

While the right of government to priority of payment of debts due it is held by the courts of a number of the states to have become a part of our

See also 43 L. R. A. 840.

4. Funds in the hands of a trustee who has become insolvent, which are less than the amount of the trust funds, are presumed to belong to the trust.

5. Money remaining in the vaults of a bank and on depos it by itin other banks, when the banker becomes insolvent, will be held to constitute part of a trust fund of greater amount, which had been received by the banker; but it is otherwise with commercial paper representing loans made by him before assignment.

(January 5, 1895.)

RESERVATION by the District Court for Laramie County for the opinion of the Supreme Court of questions arising in actions brought by the State and the County of Laramie to establish priority for their claims upon the estate in possession of defendant as assignee of an insolvent debtor. *Trust declared as to moneys on hand.*

The facts are stated in the opinion.

Messrs. **J. A. Van Orsdel, Frank H. Clark,** and **A. C. Campbell,** for plaintiffs:

The funds received by John Roberts, treasurer, and by him deposited with T. A. Kent, banker, belonged to and were the property of the county of Laramie, Wyoming.

Wyo. Laws 1890–91, chap. 45, p. 177; *Mo-*

jurisprudence by the adoption of the common law and the policy which governed the royal prerogative has been supposed to be traceable in the doctrine as adopted in this country, the numerous departures from the rules of the common law incident to our different institutions, together with the thoroughness with which our courts have treated the subject and its extent, has prompted the confinement of this note to the American cases on the subject.

II. *Priority of the United States.*

a. *Upon what based.*

The right of the United States to priority of payment of debts due it does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of its statutes. United States v. State Bank of North Carolina (1833) 31 U. S. 6 Pet. 29, 8 L. ed. 308.

The first enactment on the subject will be found in the Duty Collection Act of Congress of August 4, 1790, providing that when any bond for the payment of duties shall not be satisfied on the day it becomes due, the collector shall forthwith cause a prosecution to be commenced for the recovery of the money thereon by action or suit at law in the proper court having cognizance thereof, and in all cases of insolvency, or where the estate in the hands of the executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bond shall be first satisfied. *Ibid.*

This was followed by the Act of Congress of March 3, 1797, providing that when any revenue officer or other person hereafter becoming indebted to the United States, by bond or otherwise, shall become insolvent, or when the estate of any deceased debtor, in the hands of executors or administrators, shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority thus established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed. United States v. State Bank of North Carolina, *supra.*

The Statute of August 4, 1790, was substantially re-enacted in the Act of Congress of March 2, 1799, section 65, which provided, in addition thereto, that any executor, administrator, or assignee or other person, who shall pay any debt due by the person or estate, for whom or for which they are acting, previous to the debt or debts so due to the United States, from such person or estate being first duly satisfied and paid, shall become answerable in their own person or estate for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid, and actions or suits at law may be commenced against them for the recovery of the said debt or debts, in the proper court having cognizance thereof, adding a clause substantially the same as the last clause of the Act of March 3, 1797, as above set forth, except that it requires the voluntary assignment to be one for the benefit of creditors, and providing that if the principal in any bond given for duties shall be insolvent or if he be dead and his estate and effects are insufficient to pay his debts and a surety on such bond or the executor, administrator, or assignee of such surety shall pay the money due on such bond, such surety or his representative, or assignee shall have and enjoy the like advantage, priority or preference for the recovery of such moneys out of the estate of the insolvent or deceased principal as are reserved and secured to the United States.

These statutes continued to govern the question until the enactment of the revised statutes, in which the whole was revised and re-enacted, the Act of March 3, 1797, as above set forth, reappearing with substantially no changes except that it was made applicable to "any person indebted," etc., instead of "any revenue officer or other person," as section 3466.

Which was followed by section 3467, providing that every executor, administrator, or assignee or other person who pays any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable, in his own person and estate, for the debt so due to the United States, or for so much thereof as may remain due and unpaid.

And by section 3648 providing that when the principal in any bond given to the United States is insolvent, and his estate and effects are insufficient to pay the United States the money due on the bond, any surety, or his representatives, who pays to the United States the money due on the bond, has a like priority for the recovery and receipt of the money out of the estate of the insolvent as is secured to the United States, and may bring and maintain a suit upon the bond, in law or in equity in his own name for the recovery of all moneys paid thereon.

And the provisions of the revised statute remain in force and were not repealed or affected by the bankruptcy laws.

Thus in Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513, it was said that the provision of the Bankruptcy Act of March 2, 1867 (14 Stat. at L. 517) for priority of all debts due the United States is *in pari materia* with the several acts giving priority of payment to the United States, and was doubtless put in to recognise and reaffirm the rights which those statutes give and to exclude the possibility of a different conclusion.

But the provision of the act for the formation of national banks for the distribution of the entire

Clune v. *La Plata County Comrs.* 19 Colo. 122.

John Roberts, treasurer, being simply the custodian of these funds belonging to Laramie county, and, as such custodian, depositing the same with T. A. Kent, banker, and the said T. A. Kent, banker, receiving the same at the time and at all times well knowing them to be the funds of Laramie county—such deposits became trust funds in the hands of T. A Kent as trustee.

McColl v. *Fraser*, 40 Hun, 113; *Wells, Fargo & Co.* v. *Robinson*, 13 Cal. 134.

The funds of the estate of T. A. Kent, banker, at the time of his failure, and by him transferred to Joel Ware Foster, assignee, are charged with a trust as a part of the funds of Laramie county.

Peake v. *Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *People* v. *City Bank of Rochester*, 96 N. Y. 35; *Frelinghuysen* v. *Nugent*, 36 Fed. Rep. 239; *Re Armstrong*, 38 Fed. Rep. 405; *First Nat. Bank of Montgomery* v. *Armstrong*, 36 Fed. Rep. 59; *People* v. *Bank of Dansville*, 39 Hun, 187; *McColl* v. *Fraser, supra; Fifth Nat. Bank of St. Louis, Mo.*, v. *Armstrong*, 40 Fed. Rep. 46; *Central Nat. Bank of Baltimore* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *First Nat. Bank of Central City* v. *Hummel*, 8 L. R. A. 788, 14 Colo. 259, affirmed

assets of the bank in case of insolvency giving no preference to any claim except for moneys to reimburse the United States for advances in redeeming the notes, is inconsistent with and repugnant to U. S. Rev. Stat. § 5466, giving priority to demands of the United States against insolvents, previously enacted as applied to demands against national banks, and supersedes the latter to the extent of the repugnancy, although the United States is not expressly mentioned in it, as it is clearly designed to prescribe the only rules which should govern on the subject. Cook County Nat. Bank of Chicago v. United States (1882) 107 U. S. 445, 27 L. ed. 537.

b. *Constitutionality of provisions for.*

Congress has a constitutional right to claim preference in the payment of claims due the United States out of the estate of the public debtor. Com. v. Lewis (1814) 6 Binn. 266.

And the constitutionality of the acts of congress providing therefor has been upheld on different grounds.

Thus the Act of Congress of March 3, 1797, is held to be constitutional and valid, as falling within the power to provide for the common defense and general welfare, in United States v. Clason (1806) 2 Brev. 118.

And it was held to be a valid exercise of legislative power under the constitutional provision authorizing congress to make all laws which shall be necessary and proper to carry into execution the powers vested by the constitution in the government of the United States or any department thereof, in United States v. Fisher (1804) 6 U. S. 2 Cranch, 358, 2 L. ed. 304.

So it is not subject to the objection that it interferes with the right of state sovereignty respecting the dignity of debts and defeats the measures the states have a right to adopt to secure themselves against delinquencies, on the part of their own revenue offices, as that is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the power of congress extends, the object being an objection to the constitution itself. *Ibid.*

So in Aikin v. Dunlap (1819) 16 Johns. 77, it was said that it cannot be doubted that congress has the right to stipulate for preference in their contracts for securing the public revenue.

c. *Superiority over state laws.*

The law of congress giving the right of priority of payment of an indebtedness due it to the United States supersedes all state laws upon the subject of the distribution of those estates that come within its provisions. United States v. Duncan (1850) 4 McLean, 607, 12 Ill. 527.

And the local laws of a state cannot create a priority in favor of other creditors which will supersede that of the United States. Field v. United States (1835) 34 U. S. 9 Pet. 182, 9 L. ed. 94.

So the construction of the act of congress giving the United States the right of priority of payment of an indebtedness due it over other creditors cannot depend upon the provisions of any particular statutes of a state which does not fall within its very terms. United States v. McLellan (1838) 3 Sumn. 345.

And when property subject to a lien for a tax due the United States to which priority is given is sold under process issued from a state court, that court will distribute the proceeds and recognise the priority of the claim of the United States. Dungan's App. (1871) 66 Pa. 204, 5 Am. Rep. 169.

In Aikin v. Dunlap (1819) 16 Johns. 77, the court declined to decide whether the preference given by the act of congress controlled the rule of distribution adopted by the statutes of the states, upon the ground that the question was not immediately before it but stated that, in its opinion, the insolvency law must be considered as subject to the paramount law of congress and must be so construed as to give it effect.

d. *Construction and scope of.*

1. *Generally.*

"The statutes giving the government a priority are presumed to have for their object the public good, and are, therefore, to be liberally construed." United States v. Duncan (1850) 4 McLean, 607, 12 Ill. 523; United States v. State Bank of North Carolina (1832) 31 U. S. 6 Pet. 29, 8 L. ed. 308; Beaston v. Farmers' Bank of Delaware (1838) 37 U. S. 12 Pet. 134, 9 L. ed. 1029.

And ought to receive a fair and reasonable interpretation according to the just import of their terms. United States v. State Bank of North Carolina, *supra.*

In that case, it was said that the same policy which governed in the case of the royal prerogative may be clearly traced in these statutes. *Ibid.*

In Com. v. Phœnix Bank (1846) 11 Met. 129, however, it was said that claims to a preference and payment in full are not favored by any considerations of equity, and that the general rule is that when several creditors are entitled to payment from a fund insufficient to satisfy the whole, they shall share in proportion, and, in order to establish such preference, it must be made plainly to appear that the case is within the rule of law that secures it.

These statutes provide for four classes of cases: First, cases where the estate and effects of any deceased debtor in the hands of his executors or administrators are insufficient to pay his debts; secondly, cases where the debtor, not having property sufficient to pay all his debts, has made a voluntary assignment thereof for the benefit of his creditors; thirdly, cases where the estate and effects of an absconding, concealed or absent debtor have been attached by process of law; and fourthly, cases where the debtor has committed a legal act of bankruptcy. Conard v. Nicholl (1830) 29 U. S. 4 Pet. 291, 7 L. ed. 862; United States v. Canal Bank

Hummel v. *First Nat. Bank of Central City*, 2 Colo. App. 571; *Smith* v. *Combs*, 49 N. J. Eq. 420; *Griffin* v. *Chase*, 36 Neb. 328; *Anheuser-Busch Brewing Asso.* v. *Morris*, Id. 13; *San Diego County* v. *California Nat. Bank*, 52 Fed. Rep. 59.

The said T. A. Kent, banker, having mingled the funds of Laramie county entrusted to him, with his own funds and used the same for the benefit of his estate which thereafter passed, by his assignment, into the hands of Joel Ware Foster, assignee, such estate generally is now charged with the trust, and the said Laramie county is entitled to the repayment of its funds out of the said estate before any use of the same for the payment of the general indebtedness of the estate.

McClure v. *La Plata County Comrs.* 19 Colo. 123; *Myers* v. *Clay Center Board of Education*, 51 Kan. 87; *Hubbard* v. *Alamo Irrigating & Mfg. Co.* 53 Kan. 637; *San Diego County* v. *California Nat. Bank*, *supra*; *Independent Dist. of Boyer* v. *King*, 80 Iowa, 497; *McLeod* v. *Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Francis* v. *Evans*, 69 Wis. 115; *Bowers* v. *Evans*, 71 Wis. 133; *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237; *Davenport Plow Co.* v. *Lamp*, 80 Iowa, 722.

Messrs. **Charles M. Potter**, *Atty.-Gen.*, and **J. F. Vaile**, also for plaintiffs:

(1844) 3 Story, C. C. 79; United States v. McLellan (1838) 3 Sumn. 345; United States v. Griswold (1881) 8 Fed. Rep. 496.

The United States has no lien upon the real estate of a person indebted to it until suit is brought, unless a notorious insolvency or bankruptcy has taken place, or being unable to pay his debts, the debtor has made a voluntary assignment of all his property, or the debtor, having absconded, concealed or absented himself, his property has been attached on that ground, by process of law. United States v. Hooe (1805) 7 U. S. 3 Cranch, 73, 2 L. ed. 370.

To entitle the United States to preference over other creditors, it must be shown that the debtor was insolvent and had voluntarily assigned all his property for the benefit of creditors, or that an attachment had been taken out against his property as an absconding and absent debtor, and prosecuted to effect. McLean v. Rankin (1808) 3 Johns. 399.

So in Beaston v. Farmers' Bank of Delaware (1838) 37 U. S. 12 Pet. 102, 9 L. ed. 1017, in construing the Act of Congress of 1797, chap. 74 § 5, providing for priority of payment of the United States in cases of insolvency, the court said: "First, that no lien is created by the statute; secondly, the priority established can never attach while the debtor continues the owner and in possession of the property, although he may be unable to pay all his debts; thirdly, no evidence can be received of the insolvency of the debtor until he has been devested of his property in one of the modes stated in the section; and fourthly, whenever he is thus devested of his property the person who becomes invested with the title is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property."

And in United States v. Crookshank (1882) 1 Edw. Ch. 238, 6 L. ed. 121, it was said that the precedence of payment to which the United States is entitled can only arise when the property of the debtor has passed into the hands of assignees in the case of insolvency, or when, in the event of the death of the debtor, his estate has passed to executors or administrators.

2. *Who are debtors of the United States.*

It is to be observed that the provision of the revised statute includes "any person indebted," etc.

The previous Statute of 1797, however, where the expression used was "any revenue officer or other person," was held to include all debtors of the United States and not to be confined to revenue officers and persons accountable for public money, in the United States v. Fisher (1804) 6 U. S. 2 Cranch, 358, 2 L. ed. 304.

And in Beaston v. Farmers' Bank of Delaware (1838) 37 U. S. 12 Pet. 102, 9 L. ed. 1017, in construing the Act of Congress of March 3, 1797, it was said that "all debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language" and "that it is manifest that congress intended to give priority of payment to the United States over all other creditors in the cases stated therein."

So it extends to debtors of the United States generally, or at any rate to receivers of the public money whether officers or not, if entrusted by the United States with the receipt or application of public moneys, though the debtor be a foreigner resident within the United States. United States v. Clason (1806) 2 Brev. 118.

And the United States is entitled to priority of payment of an indebtedness due it out of the assets of an insolvent debtor under the acts of congress providing therefor though the contract by which the indebtedness was incurred was made with a foreigner, in a foreign country. Harrison v. Sterry (1809) 9 U. S. 5 Cranch, 289, 3 L. ed. 104.

And an agent of the United States in England cannot, by conforming to the English bankrupt laws, lessen or affect the right of the United States to priority of payment of an indebtedness due it out of his estate. Harrison v. Sterry (1807) Bee, 246.

A firm of bankers in London appointed by the United States government disbursing agents of the navy department, some of the members of which are residents of Great Britain and some of the United States, and all the American members of which were adjudicated bankrupts, the firm there being indebted to the United States for moneys placed in its hands by the department for disbursement, is within the meaning of the Act of Congress of March 3, 1797, section 5, providing for priority of payment of the United States when any revenue officer or other person indebted to the United States shall become insolvent. Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513.

So one who, with a fraudulent purpose to secure to himself the use of public money, receives it with full knowledge that it belongs to the United States, is indebted to the United States within the meaning of the Act of Congress of March 3, 1797. Bayne v. United States (1876) 93 U. S. 642, 23 L. ed. 997.

And corporations are persons within the meaning of that act. Beaston v. Farmers' Bank of Delaware (1838) 37 U. S. 12 Pet. 102, 9 L. ed. 1017.

In Com. v. Phœnix Bank (1846) 11 Met. 129, however, it was held without referring to Beaston v. Farmers' Bank of Delaware, above set forth, that an incorporated bank is not a person from which the United States would be entitled to priority of payment of a debt due it within the provisions of that act, the court saying that it was of the opinion that by a fair construction of the act it did not extend to corporations.

The burden rests with persons claiming exemption from the provision of the act providing for priority of payment to the United States where any revenue officer or other person indebted to it shall become insolvent, to show that they are not

A debt due to the state is entitled to a preference over debts due to individuals.

The king's "debt shall be preferred before a debt of any of his subjects."

1 Bl. Com. p. 240; 2 Bl. Com. p. 409; 3 Bl. Com. p. 420; Broom, Legal Maxims, p. 69; *Giles* v. *Grover*, 1 Clark & F. 72.

Various English statutes declared and affirmed this right, from Magna Charta down.

Magna Charta, A. D. 1225, 9 Hen. III., chap. 18, (1 Stat. at L. p. 7); 25 Edw. III., chap. 19, (2 Stat. at L. 59); 33 Hen. VIII. chap. 39, § 74, (5 Stat. at L. 127); 13 Eliz. chap. 4, (6 Stat. at L. pp. 262, 263).

The principle has been frequently applied in the United States.

State v. *Rogers*, 2 Harr. & M'H. 198; *Murray* v. *Ridley*, 3 Harr. & M'H. 175; *Contee* v. *Chew*, 1 Harr. & J. 417; *State* v. *Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *Smith* v. *State*, 5 Gill, 45; *Re Greene's Estate*, 4 Md. Ch. 356; *State* v. *Baltimore*, 10 Md. 515; *Orem* v. *Wrightson*, 51 Md. 42, 34 Am. Rep. 286; *Robinson* v. *Bank of Darien*, 18 Ga. 96; *Com.* v. *Cook*, 8 Bush, 224; *State* v. *Rowse*, 49 Mo. 586; *Com.* v. *Lewis*, 6 Binn. 270.

A voluntary assignment, under the Wyoming statute, does not defeat the state's right to a preference, as between the state and other creditors not having specific liens.

In the construction of a statute, if the sovereign (the state) is not specifically and expressly

within its provisions. Beaston v. Farmers' Bank of Delaware, *supra*.

3. *What debts are within the statute.*

In Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513, the court construed the provision of the Bankruptcy Act of March 2, 1867 (14 Stat. at L. 517), providing for priority of all debts due the United States and all taxes and assessments under the laws thereof, and the Act of Congress of March 3, 1798, § 5 (1 Stat. at L. 515), providing for priority of debts due to the United States from any revenue officer or other person, saying that the form of the indebtedness is immaterial. It may be by simple contract, specialty, judgment, decree or otherwise by record. The debt may be legal or equitable, and have been incurred in this country or abroad; a valid indebtedness is as effectual in one form as another, and the debtors may be joint or several, and principals or sureties. No distinction is made by the statutes, all are included.

And in Howe v. Sheppard (1835) 2 Sumn. 133, it was held that the Act of Congress of 1797 applies to equitable as well as legal debts.

Thus the United States as holder of a protested bill of exchange which has been negotiated in the ordinary course of trade, is entitled to be preferred to the general creditors of the person liable thereon under the Act of Congress of 1797, § 5. United States v. Fisher (1804) 6 U. S. 2 Cranch, 358, 2 L. ed. 304.

And a judgment in favor of the United States against a bankrupt in an action for the recovery of penalties for violation of the internal revenue laws in selling cigar lights without tax stamps is a debt provable in bankruptcy proceedings against the debtor so far as it did not consist of costs of the suit and of which the United States is entitled to priority of payment to that extent, although the judgment was obtained after the adjudication. *Re* Rosey (1873) 6 Ben. 507, 8 Nat. Bankr. Reg. 509.

And a claim of an insolvent debtor against the principal in a bond for duties which he had been compelled to pay as surety passes to his assignee and the right of the United States to priority of payment of a judgment debt due it attaches thereto and the claim is payable out of the avails of a claim by the principal on the bond against the government of Spain which was afterwards paid, under the Florida treaty, and came to the hands of the assignee. Hunter v. United States (1831) 30 U. S. 5 Pet. 173, 8 L. ed. 86.

So a claim of the United States against the estate of a deceased insolvent marshal is entitled to priority under U. S. Rev. Stat. §§ 3466, 3467, over a claim by a deputy marshal against the marshal for services. Gregory's Estate (1876) 11 Phila. 126.

The United States is not entitled to priority of payment of a claim against an insolvent national bank, out of its assets over other creditors under U. S. Rev. Stat. § 5466, giving priority to demands of the United States against insolvents, however, as the act authorizing the formation of national banks is a separate code by itself, neither limited nor enlarged by other statutory provisions with respect to the settlement of demands against insolvents or their estates and giving no preference to any claim except for moneys to reimburse the United States for advances in reclaiming notes. Cook County Nat. Bank of Chicago v. United States (1882) 107 U. S. 445, 27 L. ed. 537, reversing United States v. Cook County Nat. Bank (1879) 9 Biss. 55.

And it is not given a right of priority of payment of a claim due it out of the assets of an insolvent national bank over other creditors by the Bankrupt Act (14 Stat. at L. 517) giving priority to the demands of the United States against the estates of bankrupts, as that enactment deals with the estates of persons adjudged to be insolvent under that law and covers only the distribution of their estates. Cook County Nat. Bank of Chicago v. United States, *supra*.

So in Howe v. Sheppard (1835) 2 Sumn. 133, it was said that the United States cannot enforce its right of priority in a suit at law as assignee of a judgment of a private creditor of an insolvent debtor when the suit is brought in the name of the creditor, but that the assignment of the judgment transfers the debt, and that the government might enforce the judgment against the debtor by bill in equity, but the court stated that this was not the question intended to be raised.

And in Com. v. Phœnix Bank (1846) 11 Met. 129, the opinion was expressed that deposits made by persons and recruiting officers in a bank, in their own names, though designating the capacity in which they act, do not constitute the bank a debtor of the United States so as to entitle it to priority of payment when the officers themselves are made the absolute debtors of the United States.

See, also, as to debts due to officers and agencies of government, *infra*, heading, *Priority of the states*, subhead, *To what indebtedness it applies*.

Nor does the Act of Congress of March 3, 1797, § 5, apply to a debt which was due before the act was passed, though the balance was not adjusted at the treasury until after its passage. United States v. Bryan (1815) 13 U.S. 9 Cranch, 374, 3 L. ed. 764.

But a debt due to the United States from a deceased revenue officer is entitled to priority of payment out of the assets in the hands of his administrators in Pennsylvania, whether the debt arose before or after the passage of the Act of Congress of March 3, 1797, as it would have been entitled to such priority under the laws of that state previously existing. Com. v. Lewis (1814) 6 Binn. 266.

The priority to which the United States is entitled under that act comprehends a bond for the payment of duties executed anterior to the date of the assignment but payable afterwards. United States v. State Bank of North Carolina (1832) 31 U. S. 6 Pet. 29, 8 L. ed. 308.

mentioned in the statute, it will not be bound.

Willion v. *Berkley*, 1 Plowd. 289 *a*.

(a). As to the statute of limitations.

United States v. *Hoar*, 2 Mason, 311. See also *People* v. *Gilbert*, 18 Johns. 227; *Com.* v. *Johnson*, 6 Pa. 136; *Josselyn* v. *Stone*, 28 Miss. 753.

(b). As applied to questions of jurisdiction.

United States v. *Greene*, 4 Mason, 427. See also *United States* v. *Hewes*, Crabbe, 307, 313; *State* v. *Garland*, 29 N. C. 48; *The Dollar Sav. Bank* v. *United States*, 86 U. S. 19 Wall. 227, 22 L. ed. 80.

(c). As applied to grants by the sovereign.

Feather v. *Queen*, 6 Best & S. 257; *Dixon* v. *London Small Arms Co.* L. R. 1 App. Cas. 632.

(d). As applied to claims asserted against the state.

Divine v. *Harvie*, 7 T. B. Mon. 439, 18 Am. Dec. 194.

(e). As to claims of creditors on lands escheated to the state.

Den v. *O'Hanlon*, 21 N. J. L. 582.

(f). As to taxes against property held in public interests.

Public Schools Trustees v. *Trenton*, 30 N. J. Eq. 667.

(g). As to state's liability for official fees.

4. *What constitutes insolvency.*

The mere inability of a debtor to pay his debts does not entitle the United States to priority of payment of an indebtedness due it under the Act of Congress providing for such priority in case of the insolvency of the debtor. Farmers' Bank of Delaware v. Beaston (1836) 7 Gill & J. 421, 28 Am. Dec. 226; United States v. Griswold (1881) 8 Fed. Rep. 496; Thelusson v. Smith (1817) 15 U. S. 2 Wheat. 396, 4 L. ed. 271; Com. v. Phœnix Bank (1846) 11 Met. 129.

And it is not entitled to priority of payment of an indebtedness on bonds given for duties when the debtor has not sufficient property to pay his debts, but has made no general assignment for the benefit of creditors either voluntarily or by process of law. Smith v. Tinker (1806) 2 Day, 236.

Nor is it sufficient that the winding up of his affairs is effected in whole or in part by legal proceedings. It must be accompanied by a voluntary general assignment or a legal bankruptcy. Com. v. Phœnix Bank, *supra*.

It must be a legal, actual and known insolvency manifested by some notorious act of the debtor pursuant to law. Prince v. Bartlett (1814) 12 U. S. 8 Cranch, 431, 3 L. ed. 614; Marshall v. Barclay (1828) 1 Paige, 159, 2 L. ed. 600.

The word "insolvency" in the acts of congress providing for the priority of payment of an indebtedness to the United States means a legal insolvency and does not apply to an inability on the part of the debtor to satisfy all his debts where his insolvency was not notoriously known. Thelusson v. Smith (1817) 15 U. S. 2 Wheat. 396, 4 L. ed. 271.

Some overt and notorious act is meant which the laws of the state recognize as an insolvency. Bartlet v. Prince (1812) 9 Mass. 431; Marshall v. Barclay (1828) 1 Paige, 159, 2 L. ed. 600.

And it relates to such a general divestment of property as would, in fact, be equivalent to insolvency in its technical sense. It supposes that all the debtor's property has passed from him. Conard v. Atlantic Ins. Co. of New York (1828) 26 U. S. 1 Pet. 386, 7 L. ed. 189.

Thus the Act of Congress of 1797, providing that, in case of insolvency, debts due to the United States shall be first paid, is confined to cases of declared insolvency, when the effects of the debtor are to be appropriated to the payment of his debts, and does not apply to a case of a prior conveyance by the debtor to a bona fide purchaser, as no lien is created by the statute. Otis v. Warren (1819) 16 Mass. 53.

"Its insolvency, if not established by legal proceedings resulting in the appointment of an official assignee, must be accompanied by a voluntary assignment of substantially all the debtor's property; so long as it remains in his own hands, any partial sale, transfer, or pledge of it does not bring the case within the statute." United States v. Griswold (1881) 8 Fed. Rep. 496.

And the Act of March 2, 1799, only gives preference to the United States on custom-house bonds as against other creditors, after a notorious act of insolvency, as where the debtor has assigned for the benefit of creditors, when he has absconded and his property is attached, etc. United States v. King (1801) Wall. C. C. 12.

And the United States is not entitled to priority of payment of custom-house bonds due it over another creditor of the debtor firm to whom an assignment of certain property had been made in satisfaction of his debt, though at the time of such assignment the house was, in fact, insolvent, where it continued in business, though embarrassed, and no act of bankruptcy had been committed and no assignment for creditors made or attachment issued. *Ibid.*

Thus the concealment of a debtor, while insolvent to avoid arrest by his creditors is not a legal act of bankruptcy, which will give the United States the right of priority of payment of a debt due it from the insolvent, the right of priority not attaching while the property remains in the hands of the debtor and subject to his control. United States v. Clark (1826) 1 Paine, C. C. 629.

And a mortgage made while the mortgagor was not legally a bankrupt or insolvent, though in fact unable to pay his debts, as a security for an ordinary loan and which did not amount to and was not pretended to be a voluntary assignment of all his property for the benefit of his creditors, does not constitute an act of bankruptcy and does not give the United States a right of priority of payment of an indebtedness due it under U. S. Rev. Stat. § 3466. United States v. Griswold (1881) 8 Fed. Rep. 496.

Nor is the United States entitled to priority of payment of an indebtedness out of the assets of a bank under Act of Congress of 1797, chap. 74, § 5, where the assets of the bank are put in the hands of receivers under process issued by the bank commissioners pursuant to U. S. Stat. 1838, chap. 14, § 5, for the purpose of the adjustment of its affairs according to the provisions of U. S. Rev. Stat., chap. 44, such proceedings not constituting a legal bankruptcy or insolvency within the meaning of the act. Com. v. Phœnix Bank (1846) 11 Met. 129.

A deed executed by a person indebted to the United States conveying all the property in his possession to trustees for the payment of his debts, not including the debt to the United States, is an act of insolvency within the provisions of the act of congress, however, and such priority attaches at the instant the deed is executed and cannot be defeated by a subsequent decision, in his favor, in an action for the recovery of property which had never been in his possession upon an unascertained claim of the debtor's wife. United States v. The Marshal of Dist. of North Carolina (1833) 2 Brock. 488.

And a reservation of a female slave, with her three children, worth between three and four hundred dollars, from a deed of assignment for the benefit of creditors conveying a large property, is but a trivial portion of the estate, and does not prevent the deed from constituting an act of in-

State v. *Kelsey*, 44 N. J. L. 1.

The state is not affected by bankruptcy or insolvent laws.

Rex v. *Pixley*, Bunb. 202; *Ex parte Temple*, 2 Ves. & B. 395; *People* v. *Rossiter*, 4 Cow. 143; *People* v. *Herkimer*, 4 Cow. 345, 15 Am. Dec. 379. See also *Saunders* v. *Com.* 10 Gratt. 494; *Com.* v. *Hutchinson*, 10 Pa. 466; *Public Schools Trustees* v. *Trenton*, 30 N. J. Eq. 684; *State* v. *Camden County Common Pleas Ct.* 51 N. J. L. 426; *Greeley* v. *Provident Sav. Bank*, 98 Mo. 458.

The language of the assignment act of Wyoming shows that it was not intended to apply to the state.

See *The Dollar Sav. Bank* v. *United States*, 86 U. S. 19 Wall. 239, 22 L. ed. 82; *Den* v. *O'Hanlon*, 21 N. J. L. 590. See also *King* v. *Allen*, 15 East, 333.

Under the assignment law, the assignee takes the property of his assignor, subject to the equitable lien of the state for the amount due to it.

State v. *Rowse*, 49 Mo. 586; *Greeley* v. *Provident Sav. Bank*, 98 Mo. 460; *Dunlap* v. *Gallatin County*, 15 Ill. 7; *Re Fulton's Estate*, 51 Pa. 211; *Ludington's Petition*, 5 Abb. N. C. 313; *Gifford* v. *Black*, 22 Ind. 444.

In *Re Cavin's Petition* v. *Gleason*, 105 N. Y 256, the court says upon an accounting in

solvency which will entitle a debt due to the United States to priority of payment, especially when they were not reduced to possession until after the assignment. *Ibid.*

An assignment by a partnership of all the partnership effects for the payment of its debts for which the partnership fund is inadequate, is an act of insolvency which will entitle the United States to priority of payment of a debt due it from the firm, though one of the partners remained solvent. United States v. Shelton (1821) 1 Brock. 517.

And the United States, having obtained a joint judgment against all the obligors on a joint and several bond given for duties, both principal and sureties, and one of the obligors having died and the others having become insolvent, may, by virtue of its right of priority in case of insolvency, maintain a suit in equity for the recovery of the debt out of the assets of the deceased judgment debtor whose estate was also insolvent. United States v. Cushman (1836) 2 Sumn. 426.

5. Sufficiency of assignment to confer priority.

There must be, in some way, an assignment of the debtor's property to a third person for distribution among his creditors before the statute giving priority to a debt due to the United States, can be invoked. Bush v. United States (1882) 8 Sawy. 322, 15 Cent. L. J. 427; Smith v. Tinker (1804) 2 Day, 236.

Thus a consignment of goods by a debtor abroad, though insolvent, with directions to have them sold and the proceeds paid to his creditors in the state, is not such an assignment of his property as will entitle the United States to priority of payment of a claim due it out of the assets of the debtor under the act of congress providing therefor in case of a voluntary assignment. McLean v. Rankin (1808) 3 Johns. 369.

"Nor is a sale or mortgage for a present consideration, and not on account of a pre-existing debt or obligation, an assignment, actually speaking, or within the spirit or meaning of the statute which contemplates that the debtor shall thereby devest himself of his property for the benefit of one or more of his creditors." United States v. Griswold (1881) 8 Fed. Rep. 496.

And the election of trustees to wind up the business of a debtor bank under a special statute passed upon the bank's application, is not such an assignment of all its property as will entitle the United States to priority of payment of a debt due it out of the funds of the bank under the Act of Congress of March 3, 1797, where the trustees refused to accept the trust. Beaston v. Farmers' Bank of Delaware (1838) 37 U. S. 12 Pet. 102, 9 L. ed. 1017, affirming Farmers' Bank of Delaware v. Beaston (1836) 7 Gill & J. 421, 28 Am. Dec. 226.

Or where they were not selected after notice as required by the special act, and did not accept the trust. Farmers' Bank of Delaware v. Beaston, *supra*.

And the appointment of receivers of a debtor banking corporation is not such a transfer and possession of the property of the bank as will entitle the United States to priority of payment of a claim due it within the meaning of the Act of Congress of March 3, 1797, providing for such priority, especially where it does not appear that the power conferred upon them was ever executed. Beaston v. Farmers' Bank of Delaware, *supra*.

Nor is the United States entitled to priority of payment of an indebtedness due it under the acts of congress providing therefor where the debtor has made an assignment of his property, unless the assignment covered all his property. United States v. Howland (1819) 17 U. S. 4 Wheat. 108, 4 L. ed. 528; United States v. Mott (1822) 1 Paine, C. C. 188.

It must appear that the assignment was of all his property, or that it was made with a view to defeat the claim of the United States. Marshall v. Barclay (1828) 1 Paige, 159, 2 L. ed. 600.

An assignment for the benefit of creditors which is partial on its face and partial in fact, not including all the assignor's property, is not one which will entitle the United States to priority of payment of a claim due. United States v. Bank of United States (1844) 3 Rob. (La.) 262; United States v. Amory (1880) 5 Mason, 455.

An omission of portions of the debtor's property not by accident or for the purpose of evading the statute, but to pay particular creditors, renders the assignment ineffective to give priority to the United States, though the omitted portion did not extend one-twentieth of the whole. United States v. Amory, *supra*.

So when an assignment for the benefit of creditors purports upon its face to convey specific property only and not to be universal in its operation, it is necessary in a proceeding by the United States to establish a right to priority of payment of an indebtedness due it upon the ground of a general assignment to expressly aver that the assignment conveys all the property of the debtor. United States v. Munroe (1830) 5 Mason, 572.

And an assignment of all the debtor's property in a schedule referred to, which enumerates only specific property and does not purport to be all, affords no presumption that it is all the debtor's property, and is not such an assignment as will entitle the United States to priority of payment of a debt due it when there is no proof that it contained all or that there was a suppression of fact with the fraudulent design to evade the rights of the United States. United States v. Langton (1829) 5 Mason, 280.

And the burden of proof rests with the United States to establish that an assignment for the benefit of creditors not purporting on its face to be of all the debtor's property does in fact contain all of it, where it insists on priority of payment of an indebtedness due it under the Act of Congress of 1799, chap. 128, § 65. United States v. Langton, *supra*; United States v. Howland (1819) 17 U. S. 4

bankruptcy or insolvency a trust creditor is not entitled to a preference over general creditors of the insolvent, merely on the ground of the nature of his claim, that is, that he is a trust creditor as distinguished from a general creditor.

See also *Atkinson* v. *Rochester Printing Co.* 114 N. Y. 168.

Messrs. **Lacey & Van Devanter** and **Baird & Churchill,** for defendant:

Wherever the property of a party has been wrongfully misapplied, or a trust fund has been wrongfully converted, if its identity can be traced, it will be held, in its new form, liable to the rights of the original owner *cestui que trust;* and conversely, if its identity cannot be traced, the remedy of the *cestui que trust* against any specific property, is lost.

2 Story, Eq. Jur. § 1258, and authorities cited; 2 Pom. Eq. Jur. § 1051, and authorities cited; 2 Perry, Tr. §§ 835 *et seq.*, and authorities cited; 1 Beach, Eq. Jur. §§ 284, 286.

In *Little* v. *Chadwick*, 7 L. R. A. 570, 151 Mass. 109, the court says: "When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases."

In *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237, the court holds that the right to follow

Wheat. 108, 4 L. ed. 526; United States v. Clark (1826) 1 Paine, C. C. 629.

But an assignment for the benefit of creditors, to give the United States the right of priority of payment of an indebtedness due it from the assignor, must be of all the debtor's property as contradistinguished from a partial assignment or professedly an assignment of part of the debtor's property only. United States v. Clark, *supra.*

And the omission by accident or mistake of an article of property from an assignment for the benefit of creditors which purports to be general and does not show that the intention was that it should be partial as opposed to a general one will not defeat the right of the United States to priority of payment of a debt due it out of the assets. *Ibid.*

And a small portion of the property of a debtor left out of an assignment for the benefit of creditors made by him will not defeat the right of the United States to priority of payment of a debt due it. United States v. Langton, *supra.*

An assignee for the benefit of creditors is concluded from disputing the generality of the assignment and setting up the omission of an item of property therefrom for the purpose of defeating the right to priority of payment of the United States, when the assignment was general in form and given out to be general and so understood and declared by the parties. United States v. Clark, *supra.*

In United States v. Hooe (1805) 7 U. S. 3 Cranch, 73, 2 L. ed. 370, however, it was said that "if a trivial portion of an estate should be left out, for the purpose of evading the act, it would be considered as a fraud upon the law, and the parties would not be enabled to avail themselves of such a contrivance."

So an assignment, though it must be of all the debtor's property, need not, under the Act of Congress of March 3, 1797, be for the benefit of all his creditors. United States v. Mott (1822) 1 Paine, C. C. 186.

And the rule would undoubtedly be the same under section 3466 of the Revised Statutes as the language of the Act of March 3, 1797, "a voluntary assignment thereof" is there reproduced.

But an assignment by a debtor of his property for the benefit of a single creditor providing for the payment of no debts except such as were due him, or upon which he was liable as surety, or for the benefit of one or more creditors to discharge the debts due them, is not such an assignment as will give the United States the right of priority of payment of a debt due it under the Act of Congress of 1799, chap. 128, § 65, providing therefor, where the debtor shall make a voluntary assignment of his property for the benefit of his creditors. Bouchaud v. Dias (1843) 1 N. Y. 201, reversing 10 Paige, 445, 4 L. ed. 1044, as to this point. United States v. McLellan (1868) 3 Sumn. 345.

Unless it was given for the purpose of evading the right of priority given by the statute. United States v. McLellan, *supra.*

And U. S. Rev. Stat. § 3466, providing for the priority of payment of an indebtedness due the United States, is only applicable to cases where the debtor's estate, either by his death, legal bankruptcy or insolvency has passed into the hands of an administrator or assignee for the benefit of creditors or where the debtor himself has voluntarily made such disposition of it, and not to a conveyance, assignment or transfer, by whatever means accomplished, to a real or pretended creditor or creditors in payment or satisfaction of a debt or claim. Bush v. United States (1882) 15 Cent. L. J. 427, 8 Sawy. 322.

But "an assignment may be made, within the statutes, by one or more instruments to one or more persons at different dates, provided that the circumstances warrant the conclusion that they are all the result of a pre-existing purpose to assign the insolvent's property for the benefit of his creditors." United States v. Griswold (1881) 8 Fed. Rep. 496.

An insolvent debtor who assigns all his property by different acts cannot thereby, under the pretext that the assignment was partial and not general, defeat the right of the United States to priority of payment of a claim due it. United States v. Bank of United States (1844) 8 Rob. (La.) 283.

And when one who has ceased to do business and is clearly insolvent, with the intent to assign his whole estate for the benefit of creditors, first assigns a part for the benefit of one set of creditors and afterwards assigns the residue for the benefit of another set, the two assignments will be regarded as one transaction, constituting an assignment of all the debtor's property which will entitle the United States to priority of payment of a debt due it under the acts of congress providing therefor. Downing v. Kintzing (1816) 2 Serg. & R. 326; Marshall v. Barclay (1828) 1 Paige, 159, 2 L. ed. 600.

So judgments confessed by a person indebted to the United States, which, when docketed, operate to transfer to the creditors therein substantially all the property owned by him after satisfying specific liens thereon, may constitute a voluntary assignment within the meaning of the statute giving priority of payment to the United States. United States v. Griswold (1881) 8 Fed. Rep. 496.

But the confession of judgments by a debtor unable to pay his debts, to sundry persons, for an aggregate sum, which, together with his indebtedness to the United States and sundry mortgage creditors, far exceeded the value of his assets, most of which were based upon fictitious claims and made with intent to hinder, delay and defraud the United States in the collection of its claim, does not amount to an assignment, within the purview of the act of congress giving priority to the United States. Bush v. United States (1882) 15 Cent. L. J. 427, 8 Sawy. 322.

So the right of priority of the United States attaches in case of an assignment by an agent of the United States in England who is indebted to it

trust moneys into other property has its basis in the right of property, and never was based upon the theory of preference by reason of unlawful conversion, and that the guiding principle is that a trustee cannot assert a title of his own to trust property.

In *Peters* v. *Bain*, 133 U. S. 670, 671, 693, 33 L. ed. 696, 704, the court held that before the bank could claim a lien upon, or preferential payment out of, any particular piece of property, the funds of the bank must be distinctly and directly traced into that particular piece of property.

See also *Commercial Nat. Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Philadelphia Nat. Bank* v. *Dowd*, 2 L. R. A. 480, 88 Fed. Rep. 172; *Multnomah County* v. *Oregon Nat. Bank*, 61 Fed. Rep. 912; *Illinois Trust & Sav. Bank of Chicago* v. *First Nat. Bank of Buffalo*, 15 Fed. Rep. 858; *Phelan* v. *Iron Mountain Bank*, 4 Dill. 88.

In *Shields* v. *Thomas*, 71 Miss. 260, the court says, "The principle of following trust funds in equity is fully discussed in *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696, and *Central Nat. Bank of Baltimore* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693. The rule announced in these cases, as we understand it, is that trust property will be followed by a court of equity through all its

where the property of the debtor is within the jurisdiction of our courts. Harrison v. Sterry (1807) Bee, 246.

And an assignment made by a debtor when his property was about to be levied upon under judgments in favor of a creditor, in trust, first for the debt of such creditor and then for a debt to the United States, is a voluntary assignment which will entitle the United States to preference under the Act of Congress of March 3, 1797, but it is fraudulent and void as against the United States though the creditor gave up his intention of levying in consideration thereof, and the property could be sold thereunder for the benefit of the United States. United States v. Mott (1822) 1 Paine, C. C. 188.

6. Sufficiency of attachment to confer priority.

There are two classes of attachment in the United States: In the one the effect is to vest the property in trustees for the benefit of all the debtor's creditors; in the other class the attachment is for the exclusive benefit of the attaching creditor, and the provision of the United States statutes giving priority in case of the attachment of the estate and effects of an absconding, concealed or absent debtor applies only to the former class. United States v. Wilkinson (1878) 5 Dill. 275.

Thus the right of the United States to priority of payment of debts due it given by U. S. Rev. Stat. § 3466, when the estate and effects of an absconding, concealed or absent debtor are attached by process of law, does not attach where the estate and effects of the debtor are attached, as under the Missouri laws, for the exclusive benefit of the attaching creditor. *Ibid.*

And the seizure of the property of a person indebted to the United States under attachments and executions on private claims does not constitute such an insolvency as will give priority of payment to the United States when it does not appear that the property was attached as that of an absconding, concealed or absent debtor, or that the debtor had made a voluntary assignment of his property for the benefit of creditors or committed any act of bankruptcy, though the property seized was insufficient to pay the claims exhibited, and the debtor was unable to pay his debts. Prince v. Bartlett (1814) 12 U. S. 8 Cranch, 431, 3 L. ed. 614.

So a foreign attachment under the Massachusetts statute establishing the trustee process which does not require that the debtor whose goods or effects are attached should have absconded, concealed himself, or should be absent, its principal office being to attach credits or effects which cannot be reached by ordinary process, is not an attachment of the effects of an absconding, concealed, or absent debtor within the provisions of the Act of Congress of 1797, chap. 74, § 5, providing for priority of payment to the United States in such case. Watkins v. Otis (1824) 2 Pick. 88.

And an attachment which is taken out and afterwards withdrawn by consent of creditors without any proceedings under it is not such an attachment as will give the United States priority of payment of a debt due it out of the assets of the debtor under the act of congress. McLean v. Rankin (1808) 3 Johns. 369.

e. When and to what it attaches.

The right of the United States to priority of payment of debts due it attaches at the time of the death of the debtor or the completion of the act of bankruptcy or insolvency, and extends to the whole fund available for the payment of debts.

Thus the right takes effect from the date of a judgment confessed by a person indebted to the United States, which when docketed, will operate to transfer to the creditors therein named substantially all the property owned by him after satisfying specific liens, thus being, in effect, an assignment for the benefit of creditors. United States v. Griswold (1881) 8 Fed. Rep. 496.

And it attaches at the instant of the execution of a deed of conveyance by the debtor of all the property in his possession to trustees for the payment of his debts, and is not defeated by a subsequent decision in his favor in an action for the recovery of property which had never been in his possession, upon an unascertained claim of his wife. United States v. The Marshal of Dist. of North Carolina (1833) 2 Brock. 488.

So the priority of the United States in case of an assignment by one indebted to it to a syndic, attaches by virtue of the assignment and notice to the syndic of its claims. Field v. United States (1835) 34 U. S. 9 Pet. 182, 9 L. ed. 94.

And the surety on the bond of a paymaster becomes a debtor of the United States within the provisions of the Act of Congress of 1797 when the paymaster fails to account as required by law and not from the time of the striking of a balance on the treasury books. United States v. Clark (1826) 1 Paine, C. C. 629.

So the right of the United States to priority of payment of a debt due under the act of congress providing therefor in case of insolvency extends to the whole of the property of the insolvent until the debt is paid. Hunter v. United States (1831) 30 U. S. 5 Pet. 173, 8 L. ed. 86.

And where the debtor commits an act of bankruptcy it extends to all his estate which comes to the hands of his assignee. United States v. Barnes (1884) 31 Fed. Rep. 705.

And the fact that the fund arose and the trustee thereof was appointed under the bankruptcy act does not affect the right of the United States to pursue both and assert its right to priority of payment in the circuit court where it had jurisdiction of the subject-matter. Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513.

So where a debtor makes an assignment of all the property in his possession for the benefit of creditors and subsequently recovers possession of other

transmutations and forms, and that, whether its identity and individuality is preserved, or is merged in a mass of which it forms a part; but that the right rests upon the equitable title of the beneficiary, who, seeking to recover specific property or to fix a charge upon a mass, must trace his estate, and show that the specific thing claimed is, in equity, his property, or that his estate has gone into and remains in the mass he seeks to charge," citing authorities.

In *Eureka Dist. Twp.* v. *Farmer's Bank of Fontanelle*, 88 Iowa, 194, the court says: "We do not think it is necessary to trace the deposit into any specific property in the hands of the assignee in order to establish a trust, but it should be shown presumptively, at least, that the estate in his hands has been augmented by the trust fund."

See also *Phillips* v. *Overfield*, 100 Mo. 466.

A court of equity regards no debt as superior in sacredness to any other.

That one has fraudulently used trust estate gives to the *cestui que trust* no general lien upon the property of the trustees.

McAfee v. *Bland* (Ky.) 11 S. W. Rep. 439; *Brocchus* v. *Morgan* (Tenn.) 5 Cent. L. J. 53; *Akin* v. *Jones*, 25 L. R. A. 598, 93 Tenn. 353; *St. Louis Brewing Asso.* v. *Austin*, 100 Ala. 313; *Parker* v. *Jones*, 67 Ala. 284; *Slater* v. *Oriental Mills*, 18 R. I. —; *Neely* v. *Rood*,

property which had never previously been in his possession upon an unascertained claim of his wife, the right of the United States to priority of payment of a debt due it, which attached by virtue of the assignment, extends also to such subsequently acquired property. United States v. The Marshal of Dist. of North Carolina (1833) 2 Brock. 488.

And when a debt due from an assignee for the benefit of creditors to the assignor growing out of a previous partnership between them is omitted from the assignment and the assignee subsequently gives his bond for the debt, the amount of the bond may be recovered by the United States in an action of assumpsit against the assignee under the act of congress charging the assignee with the duty of first paying an indebtedness due the United States out of the assets of the insolvent if the bond was given for moneys in the hands of the assignee at the time of the assignment, but not if it grew out of unsettled partnership concerns. United States v. Clark (1826) 1 Paine, C. C. 629.

The expenses of the recovery of a sum of money due an insolvent estate by the assignee in insolvency, however, are to be first deducted from the gross amount recovered, and the right of the United States to priority of payment of an indebtedness due it from the estate attaches to the balance remaining after such payment only. United States v. Hunter (1828) 5 Mason, 229.

And taxes and funeral charges are not debts due from the deceased over which an indebtedness due the United States has priority in the distribution of the estate but charges imposed by law which the administrator is bound to discharge in the performance of his trust, before satisfying a claim of the United States. United States v. Eggleston (1877) 4 Sawy. 199.

But the costs and expenses of defending an action brought by the United States to establish its right of priority of payment out of the assets of a deceased person, of a prima facie just claim which should have been allowed, are not a part of the necessary expenses of administration which should be paid before paying the claim of the United States. *Ibid.*

And the expenses of the last sickness of a deceased person is a debt due from the deceased over which a claim due to the United States is entitled to priority of payment. *Ibid.*

Nor does the Act of Congress of March 3, 1797, giving the United States the right of priority of payment of an indebtedness due it in the distribution of the estate of a deceased person over all debts due from him, entitle it to receive its debt from the administrator prior to his payment of the allowance to the widow made by the judge of probate under Maine Laws, vol. 1, chap. 51, § 30, providing that in the settlement of estates, whether solvent or insolvent, the widow shall be entitled to her wearing apparel and so much of the personal estate as the judge of probate shall determine to be necessary, regard being had to the family under her care. Postmaster General v. Robbins (1829) 1 Ware, 165.

So the preference of the United States as a creditor of a partnership applies to the separate and individual estates of the bankrupt partners. Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513.

And an indebtedness due the United States from a firm is entitled to priority of payment out of the separate estates of the partners and will not be postponed to claims of individual creditors, the rule that the joint estate must be applied to pay joint debts and the separate estate to pay individual debts applying only when both estates are before the court for distribution. United States v. Lewis (1874) 13 Nat. Bankr. Reg. 33.

And an indebtedness due the United States from a firm, some of the members of which are residents of a foreign country, is entitled, upon the resident partners becoming bankrupt, to priority of payment out of their separate estate. *Ibid.*

Nor is the United States under any obligation to pursue the partnership effects of a firm indebted to it, which is located in London, a part of its members being residents of Great Britain and a part of the United States, where the American members have all been adjudicated bankrupts, but may proceed against the American members and claim its right of priority of payment out of their separate estates. Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513.

Likewise a claim of the United States against a bankrupt firm for a forfeiture of the value of goods incurred by the entry of goods at the custom house upon fraudulent under-valuations is joint and several, upon which the United States is entitled, under U. S. Rev. Stat. §§ 3466, 5501, to priority of payment, upon proof of claim showing the facts, out of the proceeds of the separate estates of the bankrupt partners as well as out of those of the joint estate. *Re* Vetterlein (1884) 20 Fed. Rep. 109.

And the appropriation by the executors of a deceased partner who died insolvent and indebted to the United States, of partnership property to the payment of the expenses of administration and of taxes on his property, does not affect the right of the United States to priority of payment, or the lien of the judgment obtained on such indebtedness, or prevent it from enforcing them against the real estate of the deceased partner. United States v. Duncan (1850) 4 McLean, 607, 12 Ill. 523.

So the United States is entitled to priority of payment of a judgment obtained by it against three persons, two of whom had been partners, for the individual debt of one of them, the other two being his sureties, out of the partnership as well as the individual assets of the partners over all creditors whether partnership or individual. *Re* Strassburger (1877) 4 Woods, C. C. 557.

And in United States v. Shelton (1821) 1 Brock. 517, in which a partnership made an assignment of its property for the benefit of creditors and one

54 Mich. 184; *Sherwood* v. *Milford State Bank*, 94 Mich. 78; *Union Nat. Bank of Chicago* v. *Goetz*, 138 Ill. 127; *Wetherell* v. *O'Brien*, 140 Ill. 146; *Mutual Acc. Asso. of the Northwest* v. *Jacobs*, 16 L. R. A. 516, 141 Ill. 261; *Thompson's App.* 22 Pa. 16; *Columbian Bank's Estate*, 147 Pa. 422; *Hopkins' App.* (Pa.) 8 Cent. Rep. 860; *People's Bank's App.* 93 Pa. 107, 39 Am. Rep. 728; *Freiberg* v. *Stoddard*, 161 Pa. 259; *Third Nat. Bank of St. Paul* v. *Stillwater Gas Co.* 36 Minn. 75; *Re Seven Corners' Bank* (Minn.) 59 N. W. Rep. 634; *Ferchen* v. *Arndt*, 26 Or. 121; *Englar* v. *Offut*, 70 Md. 78; *Lathrop* v. *Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Goodell* v. *Buck*, 67 Me. 514; *Portland & H. S. B. Co.* v. *Locke*, 73 Me. 370; *Dyer* v. *Jacoway*, 42 Ark. 182; *First Nat. Bank of Richmond* v. *Davis*, 114 N. C. 343.

The United States is not entitled to preference as a prerogative, nor entitled to any preference beyond what is expressly given by statute.

See *Middlesex County Board of Chosen Freeholders* v. *State Bank at New Brunswick*, 29 N. J. Eq. 268, 30 N. J. Eq. 311; *State* v. *Harris*, 2 Bail. L. 598.

The king's priority was not a lien. The king's right existed only while the property

of the members of the firm also assigned for the benefit of his private creditors, the court on application by the United States for priority of payment of a debt due it, from the firm, without deciding whether the act of insolvency of the firm subjects the private property of the individual partners to the United States' right of priority, directed the trustees under the partnership deed to pay the debts due the United States, with liberty to apply to the court should the fund prove insufficient.

But the priority of the United States in the payment of an indebtedness due it out of the assets of an insolvent given by the Act of Congress of March 3, 1797, does not authorise it to take the property of a partner from partnership effects to pay a separate debt due by such partner to the United States, where the partnership effects are not sufficient to satisfy the creditors of the partnership. United States v. Hack (1834) 33 U. S. 8 Pet. 271, 8 L. ed. 941; United States v. Duncan, *supra*.

And the United States is not entitled to priority of payment of an indebtedness due it from a member of a partnership out of the partnership assets over joint creditors upon an assignment of all the joint and several property of the partners for the benefit of creditors. United States v. Evans (1836) Crabbe, 60.

But when property has ceased to be partnership property and become the separate property of the debtor partner, the rule is different, the test being whether the property belonged to the firm or the individual. United States v. Duncan, *supra*.

f. Nature and extent.

It has been the uniform construction of the acts of congress providing for priority of payment of debts due the United States that whether in case of insolvency, death or assignment, the property of the debtor passes to the assignee, executor or administrator, the priority of the United States operating not to prevent the transmission of the property but giving a right of preference in payment out of the proceeds. Brent v. Bank of Washington (1836) 35 U. S. 10 Pet. 596, 9 L. ed. 547.

The priority given to the United States is a mere right of prior payment out of the general funds of the debtor in the hands of assignees. It is not a right which supersedes or overrules the assignment of the debtor as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of the assignment to the assignees. Conard v. Atlantic Ins. Co. of New York (1828) 26 U. S. 1 Pet. 386, 7 L. ed. 189.

And where, before the right of preference of the United States accrues under the act of congress providing therefor, the debtor makes a bona fide conveyance, in the ordinary course of business, of his estate to a third person, it is divested out of the debtor and cannot be subjected to the claim of the United States. Thelusson v. Smith (1817) 15 U. S. 2 Wheat. 396, 4 L. ed. 271; Brent v. Bank of Washington, *supra*.

And the rule is the same where the debtor mortgages it to secure a debt before the right of the United States attaches. Thelusson v. Smith, *supra*.

Or where it is seised under execution. *Ibid.*

Thus a mortgage of a part of his property made by a collector of revenue to his surety on his official bond to indemnify him against his responsibility as such surety, and to secure him against liability on existing and future indorsements for the mortgagor, is valid and effectual as against the claim of the United States of a right of prior payment of an indebtedness due it though the collector was unable to pay all his debts at the time when the mortgage was given and the mortgagee knew at that time that the mortgagor was largely indebted to the United States. United States v. Hooe (1805) 7 U. S. 3 Cranch, 73, 2 L. ed. 370.

And property of a debtor to the United States, which has passed to an assignee for the benefit of creditors by a bona fide assignment, is not subject to levy under execution issued on a judgment obtained on the indebtedness due the United States. Conard v. Atlantic Ins. Co. of New York (1828) 26 U. S. 1 Pet. 386, 7 L. ed. 189.

Nor is the assignment of a chose in action a mere contract rather than a transfer, but an equitable assignment which will defeat the right of the United States to priority of payment of an indebtedness due it out of the avails thereof, upon the subsequent insolvency of the assignor. Harrison v. Sterry (1809) 9 U. S. 5 Cranch, 289, 3 L. ed. 104.

And an assignment by one partner to whom the whole commercial business of the partnership was committed and who was the only partner residing in the country, made in the name of the firm, of partnership effects and credits, is valid and constitutes such a transfer of title as will prevent the right of priority of the United States of payment of an indebtedness due it, from attaching upon the subsequent insolvency of the firm. *Ibid.*

And a loan on *respondentia* accompanied by an agreement that the outward and homeward cargoes should be collateral security for the loan, and that the outward bill of lading should be assigned to the lender for that purpose, and that the homeward should be to order with a blank indorsement, vests an equitable interest in the lender which cannot be defeated by a claim of priority of payment interposed by the United States. Atlantic Ins. Co. v. Conard (1827) 4 Wash. C. C. 662, affirmed Conard v. Atlantic Ins. Co. of New York (1828) 26 U. S. 1 Pet. 386, 7 L. ed. 189.

But an assignment of property and choses in action made by a person indebted to the United States immediately before and in contemplation of insolvency afterwards occurring, is not such a transfer as will defeat the right of the United States to priority of payment out of the avails of the property and choses in action assigned. Harrison v. Sterry, *supra*.

So the right of priority of the United States does

remained in the king's debtor, and the right itself was lost upon any alienation of the property.

2 Tidd, Pr. § 1053; *Giles* v. *Grover*, 9 Bing. 128.

If the state has a preference in the nature of the crown's prerogative, that right of preference itself is therefore lost by any alienation of the property.

State v. *Bank of Maryland*, 6 Gill & J. 226, 26 Am. Dec. 561.

An assignee for benefit of creditors does not take subject to priorities and preferences.

2 Tidd, Pr. 1053; *State* v. *Bank of Maryland, supra; King* v. *Watson*, 3 Price, 6.

By assignment for benefit of creditors, the title passed from the debtor.

Burrill, Assignm. § 6; Laws 1890, § 1, p. 84, *Form of Conveyance.*

Groesbeck, Ch. J., delivered the opinion of the court:

These actions were brought in the district court for Laramie county, and by that court were reserved to this court for decision upon certain important and difficult questions arising in them. They were consolidated in the trial court for the purposes of argument and

not constitute a lien upon the property of the debtor in the hands of his assignee or representative, it merely gives a right of prior payment out of the funds in his hands. Forsyth v. Clark (1829) 3 Wend. 637; Conard v. Atlantic Ins. Co. of New York (1828) 26 U. S. 1 Pet. 439, 7 L. ed. 212; Otis v. Warren (1819) 16 Mass. 53.

And it does not supersede or overreach prior liens on such property.

Thus the right of priority of the United States in the payment of a debt due it from an insolvent or deceased person's estate given by the Act of Congress of 1797, section 5, does not attach as against the holder of a mortgage, whether title be regarded as in the mortgagor or mortgagee. United States v. Hawkins (1826) 4 Mart. N. S. 317.

And where a mortgagor in good faith procures the satisfaction of his mortgages without payment upon the understanding that he is to give new mortgages, but dies before doing so, after which his heirs give them, they should be given the same effect as the old securities, subject to intervening rights, and the United States will not be permitted to come in either for priority of payment of duties secured by bond due from the deceased or to share ratably with the mortgagees. United States v. Crookshank (1832) 1 Edw. Ch. 233, 6 L. ed. 121.

And in Field v. United States (1835) 34 U. S. 9 Pet. 182, 9 L. ed. 94, in considering the right of the United States to priority of payment under the Duty Collection Act of 1799, chap. 128, the court said there is no doubt that the mortgages upon particular estates sold must be first paid out of the proceeds of the sales of those estates. But if there be any deficiency of the proceeds of any particular estate, to pay the mortgages thereon, the mortgagees thereof cannot come in upon the funds and proceeds of the sales of the other estates except as general creditors.

So the preference in the payment of debts due it to which the United States is entitled over other creditors, will not attach as against persons from whom the debtor borrowed money on *respondentia* upon goods laden on board a vessel and to whom he indorsed the bill of lading as security for the debts, before the right of preference had accrued by the commission of an act of insolvency. Conard v. Atlantic Ins. Co. of New York (1828) 26 U. S. 1 Pet. 386, 7 L. ed. 189; United States v. Delaware Ins. Co. (1823) 4 Wash. C. C. 418.

Unless it appears that the right of the *respondentia* holders is reduced to a mere general lien. Conard v. Atlantic Ins. Co. of New York, *supra*.

And in Brent v. Bank of Washington (1836) 35 U. S. 10 Pet. 596, 9 L. ed. 547, it was said to be a well-settled rule that the priority of payment given the United States by the Act of Congress of March 3, 1797, does not attach to property legally transferred to a creditor on *respondentia*, though he may hold it subject to account, equity or trust, for the borrower.

And an assignment made by the owner of goods consigned to a factor indorsed upon the bill of lading, of the within bill of lading, and the goods, etc., to be procured thereon and thereby, and any return cargo to be obtained, etc., by the proceeds thereof, and all the return cargo to be taken on board on the assignor's account, as collateral security for the payment of a *respondentia* bond, is not a mere assignment of the bill of lading itself, operating as an equitable assignment of the interest of the owner in it, but an assignment of the goods contained in it, which will defeat a subsequent levy on the goods under execution issued on a judgment against the owner, in favor of the United States, upon a claim for the payment of which the United States claims priority under the Act of Congress of 1799, chap. 128, the owner having become insolvent. Conard v. Atlantic Ins Co. of New York (1828) 26 U. S. 1 Pet. 386, 7 L. ed. 189, affirming (1827) 4 Wash. C. C. 662.

And the doctrine of Conard v. Atlantic Ins. Co. of New York, *supra*, was followed and reaffirmed in Conard v. Nicoll (1830) 29 U. S. 4 Pet. 291, 7 L. ed. 862.

A loan on *respondentia* "upon the goods to the amount of the loan, laden or to be laden on board the vessel, or which may be laden on board at any time during the voyage," gives the lender a mere lien on the homeward-bound goods, however, which cannot be opposed to a claim of priority of payment interposed by the United States. Atlantic Ins. Co. v. Conard (1827) 4 Wash. C. C. 662.

So workmen and materialmen having a lien on a vessel which has been taken and sold under execution issued on a judgment in favor of the United States, are entitled to payment out of the proceeds of sale in preference to the United States. Phillips v. The Thomas Scattergood (1828) Gilp. 1.

And a sale of steamers by creditors of a steamship company under execution issued out of a state court will not be enjoined by a federal court, on motion of the United States, on the ground that it had liens on the steamers under chattel mortgages for advances made to build them, a sale under the mortgages requiring a prior notice of six months, the right of the execution creditors being superior to those of the government so far at least as to allow them to sell, subject to the lien of the government. United States v. Collins (1856) 4 Blatchf. 142.

Nor has the United States any lien for a penalty for violation of the Act of Congress of July 7, 1838, to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, which will overreach a claim of materialmen who have acquired title to the vessel, no forfeiture of the boat being declared and no express lien given for the penalty. United States v. The Steamboat Laurel (1852) Newb. Adm. 269.

Neither does the Act of Congress of March 2, 1799, give a right of priority of payment out of real estate or the proceeds of real estate belonging to or vested in the heirs of the debtor. United States v. Crookshank (1832) 1 Edw. Ch. 233, 6 L. ed. 121.

determination, and are so considered here, as they present substantially the same questions. The relief sought is of an equitable nature, to impress a trust in favor of the state of Wyoming and the county of Laramie, to the amount of certain public funds by the respective treasurers of the state and county deposited in the banking house of Thomas A. Kent, an insolvent debtor, at Cheyenne, in this state, upon the estate of such insolvent, in the hands of the defendant, as assignee. The court below entered findings of fact in each case, which disclose the following important facts: The assignor, Thomas A. Kent, was engaged in a general banking business prior to his assignment. While doing business as a banker, he received deposits from the treasurer of each of the plaintiffs, all of which were placed to the credit of such treasurer, as treasurer, and which were from time to time checked upon. At the time of the assignment, there was a balance due upon the account with the treasurer of the state of Wyoming, in the sum of $56,454.70, and a balance due to the treasurer of the county of Laramie, in the sum of $16,153.98. The balance in favor of the state treasurer was funds belonging to the state of Wyoming, and the balance in favor of the treasurer of Laramie county was the property

Nor does the right of the United States to priority of payment given by the Act of Congress of March 3, 1797, attach so as to authorize the appropriation of stock in a bank owned by a deceased debtor to the satisfaction of a claim of the United States as against an indebtedness to the bank where the charter of the bank gives it a lien on the stock held by a debtor for the payment of the debts due it. Brent v. Bank of Washington (1836) 35 U. S. 10 Pet. 596, 9 L. ed. 547.

So the United States has no priority or privilege with respect to debts due it over debts due to private persons which will entitle it to prior satisfaction out of property attached before other attaching creditors whose attachments are of earlier date. United States v. Canal Bank (1844) 3 Story, C. C. 79.

And the lien acquired by an attachment issued against an insolvent debtor at the suit of a private creditor which is in the nature of an execution, is not defeated or displaced by virtue of the Act of Congress of March 3, 1797, by a subsequent attachment issued at the suit of the United States and laid upon the same property as the former attachment. Beaston v. Farmers' Bank of Delaware (1838) 37 U. S. 12 Pet. 102, 9 L. ed. 1017.

But the priority given to the United States by the Act of Congress of March 2, 1799, in the payment of debts due upon custom-house bonds out of the estates of insolvents attaches as against and supersedes a foreign attachment laid on the property of the insolvent, prior to the insolvency, and must be first paid out of the funds attached in the hands of the garnishee, the lien of the attachment being of a special nature liable to be defeated. Willing v. Bleeker (1816) 2 Serg. & R. 221.

And in South Carolina a private creditor of an insolvent person indebted to the United States does not, by the service of an attachment, acquire a prior lien upon the effects of the debtor which cannot be devested or impaired by the operation of the Act of Congress of March 3, 1797. United States v. Clason (1806) 2 Brev. 118.

So a judgment and execution against an insolvent debtor is entitled to priority of payment out of his assets in the hands of his assignee for the benefit of creditors over a judgment against him in favor of the United States for duties subsequently rendered, and a mortgage subsequently executed by him. United States v. Sheriff of Charleston Dist. (1803) Bee, 196; Wilcocks v. Wain (1823) 10 Serg. & R. 380.

And the taking out of a *fieri facias* and levying it on the lands of a judgment debtor and condemning them by an inquest are sufficient without a *scire facias* to keep the judgment upon which it was issued alive and preserve its lien on the real estate so as to prevent a judgment subsequently rendered against the debtor in favor of the United States from coming in and taking priority over it. United States v. Mechanics' Bank of Philadelphia City & County (1829) Gilp. 51.

With reference to ordinary judgments without execution it was held in the early case of Thelusson v. Smith (1817) 15 U. S. 2 Wheat. 396, 4 L. ed. 271, affirming (1815) 1 Pet. C. C. 195, that the right of priority of payment of the United States of a debt due it in case of insolvency of the debtor, takes precedence over and cuts out a prior judgment.

But in Conard v. Atlantic Ins. Co. of New York (1828) 26 U. S. 1 Pet. 386, 7 L. ed. 189; Thelusson v. Smith, 15 U. S. 2 Wheat. 396, 14 L. ed. 271, was limited and explained, the court saying that that case turned upon its own particular circumstances, that it did not decide that the priority of the United States cut out the lien of the particular creditor and that the real ground of the decision was that the judgment creditor had never perfected his title by an execution and levy on the estate and had acquired no title on the proceeds as his property, and that, if the proceeds were to be deemed general funds of the debtor, the priority of the United States had attached against all other creditors and that, a mere potential lien on land did not carry a legal title to the proceeds of a sale made under an adverse execution.

And Johnson, J. in a concurring opinion in Conard v. Atlantic Ins. Co. of New York, *supra*, said that it would be vain to endeavor to reconcile the decision with that of Thelusson v. Smith, *supra*, disapproving of that decision, and claiming that it was thereby overruled.

And in the subsequent case of Brent v. Bank of Washington (1836) 35 U. S. 10 Pet. 596, 9 L. ed. 547, it was stated that it had never been decided that the right of the United States to priority of payment of debts due it affects any lien, general or specific, existing when the event took place which gave it a claim of priority.

And that a judgment in favor of the United States is not entitled to priority of payment out of the estate of an insolvent debtor over an earlier judgment against the debtor which existed and was a lien before the debtor became insolvent, was held in Cottrell v. Pierson (1881) 2 McCrary, 390.

A claim of the United States for an unpaid tax on distilled spirits, however, is entitled to priority of payment out of the proceeds of a sheriff's sale under execution, on a judgment in favor of a third person, of property used in the distillery and in distilling over a claim of the landlord of the distiller for rent, under the Act of Congress of July 20, 1868 (15 Stat. at L. 125, § 1) making such tax a first lien upon the spirits distilled, and the distillery and the stills, vessels, fixtures and tools therein. Dungan's App. (1871) 68 Pa. 204, 8 Am. Rep. 169.

g. Marshaling assets.

The right of the United States to priority of payment of debts due it is not affected by the rule that a party having a lien upon two funds while another has a lien upon but one of them will be obliged to resort, in the first instance, to the one upon which the other has no lien. United States v. Duncan

of said county, and these moneys had been received by said Kent with knowledge of such ownership. Neither of the treasurers had authority to deposit any of the funds with said Kent, as banker, unless such authority is to be presumed by reason of the fact that, for at least 18 years last past, the treasurers, both of the territory and the state, with the knowledge of the people and of the officials of the state, had been accustomed to deposit the funds of the territory and of the state in the manner that the funds in question were deposited, and that in like manner, for the same period of time, the treasurers of Laramie county, with the knowledge of the people and officials of the county, had likewise deposited the county funds in the custody of such treasurers, as such, with bankers, in the same manner as was done in the present instance. The moneys belonging to each of the plaintiffs, and all other moneys of said Kent, as banker, were paid out to depositors, on checks, in the ordinary course of business, excepting that there remained in the vaults at the bank, at the time of the assignment, the sum of $2,058.72 in cash, and also on deposit in other banks, the sum of $1,684.82. None of the real and personal property assigned by the said Kent to the defendant, as assignee, was either

(1850) 4 McLean, 607, 12 Ill. 523; United States v. Mott (1822) 1 Paine, C. C. 188.

Or by the New York rule that lands consisting of different parcels subject to a general incumbrance are to be charged in the inverse order of their alienation. United States v. Duncan, *supra*.

Thus judgments in favor of the United States, binding all the lands of a deceased insolvent debtor, made perfect by a levy, prior in point of time, to judgments in favor of individuals which had also been made perfect by the issue of execution, and which were binding upon lands in a particular county only, will not be thrown upon the lands upon which the judgments of the private creditors were not binding and be required to be paid out of the proceeds of the sale thereof leaving the other land for the satisfaction of the judgments of the private creditors, as the United States had the older lien. *Ibid.*

And the United States having a judgment against three persons, two of whom had been partners for the individual debt of one of them, and against the others as sureties, cannot be required to pursue its remedy and assert its right of priority first against the surety who was not a member of the firm, before coming on the partnership assets. *Re* Strassburger (1877) 4 Woods, C. C. 557.

Nor can the United States be required to exhaust collaterals held by it before claiming priority of payment out of a bankrupt estate. Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513, affirming United States v. Lewis (1874) 13 Nat. Bankr. Reg. 33.

And a decree in favor of the United States against assigned property will not be suspended on bill filed by the United States to obtain its right of priority against a creditor and sureties on the debtor's bond who were joint assignees of the debtor's estate until it should have proceeded to execution upon a judgment against the sureties and no decree will be made in favor of the creditor, the sureties, though the assignment had been made for their benefit and at their request, and they, by becoming parties to it had covenanted for the execution of its trusts. United States v. Mott (1822) 1 Paine, C. C. 188.

But the question whether such relief would have been afforded the creditor had the sureties been properly before the court for that purpose, was not decided. *Ibid.*

h. *Liability of assignee or representative.*

The statutes providing for priority of payment of debts due the United States operates upon the doing of an act of insolvency by the debtor, directly upon the assignee by requiring him to first pay the claim of the United States and making him personally liable therefor if he does not. Bush v. United States (1880) 15 Cent. L. J. 427, 8 Sawy. 322.

The assignee becomes a trustee for the United States and is bound to pay its debts first out of the proceeds of such estate. And when he has notice of such debt he cannot escape personal liability for its amount to the extent of the value of the assets that come to his hands, if he fails to provide for it before making distribution to other creditors. United States v. Barnes (1887) 31 Fed. Rep. 705; United States v. Duncan (1850) 4 McLean, 607, 12 Ill. 523.

Claims of the United States against the estate of a deceased person must, if known to the administrator, be paid out of the funds applicable thereto pursuant to U. S. Rev. Stat. § 3466, without any allowance or classification thereof by the probate court though the statutes of the state have made no provision therefor. United States v. Hahn (1889) 37 Mo. App. 580.

And it is the duty of a syndic to whom an insolvent debtor has assigned his property for the benefit of creditors who owed debts to the United States in the payment of which it was entitled to priority under the Duty Collection Act of 1799, chap. 128, to make known such debts in his tableau of distribution as having such priority, where they had been brought to his notice, though the United States was not a party to the proceeding in the parish court. Field v. United States (1835) 34 U. S. 9 Pet. 182, 9 L. ed. 94.

Nor is it necessary that the debt of a surety on a bond to the United States should be ascertained by a judgment against him in order to render his assignee for the benefit of creditors chargeable with its payment, as he would have the right, in an action against him therefor to show any reduction of the debt in the same manner as his assignor might have done in an action against him. United States v. Clark (1826) 1 Paine, C. C. 629.

And where a debt due from an assignee for the benefit of creditors to the assignor, growing out of a previous partnership between them, is omitted from the assignment and the assignee subsequently gives his bond for the debt, the amount of the bond may be recovered by the United States in an action of assumpsit against the assignee under the act of congress charging the assignee with the duty of first paying an indebtedness due the United States out of the assets of the insolvent, if the bond was given for moneys in the hands of the assignee at the time of the assignment, but not if it grew out of unsettled partnership matters. *Ibid.*

And neither the assignee of an insolvent debtor nor his personal representatives can object to the priority of the United States in the payment of a debt due it out of the assets of the debtor upon the grounds that the assignment was fraudulent as against the other creditors of the assignor. Dias v. Bouchaud (1843) 10 Paige, 445, 4 L. ed. 1044.

And the assignee is concluded from disputing the generality of the assignment and setting up the omission of an item of property for the purpose of defeating the right of the United States to priority where the assignment was general in form and given out as such and so understood and declared to be by the parties. United States v. Clark (1826) 1 Paine, C. C. 629.

bought or paid for subsequently to any of the deposits of the public fund by either of the plaintiffs with the said Kent. Loans were made by him, aggregating about $15,000, while the greater part of said public moneys were on deposit in the said bank; but, at the time when each of the said loans was made, said Kent, as banker, had, after deducting the amount of said loans, in cash, a sum largely in excess of the aggregate due to both of the plaintiffs. None of the money of either of the plaintiffs came into the hands of the defendant, unless the moneys remaining in the vaults of the bank, and on deposit with other bankers, are presumed to be moneys of plaintiffs; and the estate that came to his hands has not been increased by said moneys, or their use in paying debts by the insolvent. Upon these findings the court made the following order, reserving the causes for decision to this court: "And the court and the judge thereof do now, after due consideration, believe and find that important and difficult questions arise in this action, which render it both proper and necessary that this cause should be reserved, and sent to the supreme court, for its decision upon such important and difficult questions. And the court and the judge thereof believe and find that the said important and difficult questions

And the judgment of a court though of competent jurisdiction, directing an assignee in bankruptcy to distribute the estate of the bankrupt to specified creditors, cannot be invoked as a defense to an action by the United States against the assignee to recover moneys paid out by him under such judgment based upon the theory that he should have retained them and paid them to the United States as a creditor having a right of priority of payment, where it does not appear that the United States was a party to the proceeding or that the assignee took proper measures to secure its priority. United States v. Barnes (1887) 31 Fed. Rep. 705.

And the United States does not lose its right to proceed against the assignee by omitting to prove its claim in bankruptcy proceedings against the debtor until after the distribution of a part of the assets leaving a portion insufficient to pay its claim, where the assignee had notice thereof. United States v. Barnes, *supra*.

But an administrator is not liable to the United States under U. S. Rev. Stat. § 3466, for assets which he had disbursed in good faith before notice of its claim. United States v. Eggleston (1877) 4 Sawy. 199.

The payment of the debts of an intestate by an administrator disposing of all the assets before notice of a claim in favor of the United States, is not a *devastavit*. United States v. Ricketts (1825) 2 Cranch, C. C. 553.

And where all the property of an intestate has been exhausted in paying debts, which was done without notice of a debt due the United States and entitled to priority as such, the absence of notice should be specially pleaded in an action brought by the United States against the administrator therefor. United States v. Hoar (1821) 2 Mason, 311.

But notice, to bind an assignee for the benefit of creditors, of an indebtedness due to the United States, under the act of congress making the assignee a trustee for the payment thereof, need not be given by the United States and need only be such as is required in ordinary cases of trustees and enough to put a prudent man on inquiry. United States v. Clark (1826) 1 Paine, C. C. 629.

And an assignee of an insolvent debtor indebted to the United States on bonds given for duties and the personal representatives of such assignee who have notice of the several bonds and of the parties thereto, have legal notice of the rights of the sureties in such bonds to substitution to the rights of the United States, including that of priority in case such bonds are not paid out of the funds, as to which a right of preference is given. Dias v. Bouchaud (1843) 10 Paige, 445, 4 L. ed. 1044.

And a statement of an assignor for the benefit of creditors to the assignee at the time of the assignment that he was a surety on a bond to the United States and that he believed the bond was broken, is sufficient notice to charge him with the duty which the law imposed upon him to give a preference to the United States in the distribution of the assignor's estate. United States v. Clark (1826) 1 Paine, C. C. 629.

Neither a syndic nor other representative to whom an insolvent debtor has assigned his property for the benefit of creditors, who has sold the property assigned upon credit, is liable to the United States with respect to an indebtedness of the debtor to the United States in the payment of which it is entitled to priority under the Duty Collection Act of 1799, chap. 128, unless funds have actually come into its hands. Field v. United States (1835) 34 U. S. 9 Pet. 182, 9 L. ed. 94.

And the United States, in an action against an assignee for the benefit of creditors for money had and received under the act of congress, must show that the assignee had, in fact, received money to which it is entitled, or such facts must be proved as to afford a fair and reasonable presumption that money has been received. United States v. Clark, *supra*.

But evidence in an action by the United States against an assignee for the benefit of creditors based upon the act of congress charging the assignee with the duty to first pay an indebtedness to the United States out of the assets coming into his hands, of the sale of property of the estate, is prima facie sufficient to establish the receipt by the assignee of the price thereof, and casts the burden of rebutting the presumption upon the assignee, by proof upon his part. *Ibid.*

And it will be presumed that a solvent administrator indebted to the estate at the time of the issue of letters to him, performed his duty of collecting the claim by transferring the amount to himself as administrator, and it will be regarded as assets in his hands applicable to the payment of a debt due the United States from the estate, under the provisions of the act of congress charging him with the duty to first pay such debt out of the assets in his hands. United States v. Eggleston (1877) 4 Sawy. 199.

The amount recoverable in an action of assumpsit by the United States against an assignee for the benefit of creditors, based upon the act of congress charging the assignee with the duty of first paying an indebtedness due to the United States out of the moneys coming into his hands, is the amount proved to have been received by him, less commission and expenses of the sale of the property when that does not exceed the amount of the debt. United States v. Clark (1826) 1 Paine, C. C. 629.

1. *Subrogation of sureties.*

The same right of priority which belongs to the government attaches, under the acts of congress, to the claim of an individual, who, as surety on a custom-house bond, has paid money to the government. Hunter v. United States (1831) 30 U. S. 5 Pet. 173, 8 L. ed. 86.

And it is immaterial whether the payment was made by the surety before or after the bankruptcy

arising in this action are as follows: First. Do the facts that the treasurer of the plaintiff deposited the public funds of the plaintiff with T. A. Kent, banker, in the manner above found, and with no authority except as above found, and that said Kent, as banker, paid out the sums upon checks of his depositors, in the ordinary course of business,—said depositors being creditors to the amounts of the checks so drawn,—and that said Kent, thereafter, being insolvent, made and executed a general assignment for the benefit of all his creditors, under the Assignment Law of the state of Wyoming, entitle the plaintiff to a lien upon, and a prior payment out of, any of the assets in the hands of the defendant, as assignee for the benefit of the creditors of the said Kent, as against said defendant, as assignee, and as against the general creditors of said assigned estate, said assigned estate being insolvent, to the extent above found? Second. If question number one shall be answered in the affirmative, against which particular assets is the plaintiff entitled to such lien, and out of which particular assets is the plaintiff entitled to such prior payment?"

After the submission of the questions to this court, a reargument was ordered upon the question of the priority or preference of

of the principal. Mott v. Maris (1808) 2 Wash. C. C. 196.

And the sureties are entitled to priority of payment out of the bankrupt principal's estate, both of principal and interest. Champneys v. Lyle (1808) 1 Binn. 327.

Such preference given by the Act of March 1, 1799, to sureties on a custom-house bond, who pay the same to the United States, is not taken away, and that act is not repealed by the bankrupt act, providing for *pro rata* payment of all creditors. Mott v. Maris and Champneys v. Lyle, *supra*.

And the right of the United States to priority of payment under the act of congress for the regulation of the collection of duties attaches, not only as against the debtor and his assignee for the benefit of creditors, but also as against the assignee in bankruptcy of such assignee who had mixed the funds arising from the assignment with his own and afterwards became a bankrupt, but in such case the rights of a surety of the original debtor on a custom-house bond, who had paid the indebtedness to the United States, are confined to the estate and effects of his insolvent principal so that he cannot claim priority of payment from the assignee in bankruptcy where no part of the estate of his principal ever comes to the hands of such assignee. Pollock v. Pratt (1811) 2 Wash. C. C. 490.

But a surety who has paid money for a bankrupt in discharge of a bond for duties has not the right of the United States to proceed against the person of the bankrupt, but only against his effects. Kerr v. Hamilton (1809) 1 Cranch, C. C. 546.

And a surety on a custom-house bond who has paid the debt due to the United States is merely entitled, where the principal is afterwards discharged in bankruptcy, to preference out of the estate of the bankrupt, and cannot resort to an action against him for the recovery of the amount paid. Reed v. Emory (1815) 1 Serg. & R. 339.

The preference given to a surety on a bond for duties is only a right to be first satisfied out of the effects of the insolvent in the hands of his assignees, and not a right to maintain an action thereon against the insolvent himself, notwithstanding his discharge, and the discharge may be set up in defense of such action, though a debt due to the United States for duties is not barred by such a discharge. Aikin v. Dunlap (1819) 16 Johns. 77.

And a surety on a custom-house bond, who has paid it, is not entitled, under the Act of Congress of 1799 providing for the subrogation of the surety to the rights of the United States in case of payment by him, to be subrogated to such rights as against a co-surety so as to give his claim for contribution preference over other creditors, and he is not entitled to such subrogation on general principles of equity. Bank of South Carolina v. Adger (1835) 2 Hill, Eq. 208.

And a purchaser of goods sold by the collector of revenue upon which the duties had been paid by a surety on a bond given for the payment thereof, who includes in the purchase price the amount of the duties thereon, is not entitled to preference in payment out of the assets of the principal debtor in the hands of his assignee for the benefit of creditors under the act of congress providing therefor in case of payment by a surety, or even to subrogation to any of the rights of the United States at common law. Dias v. Bouchaud (1843) 10 Paige, 445, 4 L. ed. 1044.

When a bill is filed by sureties on a custom-house bond which has been paid by them for substitution in the place of the obligees therein and to settle their rights to priority of payment out of the estate of the principal debtor, all persons standing in a like situation with the complainants should be made parties or the bill should be filed in behalf of the complainants and of all others who were sureties on bonds given by the principal debtor for duties and who had paid such bonds so as to be entitled to the rights and remedies of the United States against the assigned fund. *Ibid.*

j. *What amounts to a devestiture of the right.*

The failure of the United States to prove its claim against a bankrupt in bankruptcy proceedings does not affect its right to priority of payment. Lewis v. United States (1875) 92 U. S. 618, 23 L. ed. 513.

It does not waive its right of priority of payment out of the assets of an insolvent by proving its claim before the commissioners of the bankrupt and voting in the choice of assignees. Harrison v. Sterry (1809) 9 U. S. 5 Cranch, 289, 3 L. ed. 104.

And it is not required to prove a debt due it from the estate of a bankrupt before filing a bill to enforce its right of priority of payment. United States v. Lewis (1874) 13 Nat. Bankr. Reg. 33.

Although it may prove a debt due it and assert its right of priority of payment in a bankruptcy proceeding against the debtor, it is not obliged to do so, but stands in the category of creditors who are not affected by the proceedings. United States v. Barnes (1887) 31 Fed. Rep. 705; *Re* Huddell (1891) 47 Fed. Rep. 208.

It is not bound by the bankruptcy acts, and is entitled to recover the full amount of its claim irrespective of the rights of creditors under such proceedings. *Re* Huddell, *supra*.

An assignment in bankruptcy made under and by direction of the bankrupt law does not, under the proviso thereof that nothing therein contained shall affect the right of priority of the United States, bind the United States or prevent it from claiming priority of payment of an indebtedness due it out of the assets. United States v. Fisher (1804) 6 U. S. 2 Cranch, 358, 2 L. ed. 304.

And a United States district attorney has no power by any step on his part under the commission of bankruptcy to waive the right of priority of the United States in the distribution of the assets of an insolvent debtor, as such power is not within the scope of the authority delegated to him

payment of the state and the county of Laramie, and able and exhaustive arguments were made upon this question. Owing to the limited time within which the delicate questions to be disposed of must be determined, caused by an impending change in the *personnel* of this court, the discussion of the points involved will, of necessity, be limited; but it is desirable that a speedy determination of the matters presented by the district court should be had, owing to the reason above assigned, the magnitude of the case, the importance of the questions involved, and the necessity of facilitating the settlement of the estate of the insolvent.

1. It is urged with great force that under the common law and the constitution of this state, the state and the county of Laramie have a preference or priority of payment over the general creditors of the insolvent debtor, in the distribution of his estate in the hands of his assignee by a deed of assignment executed by the debtor in trust for all his creditors, without preference or priority, under the provisions of the voluntary assignment statute of this state. Sess. Laws 1890, chap. 51. It is asserted that the state of Wyoming and her municipality, the county of Laramie, as a subdivision thereof for certain governmental purposes, has succeeded to the pre-

and as it would be directly contrary to the provision of the National Bankruptcy Act that nothing therein contained shall in any manner affect the right to prior satisfaction of debts due the United States. United States v. Clason (1806) 2 Brev. 118.

So the right of the United States to prior satisfaction of a claim due it from an insolvent surety on a custom-house bond out of the avails of a judgment obtained by him against the principal in the bond, who was also insolvent, for moneys which he was compelled to pay thereon, is not affected by the discharge of the principal from imprisonment under a special act of congress providing that any estate which he might subsequently acquire should be liable to be taken in the same manner as if he had not been imprisoned and discharged, though the act omitted the usual provision that the judgment should remain good and sufficient in law. Hunter v. United States (1831) 30 U. S. 5 Pet. 173, 8 L. ed. 86.

A decree in a state court declaring a partnership and directing the payment of the partnership debts out of the assets in the hands of the administrator of one of the partners who had died insolvent indebted to the United States, obtained in a proceeding instituted by the creditors of the partnership in which the United States was not made a party and did not appear, is not binding upon the United States and does not impair its rights, though the administrator took objection based upon the indebtedness to it and its right of priority; and notwithstanding such decree the priority of the government attaches and the administrator becomes a trustee for the United States whenever assets come to his hands. United States v. Duncan (1850) 4 McLean, 607, 12 Ill. 523.

Nor can the assertion of a joint claim against the proceeds of the estate of a bankrupt firm debar the effect of a proof of claim which entitles the United States to priority of payment out of the separate estates of the partners also. *Re* Vetterlein (1884) 20 Fed. Rep. 109.

And the payment by the secretary of the treasury of the whole of a sum awarded to an insolvent principal on a bond for duties upon a claim against a foreign nation, to his assignee, where he had been authorized to deduct therefrom a sum due from the principal to a surety on such bond for a payment which he had been required to make thereon, and retain the same by virtue of the right of the United States to priority of payment of a claim due it from the surety who was also insolvent, does not bar the claim of the government or prevent proceedings against the assignee to recover thereon. Hunter v. United States (1831) 30 U. S. 5 Pet. 173, 8 L. ed. 86.

But the right of the United States to priority of payment of an indebtedness due it out of a fund in the hands of a bankruptcy court must be worked out through the bankruptcy act, and while it is not bound to go into a bankruptcy court, and is not concluded by a certificate of discharge, if it claims priority out of the fund, it must assert its claim just as the state and operatives and persons subrogated to the rights of the government are required to do. United States v. Murphy (1883) 15 Fed. Rep. 589.

And when, knowing that the estate of its debtor is being administered upon in a bankruptcy court, it stands by and asserts no claim to the fund and suffers the settlement to proceed and final distribution to be made, under the terms of the bankruptcy act, it waives its right of priority of payment out of the bankrupt estate. *Ibid.*

Though, by omitting to prove its claim in bankruptcy proceedings against the debtor until after the distribution of a part of the assets of the estate, leaving a portion insufficient to pay its claim, the United States does not lose its right to proceed against the assignee therefor where he had notice of its claim. United States v. Barnes (1887) 31 Fed. Rep. 705.

k. *How asserted.*

While it is not required to do so, the United States may prove a debt due it and assert its right of priority of payment in a bankruptcy proceeding against the debtor. United States v. Barnes (1887) 31 Fed. Rep. 705; *Re* Huddell (1891) 47 Fed. Rep. 206.

So the United States when entitled to priority of payment of an indebtedness due it out of the assets of an insolvent debtor, may maintain an action of assumpsit against the assignee for the recovery of money received by him under the assignment. United States v. Clark (1826) 1 Paine, C. C. 629.

Or for the recovery of the amount of a bond given for an indebtedness by the assignee to the assignor, which was omitted from the assignment. *Ibid.*

For instances of actions against assignees, executors and administrators to establish the right of priority of the United States, see *supra*, under heading, *Liability of assignee or representative.*

So where a fund, out of which the United States claims priority of payment of a sum due it, is in the hands of an assignee of an insolvent, proceedings at law to establish the right might be inadequate, and therefore proceedings in equity are proper. Hunter v. United States (1831) 30 U. S. 5 Pet. 173, 8 L. ed. 86.

And in United States v. Clark (1826) 1 Paine, C. C. 629, it was said that when necessary to obtain the aid of a court of equity to carry its right of priority of payment out of the assets of an insolvent debtor in the hands of a trustee, into effect, the United States could file its bill as in compelling the execution of a trust.

The United States circuit court has jurisdiction of a bill in equity brought by the United States against a debtor of an insolvent indebted to it, claiming priority of payment under the Act of Congress of 1799, chap. 128, § 65, though the local laws where the suit is brought allow a creditor to proceed against a debtor of his debtor by a peou-

rogative of the British sovereign; that his debt should be preferred to that of his subject; and that this prerogative has become, to the states of the American republic, an attribute and incident of sovereignty. Two familiar maxims are quoted as the quintessence of the British law: "*Quando jus domini regis et subditi insimul concurrunt, jus regis præferri debet,*" and "*Thesaurus regis est vinculum pacis et bellorum nervus.*" These maxims, it is said, should apply to the state, and her revenues should be protected with as much solicitude as those of the British king, as, though her treasury may not be the "bond of peace and the sinew of war," yet she stands in the attitude of *parens patriæ*, charged, as she is, directly, through her municipal subdivisions, with the government of the people, in the enforcement of the law and the rights of her citizens, through her tribunals of justice; in the maintenance of the public order, and the execution of the laws; in the education of the young; in the support of the indigent; in the work of internal improvement; and in the various agencies of government that the state controls in the interest of her citizens. As liens are created by her positive statute upon both realty and personalty on which they are imposed, it is contended that as much concern should be manifested in the

liar process of law. United States v. Howland (1819) 17 U. S. 4 Wheat. 108, 4 L. ed. 526.

And the United States, after having filed a bill in the circuit court claiming the payment of a debt due it from a debtor who had previously been discharged under the insolvent law of Rhode Island, on the ground of an assignment made to it by the debtor who was discharged from imprisonment on the condition that he should make such an assignment, may file an amended bill claiming priority under the act of congress giving the right against debtors who have become insolvent; and on the hearing it may rely upon the whole case made by the bill or it may abandon some of the special prayers contained in it. Hunter v. United States (1831) 30 U. S. 5 Pet. 173, 8 L. ed. 86.

So a sale of lands under execution on confessed judgments which amounted to a voluntary transfer of all the debtor's property so as to entitle the United States to priority of payment of an indebtedness of the judgment debtor to it, may be declared null and void, and it may be disregarded so as to enable the United States to sell the same to enforce the judgment obtained on the indebtedness due it and thus work out its right of priority of payment. United States v. Griswold (1881) 8 Fed. Rep. 496.

And when the United States has obtained a joint judgment against all the obligors in a joint and several bond given for duties, both principal and sureties, and one of the obligors dies and the other becomes insolvent, it may by virtue of its right of priority in case of insolvency, maintain a suit in equity for the recovery of the debt out of the assets of the deceased judgment debtor whose estate was also insolvent. United States v. Cushman (1836) 2 Sumn. 426.

All persons standing in a like situation with the complainant should be made parties to a bill filed by sureties in a custom-house bond which had been paid by them, for substitution in the place of the obligee therein and to settle their rights to priority of payment out of the estate of the principal debtor, or the bill should be filed in behalf of the complainants and of all others who were sureties on bonds given by the principal debtor for duties, and who had paid such bonds so as to be entitled to the rights and remedies of the United States against the assigned fund. Dias v. Bouchaud (1843) 10 Paige, 445, 4 L. ed. 1044.

III. *Priority of the states.*

a. *Upon what based.*

The right of the state to priority of payment of debts due it is placed by the courts of the different states recognizing it upon different grounds.

Thus in Maryland the state is held entitled to priority of payment of a debt due it out of the assets of the estate of a deceased person as a prerogative right from the common law. Orem v. Wrightson (1878) 51 Md. 34, 34 Am. Rep. 286; *Re* Green's Estate (1843) 4 Md. Ch. 356; State v. Baltimore (1857) 10 Md. 504.

The state is given priority by virtue of the third article of the Declaration of Rights made on the 3d of November, 1776, declaring that the inhabitants are entitled to the common law of England according to the course of that law and to the benefit of such English statutes as existed at the time of their first emigration, etc., and also to all the acts of assembly in force on the 1st of June, 1774, where no individual creditors have prior liens. State v. Bank of Maryland (1834) 6 Gill & J. 228, 26 Am. Rep. 561.

So in Jones v. Jones (1827) 1 Bland, Ch. 444, 18 Am. Dec. 327, holding that a debtor's real estate is liable under the Maryland statute to be taken in execution, it was said that in England the king's debt in execution and in the administration of a deceased's estate is preferred to that of a citizen, which right of preference was, in Maryland, extended to the lord proprietary, and after our Revolution it was held to have devolved, according to the principles of the common law upon the state, and it has been expressly declared that all lands and tenements belonging to any public debtor after the commencement of suit against him shall be liable to execution in whatever hands or possession they may be found (March, 1778, chap. 9, § 6; Nov., 1787, chap. 40, by which legislative enactment the state's lien as in England relates not merely to the date of the judgment but to the commencement of the action), whence it follows that the liability of the real estate of a debtor to the state to be taken in execution and the lien of the state incident to such liability are founded upon the common law and the acts of assembly passed in express relation to debts due to the state.

In New York it was held in Receiver of Taxes v. Yonkers & N. Y. Fire Ins. Co. (1872) cited in article in 16 Alb. L. J. 298, that the state is a preferred creditor upon the ground that it had succeeded to the common-law prerogative of the king.

And in Wendell v. Jackson (1831) 8 Wend. 183, 22 Am. Dec. 635; Lansing v. Smith (1829) 4 Wend. 9, 21 Am. Dec. 89, and People v. Herkimer (1825) 4 Cow. 345, 15 Am. Dec. 379,—each turning upon a question foreign to this note, it was said that the people of the state, as successors of its former sovereign, the king, are entitled to all the rights which formerly belonged to him by virtue of his prerogative.

The time of such succession to the rights of the crown being placed upon the declaration of independence, in Wendell v. Jackson, *supra*.

So in Pennsylvania the rule appears to have originally been the same, though it was subsequently modified by statute.

Thus in Com. v. Baldwin (1832) 1 Watts, 54, 26 Am. Dec. 33, holding that the commonwealth is not bound by a statute limiting the duration of the lien of a judgment unless expressly named therein, it was adjudged that the commonwealth had suc-

preservation intact of the public moneys which are the fruits of taxation. The source of this power and right of preference, it is asserted, is grounded mainly on the common law, and upon certain provisions of our constitution.

Whatever of the common law is in force in this jurisdiction is here by the terms of the statute adopting it, enacted at an early day, and incorporated in section 498 of the Revised Statutes of Wyoming. It reads as follows: "The common law of England as modified by judicial decisions, so far as the same is of a general nature, and not inapplicable, and all declaratory or remedial acts or statutes made in aid of, or to supply the defects of, the common law prior to the fourth year of James the First (excepting the second section of the sixth chapter of forty-third Elizabeth, the eighth chapter of the thirteenth Elizabeth and the ninth chapter of thirty-seventh Henry Eighth) and which are of a general nature and not local to England, shall be the rule of decision in this territory (state) when not inconsistent with the laws thereof, and shall be considered as of full force, until repealed by legislative authority." The British statutes excepted from this act of adoption are: "An act for avoiding trifling and frivolous suits in her majesty's courts at Westminster" (Stat. 43 Eliz., chap. 6, § 2); "An act against usury" (Stat. 13

seeded to so much of the prerogative of the king as belonged to him in the capacity of *parens patriæ* or universal trustee, and the rule was laid down that the legislature shall not be taken to have postponed a public right to that of an individual unless such an intent be manifested by explicit terms or at least by necessary and irresistible implication.

But in Com. v. Lewis (1814) 6 Binn. 266, it was said that "the state of Pennsylvania always took preference to individuals until the Act of April, 1794, which directs that debts due to the state from deceased persons shall be last paid."

This modification, it will be observed, applies to deceased debtors only. The state still takes preference in the estates of living debtors and an account settled by the accounting officers of the commonwealth becomes a lien on all the real estate of the debtor. *Dictum* in Com. v. Lewis, *supra;* and see Forney v. Com. (1849) 10 Pa. 405, set forth under headings, *Nature and extent*, and *When it attaches and how devested;* Commonwealth's App. (1846) 4 Pa. 164; and *Re* Arnold's Estate (1863) 46 Pa. 277,—set forth under first heading above named; and in *Re* Mitchell's Estate (1838) 2 Watts, 87, set forth under heading, *When it attaches and how devested.*

And in Georgia the prerogative right of the state to preference or priority in the payment of debts was held to have constituted a branch of the common law in England and as such to have been adopted by the state by the Act of 1874 which introduced into the jurisprudence of that state the whole body of the common law so far as it was not inconsistent with its frame of government, in Robinson v. Bank of Darien (1855) 18 Ga. 65.

In that case it was said that the right of priority of payment of public debts is given because it is necessary to enable the state to accomplish the end of its institution; that, as the government was established for the good of the whole and can only be supported by means of its revenue, this revenue ought to be protected for the benefit of the whole.

But the right of the state to priority of payment does not exist with all the incidents to the royal prerogative right in England. The priority of the states is a rule only in the distribution of the property of the debtor requiring the debt due the state to be first paid when the individual creditor has no antecedent lien overreaching it. *Ibid.*

And in Kentucky, in Com. v. Logan (1809) 1 Bibb, 529, the decision that a specialty to an individual has priority over a simple-contract debt to the commonwealth, is decided upon common-law principles and authorities, though the court nowhere holds that the state is possessed of the common-law prerogative and right of priority of the king.

The state of New Jersey, however, is held not to possess the common-law prerogative of the crown to have debts due it paid in preference to debts due to other creditors. Middlesex County Board of Chosen Freeholders v. State Bank at New Brunswick (1878) 30 N. J. Eq. 311, affirming 29 N. J. Eq. 268.

And in South Carolina it is held that the state is not entitled to priority over other creditors except in cases provided by statute. State v. Cleary (1833) 2 Hill, L. pt. 2, p. 600.

And that the common-law prerogative of the king to be paid in preference to all other creditors does not apply to the state. The right of the state depends, in this respect, altogether upon the statute law. Klinck v. Keckley (1835) 2 Hill, Eq. 250.

So in State v. Harris (1832) 2 Bail. L. 598, it was held that the king's prerogative of preference in the payment of debts due the crown has not been extended to that state so as to entitle the state to priority of payment of a debt which does not constitute a specific lien upon the property of the debtor, as the prerogative right has been so modified as to depend upon statute and none of the statutes with relation thereto have been adopted in that state.

And in Commissioners of Public Accounts v. Greenwood (1795) 1 Desauss. Eq. 450, it was held that the state of South Carolina has not retained the common-law prerogative of the king of an unlimited priority of payment of debts due it before those of a citizen so as to give it a right to priority of payment out of the estate of a deceased commissioner of the treasury of a claim for a breach of his official bond over claims upon judgment and mortgages due to private creditors.

Baxter v. Baxter (1884) 23 S. C. 114, however, criticises State v. Harris, and Klinck v. Keckley, *supra*, the court saying that the preference of the state is not based upon the ground of prerogative and therefore confined to such debts as are due to the state as a sovereign, as, for instance, taxes, but that it rests solely upon the terms of the act, and the only question is as to the proper construction of the language there used.

In that case it was said that all that was decided by State v. Harris, *supra*, was that the state was not entitled at common law on the ground of prerogative to any preference over other creditors.

The proviso to the fifth subdivision of the section regulating preferences of the bankruptcy act that nothing contained in the act shall interfere with the assessment or collection of taxes by authority of the United States or of any state, does not create a preference in favor of a state, other than that in which proceedings in bankruptcy are pending, which has failed to collect taxes due it from the bankrupt. *Re* Ambler (1875) 8 Ben. 176.

b. *Constitutionality of provisions for.*

As a general rule, the constitutionality of provisions for priority of the states in the payment of debts due them has remained unquestioned, but the right has been so repeatedly upheld when questioned upon other grounds, as to tend strongly toward placing it in the list of settled questions.

In State v. Dickson (1863) 33 Ga. 171, however, the Georgia Act of 1858, authorizing priority of payment of claims due the state, was claimed to be

Eliz., chap. 8); "A bill against usury" (Stat. 37 Hen. VIII., chap. 9). The period fixed for transplanting the common law into this country, and the time in which it is considered as having effect over this jurisdiction, is the fourth year of James I.,—the period when the first territorial or colonial government was established in America, and with it the common law of England, as it then existed. *Penny* v. *Little*, 4 Ill. 304. The charter to Gates, Somers, and others for the colony of Virginia, was granted in the fourth year of that monarch, on the 10th day of April, 1606; and by it provision was made for the establishment of a government in the wilds of America, which should rest upon the reason, the experience, and the luster of the British jurisprudence. By our statute, the common law is adopted, with "all declaratory and remedial acts or statutes made in aid of, or to supply the defects of, the common law," prior to the time when the first colonial government was established by England upon American soil, with the exception of certain statutes mentioned; and these curative and remedial statutes must be as well consulted as the common law, in order to ascertain the body of law adopted here.

The right of the crown to have its debts preferred was of very ancient origin, and was recognized in Magna Charta. It was held to be an incident to sovereignty, and not as a

unconstitutional as against debts to individuals incurred before its enactment, as violating the obligation of the contract between debtor and creditor, but the court said that it thought the statute to be merely declaratory of what the law previously was, but that, if it were otherwise, it did not see how the obligation of the contract could be impaired by the assertion by the state of a priority which she claims and exercises in all cases, in the collection of her revenues.

c. *Nature and extent.*

Where the right of a state to priority of payment of debts due it rests solely upon statutes providing therefor, its extent and nature depend entirely upon the proper construction of the language used in the enactment. Baxter v. Baxter (1884) 23 S. C. 114.

And it is not entitled to priority except in the cases provided by the statute. State v. Cleary (1833) 2 Hill, L. pt. 2, p. 600.

Thus the priority of payment of debts due to the public directed by the South Carolina Act of 1789, in the administration of the assets of a deceased person, does not extend to the preference of a debt due to the state in distributing the estate and effects assigned by a debtor under the insolvent debtor's act. State v. Harris (1833) 2 Bail. L. 596.

And the state has no right of priority in the payment of debts due it under the Act of the Province of Maryland of 1650, chapter 28, giving such priority to the lord proprietary of Maryland, as that act was confined to the proprietary and his heirs, and was not in existence at the time of the Revolution. State v. Bank of Maryland (1834) 6 Gill & J. 205, 228, 26 Am. Dec. 561.

Where the right of the state to priority is based upon the prerogative right of the king, its former sovereign, its nature and extent, of course, depend upon the prerogative right as exercised at common law subject to the modifications necessitated by our different and differing forms of government.

"Anciently the king might, by his writ of protection, prevent any subject from suing his debtor until his debt was paid." Middlesex County Board of Chosen Freeholders v. State Bank at New Brunswick (1878) 29 N. J. Eq. 268.

"Debts due the crown by record or upon specialty are entitled to preference over debts of the same class due to subjects, but simple-contract debts due to the crown are not entitled to preference over debts of record due to subjects, but where both are simple-contract debts, that due to the crown must be preferred." *Ibid.*

And the state is entitled to priority at common law whenever she and a citizen have claims of equal degree and a conflict arises by death or the act of the party, the debtor not having enough to pay his debts. *Re* Green's Estate (1848) 4 Md. Ch. 356.

The priority of the state, however, is a rule only in the distribution of the property of the debtor, requiring the debt due the state to be first paid when the individual creditor has no antecedent lien overreaching it. Robinson v. Bank of Darien (1855) 18 Ga. 65.

And the state is entitled to priority of payment of a debt due it out of the assets of the estate of a deceased person, except where some antecedent lien stands in the way. Orem v. Wrightson (1878) 51 Md. 34, 34 Am. Rep. 296.

Debts due the state have priority in the distribution of the estate of an insolvent over debts due private individuals without reference to the respective dates of the liens. Seay v. Bank of Rome (1881) 66 Ga. 615.

And the state is entitled to priority of payment out of property in the hands of an heir, of a bond passed to it by the ancestor in his lifetime, over a bond given by the ancestor to an individual. State v. Rogers (1786) 2 Harr. & M'H. 198.

And out of the proceeds of lands sold for the payment of debts because of the insufficiency of the personal property of a deceased debtor for that purpose, as against other general creditors, neither the state nor the creditors having any lien. Smith v. State (1847) 5 Gill, 45.

So where two judgments are rendered against the same party on the same day, one in favor of the state and the other in favor of an individual, that in favor of the state standing first on the docket, the state's judgment is entitled to priority of payment out of the estate of the deceased judgment debtor. *Re* Greene's Estate (1848) 4 Md. Ch. 356.

And in Contee v. Chew (1803) 1 Harr. & J. 417, it was held that a judgment in favor of the state against a person since deceased has preference over and should be paid before a judgment against him in favor of an individual.

And the state is entitled to a preference, under Maryland Act of 1786, March 11, providing that in the payment of debts of deceased persons, no creditor shall be entitled to any priority except such as have judgments against the deceased, nor shall any preference be given to creditors in equal degree in the payment of a debt over all debts not on record. Murray v. Ridley (1793) 3 Harr. & M'H. 171.

But the state is entitled to preference in the distribution of the estate of a deceased person only where the intestate is indebted to the state and the citizen in equal degree; a junior judgment in favor of the commissioners of the poor, therefore, is not entitled to be paid in preference to senior judgments in favor of private creditors, Klinck v. Keckley (1835) 2 Hill, Eq. 250.

And a debt due by specialty to a citizen is entitled to preference in the course of administration over a simple-contract debt due the commonwealth. Com. v. Logan (1809) 1 Bibb, 529.

Nor is a debt due by an intestate as surety on

personal right attaching to the king's person. It was modified by a number of statutes which were incorporated in the body of the common law by our act of adoption. These were the statutes of 9 Hen. III., Stat. 1, chap. 18, of 25 Edw. III., chap. 19, and of 33 Hen. VIII., chap. 39. By them, the prerogative of the crown was shorn of its original oppressive character. Anciently, the subject had first to pay "gree" or satisfaction to the king of the king's debt, before he could have execution against the king's debtor; and, if he sued the king's debtor without first satisfying the king's debt, the writ of protection ran against the subject seeking his remedy or process against the king's debtor. The last statute in point of time (33 Hen. VIII., chap. 39), as construed in the case of *Giles* v. *Grover*, in the house of lords (decided in 1832), as appears from the opinions of the judges (9 Bing. 128), permitted the subject to secure judgment, and obtain process thereon, against the king's debtor, without first making gree or satisfaction. But the king had the right to pursue his remedy concurrently with the debtor, even after the judgment of the latter, and even if process had been issued and executed thereon, if the title to the property remained unaltered in the debtor; and the king's process, in such a case, although issued after the process of the subject, was entitled to preference. The

the bond of a county treasurer, under South Carolina Act of 1789, providing for priority of payment of debts due to the public, entitled to preference over antecedent liens either general or special. Baxter v. Baxter (1884) 23 S. C. 114.

And the same rule was applied to a claim against the estate of a deceased commissioner of the treasury for breach of his official bond as against judgments and mortgages due to private creditors, in Commissioners of Public Accounts v. Greenwood (1795) 1 Desauss. Eq. 450.

And when a judgment is obtained against a person in his lifetime, his executor or administrator must satisfy it out of his estate in preference to a debt of specialty in favor of the state created after its rendition. Hollingsworth v. Patton (1793) 3 Harr. & M'H. 125.

In Pennsylvania a claim of the commonwealth against a surety of a defaulting collector of duties is payable, under the Act of May 30, 1811, providing that the amount of balances settled agreeably to the act, due the commonwealth, shall be a lien upon the real estate of the persons indebted and their sureties from the date of the settlement, out of the proceeds of the sureties' lands sold under a decree of the orphan's court for the payment of his debts, paramount to a mortgage subsequently executed and the claims of other creditors. Forney v. Com. (1849) 10 Pa. 405.

But the commonwealth has no lien for the balance of an account settled with a county treasurer upon his real estate or that of his sureties under that act which will entitle it to preference over judgment creditors in the distribution of the proceeds of the treasurer's real estate unless a certified copy of the account has been transmitted to the prothonotary of the county in which he resided and entered of record as required by the Act of 1827. *Re* Arnold's Estate (1863) 46 Pa. 277.

Nor for an account settled with a brigade inspector which will entitle it to preference in payment out of the proceeds of real estate of such inspector sold under judgments entered by his sureties on his bond of indemnity as against such judgments under that act, where the account has not been transmitted to the prothonotary of the county where the inspector resided for entry of record as required by such Act of April, 1827. Commonwealth's App. (1846) 4 Pa. 164.

In Forney v. Com., *supra*, however, it was held that the lien of the commonwealth is not lost because no entry or notice of the lien was made in the docket of the common pleas of a county in which a surety of a defaulting collector resided, of a claim against him, as the Act of April 16, 1827, applies to principals only and not to sureties.

d. *To what indebtedness it applies.*

As a general rule the right of a state to priority of payment of a debt due it is deemed to apply to every species of indebtedness due it or to the public as such.

Debts due to the public which by South Carolina Act of 1789 are to be preferred in the order of paying the debts of a deceased person are said in State v. Harris (1832) 2 Bail. L. 598, to include debts which are due to the state as a sovereign and for the protection of citizens and property, but that debts which arise *ex contractu* and which are therefore due to her in her corporate capacity, or debts which arise *ex delicto*, and which are the punishment of the law for misdemeanors, cannot be entitled to any preference over debts due to citizens.

But in Baxter v. Baxter (1884) 23 S. C. 114, in construing the South Carolina Statute of 1789, providing for priority of payment of debts due to the public, the court overruled State v. Harris, *supra*, stating that the preference of the state is not confined to such debts as are due to the state as a sovereign but depends upon the proper construction of the statute, and saying that "where we find that there is a debt and that it is due to the public we are bound to place it in the class which the legislature has declared shall be entitled to preference."

And it was held in that case that a debt due by an intestate as surety on the bond of a county treasurer is a debt due to the public and entitled to priority as such within the meaning of the act.

In *Re* Southwestern Car Co. (1879) 9 Biss. 76, it was held that a claim of the state upon a contract for the employment of convicts is a debt due to the state which is entitled to priority of payment out of the assets of the bankrupt under the bankruptcy act. U. S. Rev. Stat. § 5101, sub. 3.

In Pennsylvania, however, the right of preference of the state applies to indebtedness of living debtors only and not to debts due from the estates of deceased persons. See Pennsylvania cases cited *supra*, under heading, *Upon what based.*

So where a bank is appointed a state depositary in Georgia and gives bond as such, a lien is created on the property of the principal and sureties which will, upon default of the depositary, entitle the state to priority of payment out of the proceeds of the sale of lands owned by a surety at the time the bond was given under execution issued against the depositary and his sureties, as against a claim for improvements made by a subsequent purchaser from the surety, without knowledge of the lien. Simpson v. Mathis (1887) 79 Ga. 159.

And the commissioners of insolvency have no jurisdiction over a claim against an insolvent estate for a debt due on state prison account, as it is a preferred claim under Me. Rev. Stat., chap. 66, § 1, providing that public rates and taxes and money due the state have priority over the general creditors of an insolvent estate. State v. Richborn (1877) 67 Me. 504.

But the proceeds of lands of a testator sold for the payment of debts under a direction in the will are equitable assets which should be distributed

proceedings between sovereign and subject are aptly termed, in the opinion of one of the judges, "a race with the crown." It was held that the sheriff holding the property of the king's debtor, seized under a *fieri facias*, but not sold, could not defeat the subsequent process of the king, either by extent in chief or in aid, which were, in effect, deemed the same, for the reason that, before the sale of the property seized under the *fi. fa.*, the title to the property had not been devested from the debtor, and the king's process should have preference, although subsequent to that of the subject creditor. It was conceded upon the argument in the case, and so held by the court, that the crown could not avoid an equitable mortgage or the lien of a factor or of a wharfinger, or of "a bona fide assignment in trust for creditors." See opinion of Patteson, J., page 139. This is stated in Tidd, Pr. 1052, 1053; *King* v. *Watson*, 8 Price, 6,—and it is undoubtedly the rule in England that the transfer, bona fide, of the debtor's property, while he has absolute dominion over it, defeats the king's prerogative right, and his preference and priority are lost. So it was held in the much-cited case of *State* v. *Bank of Maryland*, 6 Gill & J. 228, 26 Am. Dec. 561, and in a state that recognizes this common-law prerogative of the king as in force and applying to the state. So, as a valid deed of assignment for the

among all the creditors *pari passu* and cannot be appropriated in whole by the commonwealth in satisfaction of a claim held by it against the testator. Nimmo v. Com. (1809) 4 Hen. & M. 57, 4 Am. Dec. 488.

And payment of taxes by a lessor upon his own lands occupied by a lessee under contract to pay all taxes assessed on the demised premises, who had become a bankrupt, does not entitle the lessor to claim the amount of such payment as a preferred debt against the estate of the lessee under section 28 of the Bankruptcy Act. *Re* Parker & Peck (1872) 6 Ben. 286.

So the deposit by the warden of a penitentiary of funds entrusted to him by the state in his own name as warden, does not constitute the bank in which it was made a debtor of the state so as to give the state a right of prior payment of its claim therefor upon the subsequent bankruptcy of the bank. *Re* Corn Exchange Bank (1877) 7 Biss. 400, 15 Nat. Bankr. Reg. 431.

Re Corn Exchange Bank, *supra*, distinguishes Bayne v. United States (1876) 93 U. S. 642, 23 L. ed. 997, set forth under heading, *Who are debtors of the United States*, upon the ground that that decision was rendered because the money was received by the persons with whom it was deposited in pursuance of a fraudulent conspiracy knowing that it was the money of the government held by the depositor as public money.

In *Re* Mellor (1788) 10 Ben. 58, however, it was held that a debt for merchandise which was the property of the state sold by the warden of a prison to persons who became bankrupts, for which the warden filed proof of debt stating it to be due him as agent and warden of the state prison, is a debt due to the state and entitled to priority of payment as such.

Re Mellor, *supra*, distinguishes *Re* Corn Exchange Bank, *supra*, and Com. v. Phœnix Bank (1846) 11 Met. 129, set forth under heading, *Priority of the United States*, subhead, *What debts are within the statute*, upon the ground that they were decided upon the assumption that, under the statutes regulating the rights and responsibilities of wardens of state prisons, the warden was, in effect, a contractor with the state and chargeable as such with all moneys that came to his hands and not responsible as an agent to his principal, while the law under which this case arose imposes no personal liability upon the warden for contracts made officially and his duty with reference to moneys of the state is that of a mere agent.

Nor are debts due to a corporation created by the state for banking purposes entitled to prior payment out of the assets of an insolvent debtor under Tennessee Act of 1833, chap. 36, § 4, and 1853, chap. 333, § 12, giving priority of payment of debts and arrearages due the state, though the whole interest in such corporation is owned by the state, as such provisions refer to debts and arrearages due the state in its sovereign character as revenue, fines, forfeitures, penalties, and the like. Fields v. Wheatley (1858) 1 Sneed, 351.

And where a state incorporates a bank and places the public funds in it to be controlled and managed by the officers thereof, she devests herself, so far as the operations of the bank are concerned, of her sovereign character and assumes that of a private individual, and, though the sole owner of the capital stock of the bank, she is not entitled to claim priority of payment of a debt due to the bank by virtue of her sovereign prerogative, out of a decedent's estate. Central Bank of Georgia v. Little (1852) 11 Ga. 346; Bank of the State v. Gibbs (1825) 3 McCord, L. 377.

Such a bank is a mere corporation possessing the same powers and privileges as other corporations only. Bank of the State v. Gibbs, *supra*.

And the state by giving the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank and waives all the privileges of that character. Central Bank of Georgia v. Little, *supra*, quoting Bank of United States v. Planters Bank of Georgia (1824) 22 U. S. 9 Wheat. 904, 6 L. ed. 244.

So in Moore v. Wabash & Erie Canal Trustees (1856) 7 Ind. 462, holding that a state which creates a corporation and transfers her property to it, in which she becomes an associate, loses her exemption from suit so far as that corporation is concerned, it was said, quoting from Bank of United States v. Planters Bank of Georgia, *supra*, that "as a member of a corporation, a government never exercises its sovereignty; it acts merely as a corporator and exercises no other powers in the management of the affairs of the corporation than are expressly given by the incorporating act."

And in Governor v. Woodworth (1872) 63 Ill. 254, holding that the fact that the state has an interest as a creditor in a bond running to the governor for the use of the people and all others interested does not take an action thereon out of the statute of limitations, it was said that a state becoming a partner in business with corporations or individuals, devests itself of its sovereign character, and the same rules must be applied where the company or corporation is a party as if it were composed alone of private individuals.

And in Bank of the State v. Gibson (1844) 6 Ala. 814, holding that a bank of which the state is the exclusive proprietor must cause a claim held by it to be presented to the administrator of the deceased debtor within the time prescribed for ordinary debts, it was said that the legislature cannot confer upon a monied corporation established by itself any portion of the sovereign power which is inherent in the body politic. But see next case.

A statute regulating the order in which the debts due by a testator or intestate are to be paid which includes and refers to debts due the public,

by implication, a preference or priority in favor of either the state or its municipality, as against its citizen, in the payment of the debts of a common debtor, and has no reference to the question of such priority or preference. It seems that if Kent, the insolvent assignor, is a debtor to the state and to the county of Laramie, his debt to either of them cannot be extinguished by a partial payment. A payment or dividend out of the insolvent estate might be made, *pro tanto*, but could not operate as a release of the unpaid portion of the debt, as the assignment law provides, because the constitution expressly forbids the extinction of such a debt, except by payment into the proper treasury.

2. The remaining question to be decided is that of following the trust moneys belonging to the state and the county into the estate of Kent, the insolvent debtor. Upon the deposit of these public funds in his bank, he became a quasi trustee, as he stood in the shoes of the depositing treasurers; having knowledge of the trust character of the funds, and having kept his accounts with the respective treasurers, as such. Under our constitutional and statutory provisions, it is clear that the state and the county treasurers are but custodians of the public funds coming into their hands by virtue of their office, and that such moneys remain at all times public moneys, while in their official possession, or in the hands of their depositaries. The statutes of this state are similar to those of Colorado, and in that state it is held that county moneys received and collected by a county treasurer belong to the county, which may maintain an action to recover the same. *McClure* v. *La Plata County Comrs.* 19 Colo. 122; *Sauer* v. *Nevadaville*, 14 Colo. 54. See *State* v. *McFetridge*, 84 Wis. 473, 20 L. R. A. 223. In Michigan it was held that a state treasurer, as to state funds, held a different relation to the state than a county treasurer bears to his county, under the peculiar provisions of the statutes of that state (*Perley* v. *Muskegon County*, 82 Mich. 132, 20 Am. Rep. 637), but we think no such distinction exists here. In the Michigan case just cited, it was intimated that, in the case of the death of the county treasurer, the moneys held by him in his official capacity would go to his administrator, and not to his successor in office; but our statute requires the executor or administrator of a deceased county treasurer, under severe penalties and increased liabilities, to deliver up, on demand, the books, moneys, and papers of the deceased official. Rev. Stat. § 1828. Then, as is ordinarily the case under like statutory provisions to ours, it appears the moneys received by either a state or a county treasurer, in this state, by virtue of the office, are considered as public moneys; and the state or the county may maintain an action, like the ones at bar, to charge with a trust the property purchased with such public moneys, or the moneys, in whatever form or transmutations they may have undergone, provided they can be traced or identified. A difficulty arises under the findings of the district court, in these cases, as it does not appear that the public funds deposited with Kent can be traced, or have been traced, into any specific fund or property. Their deposit is found to be a general, and not a special, deposit, and they were evidently not to be returned *in specie*, but in equivalents. They can be traced to the possession of the insolvent, the assignor, and into his estate, but not further. No particular property is discovered, into which they were converted or found their way, or for which they were substituted; but the findings, on the contrary, are that they went into the mass of the funds of the bank, and were applied generally to the payment of the debtors, including the mass of depositors, in the usual course of business. There is no property of the insolvent estate, other than the moneys on hand, and the balances due and owing to Kent from other banks at the time of his assignment which can be considered to represent any portion of the trust moneys. Some loans were negotiated by Kent, and passed by the assignment; but at the time of that assignment there was, in the vaults of the bank, only the sum of $2,058.72 in cash, and on deposit in other banks the sum of $1,624.82.

In following trust funds, they must first be traced to the estate of the trustee or quasi trustee, and the corpus of the fund must be found. It must be *in esse*, in some form, or it cannot be identified. Where the trust moneys are mingled with those of the trustee, the trust may be impressed upon such fund or property with which it is mingled; but, if it appears that the trust moneys are dissipated or lost, there is no fund to impress with the trust, and the sole remedy of the beneficiary is a proceeding against the trustee, personally. Where he is solvent, this is the usual remedy pursued, as by judgment and execution the whole estate can be impressed with the amount of the judgment. Some of the courts have held, as the "modern" equity doctrine, that all that is necessary is to trace the trust moneys into the estate of the trustee, which then becomes impressed with the trust. This was the rule established by a number of cases in the supreme court of Wisconsin, until a return to the general rule was announced in *Nonotuck Silk Co.* v. *Flanders*, 87 Wis. 237, and the former cases were overruled. The leading cases on the subject are those of *Re Cavin's Petition* v. *Gleason*, 105 N. Y. 256, 262; *Little* v. *Chadwick*, 151 Mass. 109, 7 L. R. A. 570, and *Slater* v. *Oriental Mills*, 18 R. I.—.

That the money constituting the trust may have been wrongfully converted by the defaulting or delinquent trustee does not seem to alter the situation, as some of the courts hold. There is no peculiar sanctity that surrounds an action *ex delicto*, as distinguished from an action *ex contractu*, at law, so far as the obtaining satisfaction of any judgment is concerned; and when equity is invoked in the former cases, equitable rules must be applied. Where no specific lien is created by contract, or the acts of the parties, none exists. The only course open is in equity, to discover the corpus of the trust fund, or to follow the changes and transmutations of the trust moneys into some particular property that can be charged with the trust, saving the

rights of innocent purchasers for value. The courts generally have gone as far as it seems possible, in holding that the presumption always is that the trustee has used his own funds in his business operations; and, if there be any money on hand at the time the trust is sought to be enforced, that presumption controls. So the trustee who has blended trust moneys with his own is not permitted to say that he has used trust moneys when he had a right to use his own. This appears to be one of the principles that governed the decision in the famous case of *Knatchbull* v. *Hallett*, L. R. 13 Ch. Div. 696, which overruled some prior English decisions. It is to the effect that if a person who holds money as a trustee, or in a fiduciary character, pays it to his account at his banker's, and mixes it with his own money, and afterwards draws out sums by checks in the ordinary manner, the drawer must be taken to have drawn out his own moneys in preference to the trust money. This principle pervades some of the cases which adopt the rule that the entire estate of the trustee is impressed with the trust moneys traced to it. In *Kimmel* v. *Dickson* (S. Dak.) 25 L. R. A. 309, the moneys found in a defunct bank amounted to $259.71, while the amount left there by plaintiff before it failed, to be used for the payment of his note, was $265. The case was decided upon the authority of *Ellicott* v. *Barnes*, 31 Kan. 170; *Peak* v. *Ellicott*, 30 Kan. 156, 46 Am. Rep. 90.—and upon the case of *McLeod* v. *Evans*, 66 Wis. 401, 57 Am. Rep. 287, which had then been overruled by *Nonotuck Silk Co.* v. *Flanders*, *supra*. But the order of the trial court was affirmed, and that was that the receiver of the insolvent bank pay to the plaintiff the sum found in the bank at the time of its failure, although it was less than the sum left there for the specific purpose of paying the note. So it was in the case of *Massey* v. *Fisher*, 62 Fed. Rep. 958, very recently decided. In the course of the opinion, the court remarks: "It is not important that the plaintiff's money bore no mark, and cannot be identified. It is sufficient to trace it into the bank's vaults and find that a sum equal to it, and presumably representing it, remained continuously there until the receiver took it. The modern rules of equity require no more." Some of the cases cited by the learned judge go further than he, but his conclusion, though reached at the extreme limits of the rule, seems correct. The trust moneys here are traced to the bank vaults, and to deposits made elsewhere, and the sum found there represents a portion of them. The amount of moneys on hand at the time of the assignment to the defendant for the benefit of the creditors of Kent constitutes the only portion of the trust moneys that can be traced and identified as trust moneys; and these only under the fiction or presumption, that seems to be a well-established rule of equity, that the trustee is presumed to have paid out his own moneys, and kept those belonging to the trust. This was tacitly conceded upon the argument by counsel for the defendant. The commercial paper representing loans made to different parties before the assignment, and passing by it to the assignee, as the court below finds, were severally exchanged for moneys when there was sufficient funds of Kent on hand out of which the loans were made. Upon the presumption as established in equity, and referred to above, it must be held that these loans were made from the moneys of the trustee, and not from the trust funds, and should not be impressed with the trust.

As the inquiries of the district court have been answered generally by this opinion, it will not be necessary to specifically answer the questions propounded.

Corn and **Blake**, *JJ.*, concur.

J. W. Blake, *Judge* of District Court, sat in lieu of **Conaway**, *J.*, disqualified.

CONNECTICUT SUPREME COURT OF ERRORS.

Henry BISSELL, *Appt.*,
v.
Edward H. DAVISON *et al.*

(65 Conn. 183.)

(December 1, 1894.)

1. The existence of small-pox in a town or an indication that an epidemic of that disease is likely to present itself is not necessary to permit school committees to require vaccination of pupils before attending public schools, under Gen. Stat. §§ 2127 and 2197.

2. A statute authorising school authorities to make vaccination a condition of the privilege of attending public schools is essentially a police regulation and does not violate the constitutional guaranties of due process of law or equal protection of the law.

APPEAL by plaintiff from a judgment of the Superior Court for Hartford County in favor of defendants in a proceeding for a writ of mandamus to compel defendants to admit plaintiff's son into the public schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Joseph L. Barbour** and **George W. Andrew**, for appellant:

In *Lake View School Trustees* v. *People*, 87 Ill. 303, 29 Am. Rep. 55, the trustees had statutory authority to direct what branches should be taught, and to adopt and enforce all necessary rules and regulations for the management and government of schools. A candidate for admission passed a satisfactory examination in all the required branches except grammar, which his father did not wish him to study. The court held that he was unjustly refused admission and compelled the trustees to admit him to study the other branches.

NOTE.—In connection with the above case, see **Duffield** v. **Williamsport School Dist.** (Pa.) 25 L. R. A. 152, and *note*, also the later case of *Re* Smith (N. Y.) 28 L. R. A. 820.

See also 37 L. R. A. 157; 39 L. R. A. 152; 42 L. R. A. 175.

In *Morrow* v. *Wood*, 35 Wis. 59, 17 Am. Rep. 471, the court decided that a teacher had no right to punish a pupil for refusing to pursue the study of geography, the parent having directed such refusal.

The advantages or benefit vouchsafed to each child, of attending a public school, is one derived and secured to it under the highest sanction of positive law. It is, therefore, a right, a legal right, as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and is entitled to be protected, by all the guaranties by which other legal rights are protected and secured to the possessor.

Ward v. *Flood*, 48 Cal. 36, 17 Am. Rep. 412.

Expelling a child from school is depriving him of a right within the meaning of the law.

Perkins v. *West Des Moines Independent School Dist. Directors*, 56 Iowa, 476.

It does not avail to say that the statute in question authorizes the action of the school committee and that therefore they are acting by due process of law. The phrase "due process of law," means more than a special act passed for the very purpose of authorizing the deprivation.

8 Am. & Eng. Encyclop. Law, p. 714; *San Mateo County* v. *Southern Pac. R. Co.* 13 Fed. Rep. 751; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209; *People* v. *Essex County Supra*, 70 N. Y. 234; *Ieck* v. *Anderson*, 57 Cal. 251, 40 Am. Rep. 115; *Mead* v. *Larkin*, 66 Ala. 87; *Varden* v. *Mount*, 78 Ky. 86, 39 Am. Rep. 208; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Zeigler* v. *South & North Ala. R. Co.* 58 Ala. 594.

The children who attend private or parochial schools and there receive an education are exempt from submission to an operation which may be attended with disastrous results, while those who cannot attend such schools are deprived of educational advantages unless they submit.

San Mateo County v. *Southern Pac. R. Co.* 18 Fed. Rep. 733; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220.

It cannot be justly claimed that this law is a police regulation.

Re Tie Loy, 26 Fed. Rep. 614.

The police power of the state is not above and beyond the constitution.

Powell v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Mugler* v. *Kansas*, 123 U. S. 633, 31 L. ed. 205; *People* v. *Gillson*, 109 N. Y. 400; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34; *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

It is not within the province of the legislature to arbitrarily include within the police power of the state that which does not legitimately come under its operation.

18 Am. & Eng. Encyclop. Law, p. 746; *Re Jacobs*, 33 Hun, 374, 98 N. Y. 98, 50 Am. Rep. 636.

Messrs. **Frank L. Hungerford** and **Philip J. Markley**, for appellee:

The constitution is a mere limitation of the powers of the legislative department. Nothing should be regarded as prohibited which is not so, either expressly or by fair and reasonable implication.

Lowrey v. *Gridley*, 30 Conn. 450; *Wheeler's App.* 45 Conn. 315.

The legislature is the sole judge of the justice and policy of its own acts.

Bishop's Fund Trustees v. *Rider*, 13 Conn. 103; *State* v. *Brennan's Liquors*, 25 Conn. 288; Cooley, Const. Lim. 159.

A legislative act will not be declared unconstitutional unless the fact clearly appears.

Hartford Bridge Co. v. *Union Ferry Co.* 29 Conn. 227; *White* v. *Stamford*, 37 Conn. 587. See also *Lothrop* v. *Stedman*, 42 Conn. 588.

While education is a fundamental privilege, it is not a right; public schools are instituted by the legislature and sustained by public money, and they may and should be regulated by the power that created them.

Crandall v. *State*, 10 Conn. 347.

The privilege of obtaining a common-school education is a liberty or property right within the meaning of the language of the constitution, and there has been no deprivation thereof so far as the son of the petitioner is concerned.

Miller, U. S. Const. 664; *Barbier* v. *Connolly*, 113 U. S. 31, 28 L. ed. 924; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225.

The privileges and immunities referred to in the 14th Amendment are the privileges and immunities arising out of the nature and essential character of the national government and granted or secured by the Constitution of the United States.

Miller, U. S. Const. 663; *Re Kemmler*, 136 U. S. 436, 34 L. ed. 519; *Slaughter-House Cases*, 83 U. S. 17 Wall. 36, 21 L. ed. 394.

The amendment does not prevent a state from framing such laws to regulate the privileges and immunities of its own citizens as do not abridge the privileges and immunities as citizens of the United States.

Miller, U. S. Const. 662; *Presser* v. *Illinois*, 116 U. S. 252, 29 L. ed. 615; *People* v. *Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232; *Abeel* v. *Clark*, 84 Cal. 226.

The 14th Amendment did not and was not intended to impair the police powers of the state.

Barbier v. *Connolly*, *supra*; *Powell* v. *Pennsylvania*, 127 U. S. 683, 32 L. ed. 256.

Torrance, J., delivered the opinion of the court:

On the 10th of March, 1894, the school committee of the town of New Britain passed the following vote: "That every pupil attending the public schools shall, at or before the beginning of the school term of this year, present to their teachers satisfactory evidence of vaccination, before he or she shall be allowed to attend school; and hereafter every pupil, upon entering school, shall conform to this requirement. That, after the beginning of the spring term of this year, all pupils shall be excluded from the schools, unless they have been properly vaccinated, and it shall be the duty of the superintendent to see that this order shall be enforced. Free vaccination shall be provided for all those unable to pay for the same." Under the pro-

visions of this vote, the plaintiff's minor son, a pupil in the high school of New Britain, was excluded from said school, solely because he refused and neglected to be vaccinated. Upon the application of the plaintiff, the superior court issued an alternative writ of mandamus to the school committee of New Britain, in substance, requiring them to admit said minor as a pupil in the high school, or to show cause to the contrary to said court. In their return to this writ the school committee gave, in substance, as their reasons for excluding said minor from the high school, the fact of the existence of said vote, and the further fact that the minor neglected and refused to comply with its terms. To this return the plaintiff demurred upon the grounds—First, that the vote was not warranted by law; second, because it is in violation of the constitution of this state; and, third, because it is in violation of the Fourteenth Amendment to the Constitution of the United States. The superior court held the return to be sufficient, and overruled the demurrer, and the action of the court in so doing is the sole error assigned on this appeal.

Under the provisions of sections 2187 and 2197 of the General Statutes, the school committee of New Britain is invested with the power to require that every child shall be vaccinated, before being permitted to attend the public schools. The vote in question was passed in pursuance of the power so given. It is one way of exercising that power, and, so far as we can now see, it was an unobjectionable way of exercising it. If, then, the statute conferring this power upon the committee is a valid one, it would seem that the vote was warranted by law. But the plaintiff urges that the vote was not warranted by law, because, at the time it was passed, "it does not appear that there was a single case of small-pox in the town of New Britain, nor any indication that an epidemic of that disease was likely to present itself." This claim assumes that the power in question cannot be exercised by the school committee unless at the time of its exercise one or more cases of small-pox exist in town, or an epidemic of the disease is reasonably to be apprehended. But the statute conferring the power has imposed no such conditions upon its exercise, and we see no good reasons why any such conditions should be implied. We think the vote was clearly warranted by law, provided the statute in question is a valid one, which is the next point to be considered.

This proceeding may be regarded either as one brought to vindicate some right of the plaintiff, or some right of his minor son. The right, as it is called, to attend the public school, is one belonging to the minor, and not to the plaintiff, and should properly be vindicated in a proceeding brought by or on behalf of the minor. *Stephenson* v. *Hall*, 14 Barb. 222; *Spear* v. *Cummings*, 23 Pick. 224, 34 Am. Dec. 53; *Donahoe* v. *Richards*, 38 Me. 376, 61 Am. Dec. 256. On the other hand, the plaintiff is the natural guardian of the minor, charged by law with the duty of sending him to school, and, to enable him to perform that duty, is, perhaps, entitled, on his own behalf, to bring a proceeding of this kind. *People* v. *Detroit Board of Education*, 18 Mich. 400. In discussing the validity of the statute, it will, perhaps, make the discussion briefer and clearer if we treat the proceeding—as was done in the argument—as if it were brought to vindicate the right of the minor to attend the public school.

The plaintiff contends that the statute conferring the power to require vaccination as a condition of admittance to or attendance at the public schools violates certain provisions of the constitution of this state, and of the Fourteenth Amendment to the National Constitution. He says, in effect, that it allows the privileges of the common schools to those who believe in vaccination, and denies it to those who do not; that it deprives him of his rights, without due course or process of law, and denies to him the equal protection of the laws. These objections to the validity of the statute, and the reasons and arguments urged in support of them, seem to proceed upon a misconception or misapprehension of the real nature and object of the statute. The statute in question forms a part of the laws relating to our common-school system, and must be read as a part of those laws. The duty of providing for the education of the children within its limits, through the support and maintenance of public schools, has always been regarded in this state in the light of a governmental duty resting upon the sovereign state. It is a duty not imposed by constitutional provision, but has always been assumed by the state; not only because the education of youth is a matter of great public utility, but also, and chiefly, because it is one of great public necessity for the protection and welfare of the state itself. In the performance of this duty, the state maintains and supports, at great expense, and with an ever-watchful solicitude, public schools throughout its territory, and secures to its youth the privilege of attendance therein. This is a privilege or advantage, rather than a right, in the strict technical sense of the term. This privilege is granted, and is to be enjoyed, upon such terms and under such reasonable conditions and restrictions as the law-making power, within constitutional limits, may see fit to impose; and, within those limits, the question, what terms, conditions, and restrictions will best subserve the end sought in the establishment and maintenance of public schools, is a question solely for the legislature, and not for the courts. The statute in question authorizes the committee to impose vaccination as one of those conditions. It does not authorize or compel compulsory vaccination. It simply requires vaccination as one of the conditions of the privilege of attending the public school. Its object is to promote the usefulness and efficiency of the schools by caring for the health of the scholars. It is of the same general nature as the power given in the same section to exclude from the schools children of school age, under the age of five years, whenever, in the judgment of the board or committee, the interests of the school will be thereby promoted.

The statute is essentially a police regulation,—as much so as would be one giving the power to exclude temporarily scholars afflicted with infectious or contagious diseases, or coming from homes or districts where such diseases were prevalent. In California a statute gave to the trustees of the general common-school districts the power to exclude from the schools scholars who had not been vaccinated, and this was upheld as a valid exercise of the police power. *Abeel* v. *Clark*, 84 Cal. 226. In *Duffield* v. *Williamsport School Dist.*, 162 Pa. 476, 25 L. R. A. 152 (a recent case), the resolution of a school board requiring vaccination as a condition of the right of attending the public school, was upheld as a reasonable health regulation for the benefit of the pupils and the general public. In the case at bar the required condition is made to operate impartially upon all children alike. It affects all in the same way, and reasonable provision is made for providing free vaccination where necessary. It is a reasonable exercise of the power to require vaccination, if such requirement ever can, in the nature of things, be a reasonable one. If vaccination is a preventive of small-pox, as claimed by what appears to be the great majority of the medical profession, the requirement would seem to be a reasonable one. Public opinion, also, upon this question, as crystallized into law, seems to regard it as such a preventive. It is a question, however, about which medical men differ greatly, and upon which public opinion at the present day may be said to be divided. However this may be, we think that, in a case like the one at bar, touching the terms and conditions of attendance at the public schools, the question of the reasonableness, in this sense, of such a requirement, is one exclusively for the legislature. The question before us is not whether the legislature ought to have passed such a law. It is simply whether it had the power to pass it. In no proper sense can this statute be said to contravene the provisions of section 1 of the first article of our State Constitution, as claimed by the plaintiff. It may operate to exclude his son from school, but, if so, it will be because of his failure to comply with what the legislature regards, wisely or unwisely, as a reasonable requirement, enacted in good faith to promote the public welfare. Nor, in any proper sense, can the statute be said to deprive the plaintiff of any right, without due process of law, or to deny to him the equal protection of the law.

We think the demurrer was properly overruled. There is no error.

The other Judges concur.

PENNSYLVANIA SUPREME COURT.

Noah W. SHAFER
v.
A. J. LACOCK *et al.*, *Appts.*

(168 Pa. 497.)

1. Declarations of the workmen of one employed in repairing a house which is burned during such employment, as to the cause of the fire, are admissible to charge him with liability when made while the fire is in progress.

2. One engaged in repairing a house is not relieved from liability for injury thereto by fire, through the negligence of his workmen, because he furnished proper appliances and competent workmen.

3. The burning of a house through fire set from the sparks of a fire-pot placed upon its roof by workmen engaged in repairing it will be presumed to have been caused by their negligence.

(May 30, 1895.)

APPEAL by defendants from a judgment of the Court of Common Pleas No. 2 for Allegheny County in favor of plaintiff in an action brought to hold defendants liable for the destruction of plaintiff's house by fire which was alleged to have been caused by the negligence of defendant's servants while engaged in making repairs upon the house. *Affirmed.*

The assignments of error were as follows:

"First. The court erred in admitting the following evidence, testimony of plaintiff: '*A.* Then, as soon as I got into the gate, one of the tinners came to me, and he said— *A.* He said, "I owe you an apology for burning your house down," and then he said to me,—told me how it occurred. He said, "I was working up on the roof, and I had exposed it. A spark got into the sheathing, and I thought I had put it out, and when I came back I found that the fire had such a start that we couldn't control it." What I said to him, I don't mind.'

"Second. The court erred in admitting the following evidence, testimony of Rose Shelton: '*Q.* What did they say? *A.* Why, Mary Shafer asked them whether they were hunting for something. They were talking to themselves, and she asked them what it was about, and they said a spark had caught, and they wanted some water.'

"Third. The court erred in admitting the following evidence, testimony of Charles F. Swift: '*Q.* Did you hear any conversation between the tinner and other persons, or yourself, that day, and, if so, when did you hear it? *A.* After the fire got well under headway, so far that nothing more could be done to carry articles from the house, the wind

NOTE.—On the question of the presumption of negligence arising from an accident, see *note*,—covering several classes of cases of this kind,—to Barnowski v. Helson (Mich.) 15 L. R. A. 33, also Spellman v. Lincoln Rapid Transit Co. (Neb.) 20 L. R. A. 316; Haynes v. Raleigh Gas Co. (N. C.) 26 L. R. A. 810; Howser v. Cumberland & P. R. Co. (Md.) 27 L. R. A. 154; Budd v. United Carriage Co. (Or.) 27 L. R. A. 279, and other cases there cited.

See also 43 L. R. A. 435.

shifted to the south, I think, and the cinders came in a northwesterly direction, falling on many of the articles that had been removed from the house. They were lying in the upper part of the yard, and a number of us commenced carrying a number of those articles across the road, in Mr. Collenbaugh's yard, and during the time of carrying of these articles the conversation between the group of persons who were there and the tinner occurred there. *Q.* Well, now, just state what the conversation was. *A.* As we were standing there, he pointed at an opening at the foot of the window casing or mullion,—I don't know just exactly what you call it. It was resting on the window stool outside,—a hole large enough to enter my fist through. He said that his pot was sitting out on the roof, and that sparks from that pot drew around the mansard and the corner of the casing into that hole, and he discovered it was on fire; and he said he extinguished it, as he supposed, spit in it, rubbed it with his hand, put it out, and I can't say positively whether he said he put it out as far as he could see or not. *Q.* He gave that as the way the fire occurred? *A.* That was the only theory he could give at that time. *Q.* Did he say when that occurred? *A.* During the time that he was on the roof, mending a hole in the roof near the window, opening from the roof,—what time of day, do you mean? *Q.* Yes. *A.* I can't say as he did. I don't remember as he said just what time of day it was.'

"Fourth. The court erred in admitting the following evidence, testimony of Milton Kerns: 'Q. Did Mr. Reese tell you that he expected to be discharged or bounced on Saturday for the burning of Mr. Shafer's house, and that it had caught from a spark from his charcoal stove? *A.* Yes, sir.'

"Fifth. The court erred in its answer to the fourth point submitted by defendants, which point and answer are as follows: 'If the jury believe that the workman sent by defendants to do the work upon plaintiff's house was a competent and careful workman, and that the fire pot furnished to him by defendants, and used by him, was a safe and proper appliance, then the defendants were not guilty of the want of reasonable and ordinary care, and their verdict should be for the defendants.' 'Refused.'

"Sixth. The court erred in its answer to the fifth point submitted by defendants, which point and answer are as follows: 'Fifth. Under all the evidence, the verdict should be for the defendants.' 'Refused.'

"Seventh. The court erred in its oral charge, as follows: 'Now, the contention of the defendant is that the fire did not originate from sparks from this fire pot, and he has suggested this theory to account for the fire,—and mainly on that contention they differ,—that the fire burst out at the side of the dormer window. Now, I allowed the testimony to be given of what the young man said at the time the building was burned, as a part of the *res gestæ*. He admitted to Mr. Shafer that the fire, according to Mr. Shafer's testimony, originated from a spark from his fire pot, and that he tried to put it out, and failed. The colored girl, and also Mary, heard him admit that the fire caught from a spark. A man down in the yard while the house was burning said he explained where it caught; pointed up; caught from a spark. Then, the next day, he admitted, according to the testimony of those two witnesses who were called to contradict him, that the fire caught from a spark. To one of them he expressed the fear that he would be dismissed from the employment of the defendants for burning the house, and to the other one admitted that it caught from a spark, and that he thought he had extinguished it, and, when he returned, found it had got beyond control. Now, the young man, when first called as a witness, explaining what he said to Mr. Shafer, differs materially from what Mr. Shafer says he said. He said that he told Mr. Shafer he owed an explanation, and that he told him he thought the house caught from a spark. But his testimony here is that it did not catch from a spark. He has so testified, or rather explained his declaration to Mr. Shafer at that time, because he then supposed it caught from a spark. Now, as I say, gentlemen, the first question is, How did that fire take place? If it took place from a spark or sparks from the fire pot he was using, then the next question would be, was it negligence? Was it because of his negligence in handling it, or doing something which he ought not to have done, or not being as careful as he ought to have been? The fair presumption is, if it caught from sparks, that it was negligence. That is the fair presumption. He denies here that it caught from sparks, and denies that he said so to these others. Now, I say, if you find from the evidence that the fire originated from the sparks, the fair presumption would be that it was through some negligence of his. The plaintiff cannot explain the exact circumstances of the case, but the young man knows all about it. If it was not through negligence,—that is, if this spark set fire to the house without negligence on his part,—he could explain it, because, if it was purely accidental, without any negligence on his part, there would be no responsibility on him or his employer. By way of illustrating it, what I mean, gentlemen, I will say this: If he was handling the fire box very carefully, as he ought to have been doing, upon a roof where there would be danger from sparks, and if, with that care and caution that he ought to have exercised, there was a sudden puff of wind that sent sparks into the house, he would not be responsible; there would not be negligence there. He denies that the fire took place from sparks, and you have the declarations of the various witnesses. If you find that the fire did occur from sparks, the fair presumption would be that he was in some way negligent, as he only could explain how it occurred, and why he was not guilty of negligence, if it occurred from sparks.'"

Messrs. **J. S. Ferguson, James S. Young, and Lewis McMullin,** for appellants:

Declarations are not competent as part of the *res gestæ* unless made at the time of the ac-

cident and directly connected with the main fact.

21 Am. & Eng. Encyclop. Law, p. 106.

Declarations of a servant causing an injury, made after his act is entirely finished, are inadmissible as original evidence against his master in an action for such injury.

Vassar v. *Knickerbocker Ice Co.* 28 Jones & S. 113; *Luby* v. *Hudson River R. Co.* 17 N. Y. 131; *Williamson* v. *Cambridge R. Co.* 144 Mass. 148; *Lane* v. *Bryant*, 9 Gray, 245, 69 Am. Dec. 282; *Lund* v. *Tyngsborough*, 9 Cush. 36; Story, Agency, § 134; *Northwestern Union Packet Co.* v. *Clough*, 87 U. S. 20 Wall. 540, 22 L. ed. 408; *Vicksburg & M. R. Co.* v. *O'Brien*, 119 U. S. 99, 30 L. ed. 299.

Negligence is not to be presumed upon the fact of an occurrence, the statement of which suggests itself, an anomalous, exceptional, and extraordinary character.

Buckley v. *Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 540; *Allison Mfg. Co.* v. *McCormick*, 118 Pa. 519.

The burden of proof of negligence was upon the plaintiff, and the law will not presume it for him.

McCully v. *Clarke*, 40 Pa. 399, 80 Am. Dec. 584.

The jury shall not be permitted arbitrarily and without evidence to infer that there was negligence.

Baker v. *Fehr*, 97 Pa. 72.

Where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of performance are to be ascertained as facts, a jury alone can determine what is negligence and whether it has been proved.

McCully v. *Clarke*, *supra*.

Messrs. **J. M. Garrison** and **John S. Robb** for appellee.

McCollum, *J.*, delivered the opinion of the court:

If the destruction of the plaintiff's property was the direct result of the negligence of the defendants' servants in the performance of the work their employers had undertaken to do for him, this judgment must stand, unless it plainly appears that the court below erred in its rulings on offers of evidence, or in its instructions to the jury. It is contended, in support of the appeal, that the declarations of the workmen, made while the fire was in progress, to the effect that it was caused by their carelessness, were not admissible to charge their employers with liability for the consequences of it. We think this contention is sufficiently answered by the decisions of this court in *Hanover R. Co.* v. *Coyle*, 55 Pa. 396; *Tompkins* v. *Saltmarsh*, 14 Serg. & R. 275; *Elkins* v. *McKean*, 79 Pa. 493, and *Pennsylvania R. Co.* v. *Lyons*, 129 Pa. 113. We accordingly overruled the first, second, and third specifications of error.

As the evidence complained of in the fourth specification was received in rebuttal, and manifestly for the purpose of contradicting the defendants' principal witness in a material matter, it was clearly relevant, and its admission afforded no ground for reversing the judgment. The proposition that if the defendants furnished a proper fire pot, and competent and careful workmen, they are not responsible to the plaintiff for the loss he sustained through the negligence of their servants, is not applicable to the case. The relation between the parties is not that of master and servant, and the duties which the former owes to the latter need no consideration in the decision of the questions involved in this issue. For these reasons the fourth and fifth specifications are overruled.

There are cases in which a fair presumption or inference of negligence arises from the circumstances under which the injury occurred, and this, we think, is one of them. The defendants, by their servants, were in possession of the roof of the plaintiff's house, and engaged in repairing it. For the purposes of their work, they had a fire pot there, and it is established by the verdict that the fire which destroyed his property was caused by a spark or sparks from it. The workmen, while the fire was in progress, acknowledged that it was so caused; but on the trial they set up, in the interest of their employers, a theory respecting the origin of it which was discredited by their previous declarations and other testimony, and was rejected by the jury. It was a theory born long after the fire, and opposed to their observation at the time of it. It was speculative and conjectural, and it was justly condemned. The defendants, by their servants, were in exclusive possession of the roof, and the destruction of the property was due to fire brought there by them, and under their control. The occurrence was not in the ordinary course of things, and the circumstances connected with and surrounding it put on them the duty of showing that it was at least consistent with the exercise of proper care in the performance of their work. If it was capable of an explanation which repelled an inference that it resulted from their negligence, they could and ought to have made it, because they were in a position to do so, while, from the nature of the case, it was not in the power of the plaintiff to show expressly in what manner their work was performed, or the cause of the escape from the fire pot of the sparks by means of which his house was burned. In Shearman & Redfield on Negligence, §§ 59, 60, the rule applicable to the case is thus stated: "The accident, the injury, and the circumstances under which they occurred, are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault." "When a thing which causes the injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." See also, on this point, Thomp. Neg. pp. 1227-1235; Cooley, Torts, 706; and 16 Am. & Eng. Encyclop. Law, p. 448,—and cases there cited.

In the light of the evidence, and the principles applicable to it, we cannot convict the learned court below of error in the instructions. We therefore overrule the sixth and seventh specifications.

Judgment affirmed.

MISSOURI SUPREME COURT (Division 2).

STATE of Missouri, *Respt.*,
v.
George JULOW, *Appt.*

(.....Mo.....)

1. **A right to insist that employes shall withdraw from or refrain from joining any trade union** or labor union as a condition of employment or continued employment, is within the constitutional rights of an employer and protected by the constitutional guaranty of due process of law against a statute which attempts to make it an offense for an employer to impose such conditions.
2. **A statute restricting the right to discharge laborers because of membership in labor unions** is within a constitutional provision against special laws.
3. **The police power** does not extend to a statutory prohibition of the exercise by employers of the right to insist that employés shall not belong to labor unions.

(June 18, 1896.)

APPEAL by defendant from a judgment of the St. Louis Court of Criminal Correction convicting defendant of violating the statute making it unlawful for an employer to prohibit an employé from belonging to a labor union. *Reversed.*

Statement by **Sherwood, *J.*:**

The defendant, being tried upon an information, was fined $50 and appeals to this court. The information had for its origin the following statute:

"Section 1. No employer, superintendent, foreman, or other person exercising superintendence or authority over any mechanic, miner, engineer, fireman, switchman, baggageman, brakeman, conductor, telegraph operator, laborer, or other workingman, shall enter into any contract or agreement with any such employé, to withdraw from any trade union, labor union, or other lawful organization of which said employé may be a member, or requiring said employé to refrain from joining any trade union, labor union, or other lawful organization, or requiring any such employé to abstain from attending any meeting or assemblage of people called or held for lawful purposes, *or shall by any means attempt to compel or coerce any employé into withdrawal from any lawful organization or society.*

"Sec. 2. Corporations, and the managers, superintendents, overseers, master mechanics, foremen, officers, and directors, and others exercising authority for and on behalf of corporations doing business in this state, shall be subject to the provisions of this act, and, upon conviction of the violation of any of its provisions, to the punishment prescribed by it.

"Sec. 3. Any person or corporation violating any of the provisions of this act shall, upon conviction, be punished by a fine of not less than fifty dollars nor more than one thousand dollars, or imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

The particular portion of section 1, on which the information is bottomed is that in italics. The information, in substance, charged that George Julow was on the 23d of May, 1894, a foreman or superintendent of the Hamilton-Brown Shoe Company, and as such exercised authority over one Richard C. Simmonds, then a mechanic or workman and employé of said Hamilton-Brown Shoe Company, but not under contract for any definite period of time; that at the same time Simmonds was a member of the Lasters' Protective Association of America, a lawful labor organization or society; that on the date last aforesaid Julow notified Simmonds that unless he withdrew from membership of said association he could no longer work for or be employed by said shoe company; that Simmonds refused to withdraw from said association, and thereupon he was on said date, for the reason aforesaid, by Julow discharged from the service of said shoe company, etc. The evidence supported the charge contained in the information. The defendant introduced no evidence on his part, nor did he make any admission as to the truth of such charge, but having previously demurred to the sufficiency of the information, without success, at the close of the testimony of the state he unsuccessfully renewed his attack on the information, and the evidence offered in support thereof, by moving for his discharge, which motion being denied, and he found guilty and judgment rendered against him, as aforesaid, for $50, he moved for a new trial and in arrest, but without avail; hence this appeal.

Messrs. **S. B. Jones & Williams** for appellant.

Mr. **R. F. Walker,** *Atty-Gen.*, for the State:

In discussing an Ohio statute, similar to the one under consideration in this case, Sayler, *J.*, says: "I construe it to mean that an employer shall not coerce, or attempt to coerce, his employé from belonging to a lawful labor organization, *i. e.*, shall not coerce him to quit such organization by discharging such employé. I do not think this takes away from the employer the right to discharge his employé; he may discharge him for any reason, but he shall not attempt to coerce him to quit the labor organization. I think the legislature has power to enact that the coercion of one person by another may be an offense."

Davis v. *State*, 30 Ohio L. J. 342.

NOTE.—The above case decides a new constitutional question in the law of master and servant.

As to hours of labor, see *note* to People v. Phyfe (N. Y.) 19 L. R. A. 141, also *Re* House Bill No. 1280 (Mass.) 23 L. R. A. 344.

As to payment of wages in money, see *note* to Avent-Beattyville Coal Co. v. Com. (Ky.) 26 L. R. A. 278.

See also, on the subject of statutory restrictions on contracts between master and servant, the *notes* to Com. v. Perry (Mass.) 14 L. R. A. 325, and State v. Loomis (Mo.) 21 L. R. A. 789.

See also 37 L. R. A. 802; 42 L. R. A. 718.

While the state cannot, under the guise of the police power, overthrow rights which the constitution guarantees, yet the legislature may do many things in the legitimate exercise of this power which, however injudicious they may seem, are not obnoxious to the objection of being beyond the scope of legislative action. *State* v. *Addington*, 77 Mo. 110; *St. Louis County Ct.* v. *Griswold*, 58 Mo. 175; *Phillips* v. *Missouri Pac. R. Co.* 86 Mo. 540; *State* v. *New Madrid County Ct.* 51 Mo. 82, *Ewing* v. *Hoblitzelle*, 85 Mo. 64.

Sherwood, J., delivered the opinion of the court:

The defendant alleges various grounds why the act under which he was convicted is unconstitutional, among them these: "Because the act of the legislature under which the said information was drawn is unconstitutional and void, because it violates the following provisions of the constitution of the state of Missouri: (1) "That all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry." Section 4, article 2. (2) "That no person shall be deprived of life, liberty, or property without due process of law." Section 30, article 2. (3) That the act of the legislature aforesaid violates the constitutional provision forbidding the legislature to grant to any corporation, association, or individual any special or exclusive right, privilege, or immunity. Section 53, article 4. That the act aforesaid violates the 14th Amendment to the Constitution of the United States, which provides: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

For the present purpose it will be assumed that defendant attempted to do the act with which he is charged and that it lay in his power to compel or coerce Simmonds to withdraw from a lawful organization with which he was connected; because by so doing all discussion of matters merely preliminary to the main question herein involved will be avoided. A similar provision to that contained in section 30, article 2, *supra*, is found in the 5th Amendment to the Constitution of the United States, providing, among other things, "nor deprived of life, liberty, or property without due process of law." In section 30, *supra*, as well as in the section in the Federal Constitution just recited, it will be noted that the rights of life, liberty, and property are grouped together in the same sentence; they constitute a trinity of rights, and each, as opposed to unlawful deprivation thereof, is of equal constitutional importance. With each of those rights, under the operation of a familiar principle, every auxiliary right, every attribute necessary to make the principal right effectual and valuable in its most extensive sense, pass as incidents of the original grant. "The rights thus guaranteed are something more than the mere privileges of locomotion; the guaranty is the negation of arbitrary power in every form which results in a deprivation of a right."

These terms, "life," liberty," and "property," are representative terms and cover every right to which a member of the body politic is entitled under the law. Within their comprehensive scope are embraced the right of self-defense, freedom of speech, religious and political freedom, exemption from arbitrary arrests, the right to buy and sell as others may,—all our liberties, personal, civil and political,—in short, all that makes life worth living; and of none of these liberties can any one be deprived except by due process of law. 2 Story, Const. 5th ed. § 1950. Now, as before stated, each of the rights heretofore mentioned carries with it, as its natural and necessary coincident, all that effectuates and renders complete the full, unrestrained enjoyment of that right. Take, for instance, that of property. Necessarily blended with that right are those of acquiring property by labor, by contract, and also of terminating that contract at pleasure, being liable, however, civilly, for any unwarranted termination. In the case at bar, as will be remembered, the contract was not made for any definite period. From these premises it follows that "depriving an owner of property of one of its essential attributes is depriving him of his property within the constitutional provision." *People* v. *Otis*, 90 N. Y. 48. In *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, relative to the subject under consideration, it is said: "The right to use, buy, and sell property, and contract in respect thereto, including contracts for labor, which is, as we have seen, property, is protected by the constitution." In the present instance, does the act in question seek to deprive the owner or the representative of the owner of one of the essential attributes of his property, to wit, the right to terminate any contract made by him, and does it profess to do this by force of its own terms, and without opportunity of being heard? If it does, then it falls under the ban of the prohibitory provisions of both the state and Federal Constitutions.

The "law of the land" and "due process of law" are the legal equivalents of each other. Touching this topic, a distinguished jurist observes: "Perhaps no definition is more often quoted than that given by Mr. Webster in the *Dartmouth College Case:* 'By the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial.' The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land." Cooley, Const. Lim. 6th ed. 431. Comstock, J., when discussing a constitutional prohibition such as ours, said: "No doubt, it seems to me, can be admitted of the meaning of these provisions. To say, as has been suggested, that 'the law of the land' or 'due process of law,' may mean the very act of legislation which deprives the citizen of his rights, privileges, or property, leads to a

simple absurdity. The constitution would then mean that no person shall be deprived of his property rights unless the legislature shall pass a law to effectuate the wrong; and this would be throwing the restraint entirely away. . . . Where rights of property are admitted to exist, the legislature cannot say they shall exist no longer; nor will it make any difference although a process and a tribunal are appointed to execute sentence. If this is the 'law of the land' and 'due process of law' within the meaning of the constitution, then the legislature is omnipotent. It may, under the same interpretation, pass a law to take away liberty or life without a pre-existing cause, appointing judicial and executive agencies to execute its will. Property is placed by the constitution in the same category with 'liberty and life.'" *Wynehamer v. People*, 13 N. Y. 378. Here the law under review declares that to be a crime which consists alone in the exercise of a constitutional right, to wit, that of terminating a contract,—one of the essential attributes of property, indeed of property itself, under preceding definitions. Brought to the bar of a court on such a charge the accused would have been prejudged in so far as the criminality of the act charged is concerned. No question could there be made or admitted as to the quality of the act. That would have been settled by the previous legislative declaration, and it would only remain to find the fact as charged in order to declare the guilt as charged. But the fact as charged, as already seen, is not a crime, and will not be a crime so long as constitutional guaranties and constitutional prohibitions are respected and enforced. If an owner, etc., obeys the law on which this prosecution rests, he is thereby deprived of a right and a liberty to contract or terminate a contract, as all others may; if he disobeys it, then he is punished for the performance of an act wholly innocent, unless, indeed, the doing of such act, guaranteed by the organic law,—the exercise of a right of which the legislature is forbidden to deprive him,—can by that body be conclusively pronounced criminal. We deny the power of the legislature to do this, to brand as an offense that which the constitution designates and declares to be a right, and therefore an innocent act; and consequently we hold that the statute which professes to exert such power is nothing more nor less than a "legislative judgment," and an attempt to deprive all who are included within its terms of a constitutional right without due process of law. In support of these views, see *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789; *Com.* v. *Perry*, 155 Mass. 117, 14 L. R. A. 325; *Godcharles* v. *Wigeman*, 113 Pa. 431; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 631; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Gillson*, 109 N. Y. 389; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *Ritchie* v. *People*, 155 Ill. 98, *ante*, p. 79.

2. But the statute is obnoxious to criticism on other grounds. It does not relate to persons or things as a class,—to all workingmen, etc.,—but only to those who belong to some "lawful organization or society," evidently referring to a trade union, labor union, etc. Where a statute does this,—where it does not relate to persons or things as a class, but to particular persons or things of a class,—it is a special, as contradistinguished from a general, law. *State* v. *Tolle*, 71 Mo. 645; *State* v. *Herrmann*, 75 Mo. 340. Here a non-trade-union man or a non-labor-union man could be discharged without ceremony, without let or hindrance, whenever the employer so desired, with or without reason therefor, while, in the case of a trade-union or labor-union man, he could not be discharged if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with or to terminate a contract with particular persons of a class and therefore the statute which does this is a special, not a general law, and therefore violative of the constitution. *Judge* Cooley says: "A statute would not be constitutional which should select particular individuals from a class or locality and subject them to peculiar rules, or impose upon them special obligations or burdens, from which others in the same class or locality are exempt. Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government." Cooley, Const. Lim. 391. The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be a mere arbitrary classification, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair or other individual peculiarities, something not competent for the legislature to do. *State* v. *Herrmann*, 75 Mo. *loc. cit.* 353.

3. The litigated statute is also in conflict with section 1, article 14, of the Federal Constitution, aforesaid, forbidding that "any state deprive any person of life, liberty, or property without due process of law," as to which the same considerations as heretofore announced apply.

4. Nor can the statute escape censure by assuming the label of a "police regulation." It has none of the elements or attributes which pertain to such a regulation, for it does not, in terms or by implication, promote or tend to promote the public health, welfare, comfort, or safety; and if it did, the state would not be allowed, under the guise and pretense of a police regulation, to encroach or trample upon any of the just rights of the citizen, which the constitution intended to secure against diminution or abridgment. *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636, and cases cited.

5. In conclusion, it may be said that there

is a broad distinction between the invasion of a right conferred by the constitution, to wit, a right of property, carrying with it, as we have seen, all the liberties, attributes, and coincident rights which go to effectuate the principal right, and those rights which are the mere creatures of legislative gratuity, where the legislature granting a privilege or bestowing a bounty may, of course, as no constitutional right is involved, prescribe the conditions upon which the privilege may be exercised or the bounty be obtained. This point finds ample illustration in the recent cases of *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, and *St. Joseph* v. *Levis* (decided at the present term), 31 S. W. Rep. 101, opinion by Burgess, *J.*

The premises considered, *we reverse the judgment*, and order the defendant discharged.

All concur.

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina
v.
Leroy CROOK.

(115 N. C. 760.)

Sentence in a criminal case may lawfully be suspended at the pleasure of the court and the court's power over an accused is not affected or lost by an order to pay costs both of himself and a codefendant or even by committing him for refusal to do so, since the requirement to pay costs is not part of the sentence.

(December 11, 1894.)

APPEAL by defendant from a judgment of the Superior Court for Union County sentencing him to jail upon a verdict which had been rendered against him some time previously, but sentence upon which had been suspended. *Affirmed.*

Crook and one Gurley pleaded guilty upon an indictment and were convicted for making an affray with deadly weapons. Judgment against both was suspended and the court directed Crook to pay all the costs. He was given time to comply with the order which was extended from time to time and upon his failure to comply within the time finally limited the court committed him to the county jail where he remained until just before the adjournment of the term, when the court directed him to be brought before it and sentenced him to imprisonment in the common jail for six months. From this action Crook appealed, and assigned as error: (1) That the former order or judgment of the court, made in February, 1892, that the defendant Crook pay all the costs in this case, including the costs of his codefendant, Gurley, was a judgment of the court against the defendant Crook; and the judgment having been performed in part, to wit, a payment of a part of the costs, it was no longer in the power of the court to change said judgment, and imprison the defendant. (2) That the defendant having stated to the court that he was unable to pay the balance of said bill of costs, and the court having ordered the defendant into the custody of the sheriff, said order was by implication a judgment of the court, and an order to the sheriff to imprison the defendant until the costs were paid, or he be discharged according to law; and the defendant Crook, having been in jail twelve days of the twenty or thirty days necessary to remain in jail to be discharged under the insolvent debtor's law, had thereby executed a part of this judgment; and it was no longer in the power of the court to change the judgment in a manner to make it more harsh.

Further facts appear in the opinion.

Mr. **F. H. Whitaker, Jr.,** for appellant.

Mr. **Frank I. Osborne,** *Atty-Gen.*, for the State.

Avery, *J.*, delivered the opinion of the court:

The practice of making an order, where defendants are convicted or submit on a criminal charge, that the judgment be suspended upon the payment of the costs, is one that seems to be somewhat peculiar to our own courts; but it must be admitted that its adoption has proved very salutary, both in bringing about the reformation of petty offenders, and in the suppression, especially of certain classes of offenses. The exercise of this discretionary power has not heretofore been questioned, and the beneficial effects of its judicious use have been made so manifest as to commend it both to the judges and the people. We search in vain for direct authority emanating from the courts of other states, to aid us in determining the precise meaning of such orders, because it has not been the practice to make them elsewhere in the same way. The order is, in effect, a final judgment for the whole or a certain proportion of the costs incurred in the prosecution of the charge, but a suspension of the sentence of fine or imprisonment, either generally and indefinitely, or till some specified term of the court. We cannot understand how the rights of a defendant are infringed, or his interests prejudiced, by allowing him to escape for the present upon a partial judgment for the costs, and suspending the motion or prayer for further punishment, instead of subjecting him immediately to such fine or imprisonment as his own criminal conduct has made him liable to suffer. In civil causes this court has approved the practice of granting a writ of restitution, on appeal, to one wrongfully dispossessed of land under a justice's judgment, and by the same order retaining the case till witnesses could be summoned, and the damages growing out of the wrongful ejection assessed. *Lane* v.

NOTE.—As to suspension of sentence, see also State v. Voss (Iowa) 8 L. R. A. 767; People v. Cummings (Mich.) 14 L. R. A. 285, and *note*; People v. Monroe County Court of Sessions (N. Y.) 23 L. R. A. 856, and *Re* Webb (Wis.) 27 L. R. A. 356.

See also 40 L. R. A. 109; 41 L. R. A. 472; 42 L. R. A. 190.

Morton, 81 N. C. 88. We might adduce other instances in which one branch of a controversy has been finally disposed of while other matters in dispute have been retained to await further investigation preliminary to judgment, but it is needless to do so.

It is familiar learning that a court may suspend the judgment over a criminal *in toto* until another term, but has no power to impose two sentences for a single offense, as by pronouncing judgment under one count in an indictment, and reserving the right to punish under another count at a subsequent term, or by imposing a fine, and at a later term superadding imprisonment. *State* v. *Ray*, 50 Iowa, 520; *State* v. *Miller*, 6 Baxt. 513; *State* v. *Watson*, 95 Mo. 411; *People* v. *Felix*, 45 Cal. 163; *Thurman* v. *State*, 54 Ark. 120; Whart. Crim. Pl. & Pr. § 913; *Whitney* v. *State*, 6 Lea, 247. The judgments, orders, and decrees of a court, as a general rule, are under its control and subject to modification during the term at which they are entered; but where a defendant has undergone a part of the punishment the sentence cannot be revoked, and another, except in diminution or mitigation, substituted for it, because he would be twice placed in jeopardy, and twice subjected to punishment for the same offense. *State* v. *Warren*, 92 N. C. 825; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872. The punishment which the courts are prohibited from inflicting twice is usually fine or imprisonment, now that corporal punishment is inflicted only for a few offenses, of a character more serious than that of which the defendant was convicted. *State* v. *Burton*, 118 N. C. 662; 1 Bishop, Crim. L. § 940. But costs neither constitute a part of the relief in civil actions (4 Am. & Eng. Encyclop. Law, p. 313, and *note*), nor of the punishment in criminal prosecutions, though the payment of them, or a proposition to pay, may be considered in mitigation of sentence by the court. The payment of costs is regulated by our statute (Code, § 1211), which provides that every person convicted, or confessing himself guilty, or submitting to the court, shall pay the costs of the prosecution, and the legal effect of a conviction and judgment is to vest the right to the costs in those entitled to them; but, where a fine is imposed, it is due to the state, and is remitted by a pardon granted by the governor. *State* v. *Mooney*, 74 N. C. 99, 21 Am. Rep. 487. The right of the officers to recover costs in the name of the state is a mere incidental one, arising out of the conviction under the provisions of our statute; and the judgment for them, as we have seen, vests the claim in the officers to whom they are due. The order for payment of them is no more a part of the punishment proper than that to pay an allowance and costs on conviction in bastardy; but in both cases the legislature, in the exercise of the police powers of the state, has provided for the protection of the public by making a defendant liable to imprisonment, as an inducement to the payment of such cost or allowance. *State* v. *Burton*, at page 659, 118 N. C.; *Myers* v. *Stafford*, 114 N. C. 234; *State* v. *Parsons* (decided at this term), 115 N. C. 780. In *Com.* v. *Dowdican's Bail*, 115 Mass. 136, we find a recognition of the principle we have stated in the long-continued practice of the courts of that state which eventually (in 1865 and 1869) received the sanction of the legislature. The court said: "It has long been a common practice in this commonwealth, after verdict of guilty in a criminal case, when the court is satisfied that, by reason of extenuating circumstances, or of the pendency of a question of law in a like case before a higher court, or other sufficient cause, public justice does not require an immediate sentence, to order, with the consent of the defendant and of the attorney for the commonwealth, and upon such terms as the court, in its discretion, may impose, that the indictment be laid on file. . . . Such an order is not equivalent to a final judgment, or to a *nolle prosequi* or discontinuance, by which the case is put out of court; but is a mere suspending of active proceedings in the case, which dispenses with the necessity of entering formal continuances upon the docket, and leaves it within the power of the court at any time, upon the motion of either party, to bring the case forward, and pass any lawful order or judgment therein. Neither the order laying the indictment on file, nor the payment of costs, therefore, . . . entitled the defendant to be finally discharged." It thus appears that, under the name of "laying the indictment on file," the courts of that state accomplished the same result attained here by suspending judgment. Such orders are not prejudicial, but favorable, to defendants, in that punishment is postponed, with the possibility of escaping it altogether; and it is presumed that the party adjudged guilty is present and assenting to, if not asking for, such orders. *Gibson* v. *State*, 68 Miss. 241. If the payment of the costs constitutes no part of the punishment, as was held by the supreme court of Massachusetts, and by the court of Mississippi in *Gibson's Case*, *supra*, as well as by the supreme court of Florida in *Ex parte Williams*, 26 Fla. 310, then the payment of a portion of it by the defendant is not undergoing or performing a part of the sentence, and does not bring this case within the principle announced in *State* v. *Warren*, and *Ex parte Lange*, *supra*; *Easterling* v. *State*, 85 Miss. 210.

It is conceded that when the court couples with the payment of the costs any judgment that might have constituted a part of a sentence, as that a public nuisance be abated, in case of conviction for creating it, the power of the court is exhausted in its rendition, and the suspension of judgment is deemed to have been ordered on condition of the performance of such requirement. *State* v. *Addy*, 43 N. J. L. 113, 39 Am. Rep. 547; *Gibson* v. *State*, *supra*. But the suspension of the judgment upon the payment of the whole of the costs by one of the two defendants in this case, including the solicitor's fee due from his codefendant, and the actual payment of both fees taxed for the prosecuting officer, fails to bring it within the principle announced in *Addy's Case*, *supra*, since the adjudication that such codefendant pay his own fee, as a part of the costs, would

have constituted no part of his punishment, and when added, as a part of the costs, to defendant's bill, inflicts no punishment on him. The court merely suspended judgment on the condition of paying the costs of the other defendant, as well as his own, as a part of the terms upon which the favor of the postponement was granted, as it is the practice to do on conviction in such cases. *Gibson's Case, supra.*

It has always been the practice in our courts, so far as we can ascertain, where the judgment for costs is rendered in the same order of the court which imposes the sentence, to leave the exact amount of the costs to be taxed by the clerk, and, under the Act of 1879, to be revised by the judge. The practice under that act was to revise the bill of costs at chambers, and it seems to have been contemplated neither by the courts nor by the legislature that costs in a criminal action constituted a part of the punishment for the offense, and that the party convicted might consequently claim the right to such notice as would enable him to be present when the court should adjudge what amount was due. "Where the defendant is found guilty, and the court pronounces judgment that he pay a fine, and stand committed until it be paid, the imprisonment is no part of the punishment, but only a mode of enforcing payment of the fine." 1 Archbold, Crim. Pr. & Pl. (Pom. ed.) p. 580; *Son* v. *People*, 12 Wend. 344. The same principle applies where he is committed during a term for nonpayment of a judgment for costs, like that in this case, and is brought before the judge during the same term on the prayer of the solicitor for judgment. The court, in such cases, orders the defendant to be committed by way of inducement to pay the costs. If the order prove ineffectual, it becomes optional with the court whether he shall be allowed to remain in prison, and rid himself of responsibility for costs by taking, at the proper time, the insolvent debtors' oath, or whether he shall be brought to the bar of the court, and subjected to the sentence which still remains suspended over him. An order of commitment, whether for nonpayment of fine and costs, or costs only, can be modified during the term at which it is entered (*Burton's Case, supra*), because where there is a sentence to pay a fine, "its execution" does not begin, in contemplation of law, till the power of modification by the court ends, and then committal for failure to discharge costs is treated as an effort to enforce the payment, till the same period. The rule is different where the court sentences a prisoner, as a part or the whole of its judgment, to a term of imprisonment in the common jail, and he is immediately committed to prison. In such case he is not incarcerated for failure to pay, or to enforce payment of, fine and costs, but is deemed, from the day of his commitment to the expiration of his term, to be undergoing his sentence. Upon the expiration of his term, he may still pay fine and costs imposed in addition to imprisonment, but on his failure to do so the law holds him to be still committed for the statutory period, and until he shall comply with the requirements of the statute. *State* v. *Parsons* (decided at this term), 115 N. C. 730.

We think, therefore, that there was no error in the ruling of the court below, and its *judgment is affirmed.*

MARYLAND COURT OF APPEALS.

William J. HOOPER *et al.*, Exrs., etc., of William E. Hooper, Deceased, *Appts.*,
v.
CENTRAL TRUST CO. OF NEW YORK *et al.*

(.....Md.....)

1. **A cross-bill by second mortgagees is not so far foreign to a bill filed to foreclose** the first mortgage as to be improper where the matter alleged is the same as set out in the answer and attacks the priority of the first mortgage seeking to establish that of the second and the question of priority cannot be adjusted without the aid of the cross-bill.
2. **First mortgagees will not be permitted by equity to assert their lien** against the property in preference to a grantor's lien for unpaid purchase money a waiver of which they procured by a fraudulent device so as to let in their mortgage as a first lien although the grantors agreed to take a second mortgage as security which on its face declares that it is subject to the lien of the first.
3. **Promoters of a corporation to whom stock and mortgage bonds are issued** nominally in payment for property transferred to the corporation which was in fact bought of a third person will not be permitted to jeopardize such third person's collection of the purchase money by enforcing their mortgage without paying for their stock.
4. **A stipulation in second mortgage bonds on corporate property,** that they shall not be enforced against the individual estate of stockholders, will not prevent equity from refusing to enforce a first mortgage held by such stockholders until they have paid for their stock.
5. **A prayer for payment of stock subscriptions cannot properly be inserted** in a cross-bill filed by second mortgagees on corporate property in a suit to foreclose a first mortgage held by stockholders of the corporation the priority of which over the second mortgage is attacked on the ground of fraud.
6. **A promoter of a corporation is affected and bound by any fraud contained in a guaranty** to one selling property to the corporation by another promoter that money in his hands should be applied to placing improvements on the property, for the purpose

NOTE.—The duties and liabilities of promoters to a corporation and its members are treated at length in a *note* to Yale Gas Stove Co. v. Wilcox (Conn.) 25 L. R. A. 90.

See also 39 L. R. A. 623.

of securing a waiver of the vendor's lien, so that he cannot acquire a right to a judgment for the price of such improvements which he can enforce against the objection of such vendor.

7. Promoters of a corporation who secure a waiver of the lien of one selling property to the corporation in favor of a mortgage taken by themselves upon the property by a fraudulent guaranty that certain money shall be applied to making improvements on the property, which is not done, will not be permitted to enforce their mortgage against his objection.

8. Receiver's certificates issued to a promoter of a corporation for money advanced to pay for improvements put on the corporate property will not be given priority over the rights of the seller of the property who waived his lien upon the fraudulent guaranty by another promoter at the time of the sale that money was in his possession which would be applied to pay for such improvements.

9. Equity will relieve against the waiver of a vendors' lien procured by a fraudulent guaranty on the part of the vendee.

10. That commissioners appointed to make partition of a decedent's estate refused to recognise any value in second mortgage bonds taken for property sold to a corporation will have no bearing upon the question whether or not such bonds shall not be given priority over the first mortgage bonds which were issued to promoters because of their fraud in procuring their preference.

11. A promoter of a corporation who has not paid his stock subscription will not be permitted to take an assignment of a claim for improvements made on the corporate property so as to enforce the same in priority to valid mortgages on such property.

12. Vested liens upon the property of individuals and private corporations cannot be displaced by means of receiver's certificates.

(June 20, 1895.)

APPEAL by defendants Hooper *et al.* from a decree of the Circuit Court of Baltimore City dismissing their cross-bill in a suit by the Central Trust Company to foreclose a mortgage upon property of the Maryland Ice Company. *Reversed.*

The facts are stated in the opinion.

Messrs. **Thomas M. Lanahan, John P. Poe,** and **Frank Gosnell** for appellants.

Messrs. **William Pinkney Whyte** and **Barton & Wilmer,** for appellees:

The stock by the contract between the company and the holders was issued as full paid and non-assessable. Such a contract is binding on the company.

Brant v. *Ehlen,* 59 Md. 24; *Crawford* v. *Rohrer,* Id. 604; *Bickley* v. *Schlag,* 46 N. J. Eq. 533; *Scovill* v. *Thayer,* 105 U. S. 143, 26 L. ed. 968; Cook, Stock & Stockholders, § 38.

Where actual fraud enters into the transaction, the person receiving the stock can be compelled to return the stock or its market value, but the corporation cannot hold him liable for the par value of the stock.

Phelan v. *Hazard,* 5 Dill. 51; *Zelaya Min. Co.* v. *Meyer,* 28 N. Y. S. R. 759; *Union Mut. L. Ins. Co.* v. *Frear Stone Mfg. Co.* 97 Ill. 537, 37 Am. Rep. 129; *First Nat. Bank of Deadwood* v. *Gustin-Minerva Consol. Min. Co.* 6 L. R. A. 676, 42 Minn. 327; *Harrison* v. *Union Pac. R. Co.* 13 Fed. Rep. 523; *Scovill* v. *Thayer, supra; Baltimore Granite Roofing Co.* v. *Michael,* 54 Md. 65.

The remedy of the Messrs. Hooper, if they have any claim against the stockholders, is by an original bill in equity or by a suit at law.

Crawford v. *Rohrer,* 59 Md. 604; *Norris* v. *Johnson,* 34 Md. 485.

If the alleged liability has any existence, to attempt to enforce it in this case by a cross-bill, or by any other means, is to interject into this case a controversy entirely foreign to the purposes of the litigation.

2 Dan. Ch. Pl. & Pr. 6th Am. ed. p. 15; Story, Eq. Pl. 10th ed. § 88. p. 365; *Ayres* v. *Carver,* 58 U. S. 17 How. 591, 15 L. ed. 179; *Cross* v. *Del Valle,* 68 U. S. 1 Wall. 1, 17 L. ed. 515; *Providence Rubber Co.* v. *Goodyear,* 76 U. S. 9 Wall. 807, 19 L. ed. 587; *Ayers* v. *Chicago,* 101 U. S. 184, 25 L. ed. 838; *Rowan* v. *Sharps' Rifle Mfg. Co.* 33 Conn. 27; *Remer* v. *McKay,* 38 Fed. Rep. 164; *Johnson Railroad Signal Co.* v. *Union Switch & Signal Co.* 43 Fed. Rep. 331; *Stonemetz Printer's Mach. Co.* v. *Brown Folding Mach. Co.* 46 Fed. Rep. 861; *Pacific R. Co.* v. *Cutting,* 27 Fed. Rep. 638; *Krueger* v. *Ferry,* 41 N. J. Eq. 434; *Slater* v. *Cobb,* 153 Mass. 22; *Lund* v. *Skanes Enskilda Bank,* 96 Ill. 181; *Gage* v. *Mayer,* 117 Ill. 632.

It is a statutory liability in this: That if any liability exists in spite of the contract with the company that it does not exist, it remains by force of the statute which provides the mode in which stock may be paid in property, and a receiver cannot enforce such a liability. He can only enforce a contractual liability.

2 Spelling, Priv. Corp. §§ 868, 869; *Chandler* v. *Keith,* 42 Iowa, 99; *Republic L. Ins. Co.* v. *Swigert,* 12 L. R. A. 828, 135 Ill. 150; *Bell* v. *Shibley,* 38 Barb. 610; *Stillman* v. *Dougherty,* 44 Md. 390; *Gaither* v. *Stockbridge,* 67 Md. 222; *Quincy, M. & P. R. Co.* v. *Humphreys,* 145 U. S. 98, 36 L. ed. 638; Beach, Receivers, § 670; *Coffin* v. *Ransdell,* 110 Ind. 417; 2 Morawetz, Priv. Corp. § 869; *Farnsworth* v. *Wood,* 91 N. Y. 308; *Wincock* v. *Turpin,* 96 Ill. 135; High, Receivers, § 815; *Luckemeyer* v. *Seltz,* 61 Md. 313; *Buschman* v. *Hanna,* 73 Md. 1; *Billings* v. *Robinson,* 94 N. Y. 415, 28 Hun, 122; *Cleveland* v. *Burnham,* 55 Wis. 598; *Scovill* v. *Thayer,* 105 U. S. 143, 26 L. ed. 968; *Mills* v. *Scott,* 99 U. S. 25, 25 L. ed. 294.

Under no circumstances were the holders of the stock liable to the Messrs. Hooper.

Clark v. *Bever,* 139 U. S. 96, 35 L. ed. 88; *Fogg* v. *Blair,* 139 U. S. 118, 35 L. ed. 104; *Handley* v. *Stutz,* 139 U. S. 417, 35 L. ed. 227.

Knowledge of existing arrangements against stockholders' liability on the part of a creditor forbids his assertion of a claim against a stockholder.

Coit v. *North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420; *Bank of Fort Madison* v. *Alden,* 129 U. S. 378, 33 L. ed. 725.

And knowledge may be presumed.

Whithill v. *Jacobs,* 75 Wis. 474; *First Nat. Bank of Deadwood* v. *Gustin-Minerva Consol. Min. Co.* 6 L. R. A. 676, 42 Minn. 327; *Young* v. *Erie Iron Co.* 65 Mich. 111; *Cook* v. *Bailey,* 146 Pa. 328; 2 Spelling, Corp. p. 884.

The Messrs. Hooper expressly waived all claim against stockholders by accepting the mortgage and bond, with the exemption covenant

French v. *Teschemaker*, 24 Cal. 518; *Robinson* v. *Bidwell*, 22 Cal. 379; Morawetz, Priv. Corp. § 871; *Brown* v. *Eastern State Co.* 134 Mass. 590; *Basshor* v. *Forbes*, 36 Md. 154; Cook, Stock & Stockholders, § 216.

There is no liability for unpaid stock under any circumstances in this case.

Bickley v. *Schlag*, 46 N. J. Eq. 533; *Coit* v. *North Carolina Gold Amalgamating Co.* 119 U. S. 343, 30 L. ed. 420; *Glenn* v. *Liggett*, 135 U. S. 533, 34 L. ed. 264.

The court had the right to order the issue of certificates and grant the lien for their security, notice of the application having been served on the Messrs. Hooper and they not objecting.

2 Beach, Receivers, § 747; *Ellis* v. *Vernon Ice, Light & Water Co.* 86 Tex. 110.

Mr. John H. Thomas, also for appellees:

A stockholder of a corporation is not liable as such to any creditors of the corporation, except those who became such while he was a stockholder.

Weber v. *Fickey*, 47 Md. 196, 52 Md. 500; *Coit* v. *North Carolina Gold Amalgamating Co.* 119 U. S. 347, 30 L. ed. 421; *Clark* v. *Bever*, 139 U. S. 107, 35 L. ed. 98; *Fogg* v. *Blair*, 139 U. S. 126, 35 L. ed. 107; *Bank of Fort Madison* v. *Alden*, 129 U. S. 372, 32 L. ed. 725; *Handley* v. *Stutz*, 139 U. S. 432, 35 L. ed. 236.

The appellants did not rely on any individual liability of stockholders of the ice company, as part of their security.

Corporate creditors may waive their rights, if they would otherwise have any, to the individual liability of stockholders.

1 Cook, Stock & Stockholders, § 216.

The stockholders' liability, when it exists, is not an ingredient of the contract between the creditor and the corporation; but a statutory incident of it; and it does not contradict a written evidence of corporate liability whether it be a bond or a note, to prove that it was also agreed that there should be no stockholders' liability therefor.

Basshor v. *Forbes*, 36 Md. 154; 1 Cook, Stock & Stockholders, § 216.

The rights of creditors of a corporation to recover from a stockholder depend, in the absence of fraud on the part of the stockholders, entirely on the contract between him and the corporation.

Brant v. *Ehlen*, 59 Md. 23; 1 Cook, Stock & Stockholders, § 46.

The holder of stock, issued for "property purchased," is not liable to corporate creditors, unless there was actual fraud in the transaction.

1 Cook, Stock & Stockholders, 3d ed. § 35, p. 47; *Wetherbee* v. *Baker*, 35 N. J. Eq. 501; *Bickley* v. *Schlag*, 46 N. J. Eq. 533.

The rights and liabilities of the parties to this cause depend entirely upon the statutes of New Jersey, under which the ice company was organized.

Glenn v. *Liggett*, 135 U. S. 533, 34 L. ed 264; 1 Cook, Stock & Stockholders, § 223.

The holders of stock, which has been issued for property purchased, have not been held accountable to the corporate creditors, unless there was actual fraud in the transaction.

Clark v. *Bever*, 139 U. S. 97, 35 L. ed. 88; *Van Cott* v. *Van Brunt*, 82 N. Y. 535; *Memphis & L. R. R. Co.* v. *Dow*, 120 U. S. 287, 30 L. ed. 595; *Fogg* v. *Blair*, 139 U. S. 118, 35 L. ed. 104; *Handley* v. *Stutz*, 139 U. S. 417, 35 L. ed. 227; *Lloyd* v. *Preston*, 146 U. S. 630, 36 L. ed. 1111; 2 Cook, Stock & Stockholders, § 746, p. 1210, and *notes; Camden* v. *Stuart*, 144 U. S. 105, 36 L. ed. 363; *Bank of Fort Madison* v. *Alden*, 129 U. S. 372, 32 L. ed. 725.

The ice company was justified in adopting the well-founded expectations of annual net profits it could calculate on receiving, as a basis for capitalizing the stock of the company.

Com. v. *Central Pass. R. Co.* 52 Pa. 506; 1 Cook, Stock & Stockholders, § 46, *notes* on p. 65.

Even if the amount fixed upon as the proper amount of capital stock, on this basis, was inordinately large, and the property was improperly accepted for the bonds and stock, the appellants were not injured; still less were they defrauded thereby. They cannot, on that ground, hold stockholders responsible for corporate debts.

Re Ambrose Lake Tin & Copper Min. Co. L. R. 14 Ch. Div. 390; *Com.* v. *Central Pass. R. Co.* 52 Pa. 515; 1 Cook, Stock & Stockholders, § 46, and *notes; Baltimore Granite Roofing Co.* v. *Michael*, 54 Md. 65.

The New Jersey statute provides special means for enforcing liabilities, if any, of stockholders to corporate creditors.

Corporation Acts of New Jersey, §§ 93, 94, p. 42; *Wetherbee* v. *Baker*, 35 N. J. Eq. 507; *Bickley* v. *Schlag*, 46 N. J. Eq. 533; 1 Cook, Stock & Stockholders, §§ 220–224.

These liabilities, if any, being the creatures of statute, the modes provided by the statute which created them, for the enforcement of them, must be pursued. They are exclusive of all others.

Wetherbee v. *Baker*, and *Bickley* v. *Schlag*, *supra; Pollard* v. *Bailey*, 87 U. S. 20 Wall. 527, 22 L. ed. 378; *Fourth Nat. Bank of New York City* v. *Francklyn*, 120 U. S. 747, 30 L. ed. 825; 1 Cook, Stock & Stockholders, §§ 220–224.

The ice company could not maintain an action on its contracts with the stockholders. It would be estopped by the provisions in its bonds, and by its own declarations, in the certificates of stock it issued.

Brant v. *Ehlen*, 59 Md. 23.

It could not maintain an action of tort, founded on the alleged frauds. If any frauds were perpetrated, that company was a party to them.

Roman v. *Mali*, 42 Md. 513.

Chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even where there is a suit pending to establish it.

Adler v. *Fenton*, 65 U. S. 24 How. 407, 16 L. ed. 696.

The investment corporation and Poor and Greenough are not parties to these proceedings. The question of their alleged liabilities cannot properly be adjudicated in them.

1 Cook, Stock & Stockholders, § 218.

McSherry, J., delivered the opinion of the court:

On March 21, 1890, the Maryland Ice Company was incorporated under the laws of the state of New Jersey. On the following 5th

of April the company acquired certain property situated in Baltimore city from the executors of the estate of the late William E. Hooper, deceased, and it acquired this property under an agreement previously made between the executors and Ormond Hammond, Jr., who contracted for himself and his undisclosed associates. The circumstances attending this acquisition of property will be stated later on. The price agreed to be paid was $150,000 in cash (of which $5,000 were paid when the agreement was executed) and $100,000 in second mortgage bonds of a company to be formed thereafter, which company, when formed, was the Maryland Ice Company. In the contract of purchase, which bore date February 28, 1890, there were stipulations requiring the construction by the purchaser and his associates of certain betterments and ice-manufacturing machinery upon the premises, to the value of $130,000 to $150,000, to be erected by a designated time, and to have a prescribed ice-producing capacity. Simultaneously with the execution of the deed by the executors conveying the property to the Maryland Ice Company, the latter placed upon record two mortgages to the Central Trust Company of New York, each dated on the 1st of March, and acknowledged on the 3d of April, and each covering the property so conveyed to the Maryland Ice Company by the Hoopers, and also covering all additions thereto, and all machinery thereafter to be placed thereon. The first of these two mortgages secured an issue of $250,000 of the Maryland Ice Company's bonds, and the second secured an issue of $110,000 of other bonds of the same company. These latter were delivered to the executors, $100,000 of them in part payment of the purchase money as provided in the contract of February 28, and $10,000 of them in settlement of another transaction, which has no connection with the pending controversy. Prior to the incorporation of the Maryland Ice Company, Ormond Hammond, Jr., and Thomas Sturgis, acting for and in behalf of the promoters of the enterprise, which finally culminated in the formation of the Maryland Ice Company, entered into a contract with the Arctic Ice Machine Manufacturing Company for the construction of three ice-manufacturing machines to be placed upon this property. In the contract so executed on March 15, 1890, there was a clause expressly reserving to the Arctic Company the title in these machines, and the right to reclaim and remove them if the purchase price should not be paid when due. This contract was assigned to the Maryland Ice Company after its incorporation. The machines were, after some delays, finally erected, but were not fully paid for. The Maryland Ice Company having made default on September 1, 1891, in the payment of the interest coupon due that day on its first mortgage bonds, the Central Trust Company, representing and acting for the holders of those bonds, filed on the following day, in the circuit court of Baltimore city, a bill for the foreclosure of the first mortgage, and for a sale of the property, including the machines constructed by the Arctic Company, and which had not been fully paid for by the Maryland Ice Company. With the bill there was filed the unsworn answer of the Maryland Ice Company consenting to a sale, and agreeing that a receiver be forthwith appointed. On the same day a decree was signed appointing O. Hammond, Jr., receiver, and enjoining the Maryland Ice Company and all persons from selling or disposing of any of the company's property. This whole proceeding, though ostensibly between different parties, occupying opposite sides of the docket, was in fact conducted by the same individuals, who, under other names, controlled both sides of the apparent controversy, because the trust company, the plaintiff, acted at the instance and in behalf of the first mortgage bondholders, and the Maryland Company, the defendant, represented its stockholders, who were the same identical bondholders and their agents, and coprojectors of the original undertaking. After the appointment of the receiver, the Arctic Company intervened by petition, and asserted, under the contract of March 15, 1890, made with Hammond and Sturgis, its ownership of the machines erected by it, but which had not been fully paid for. This claim was resisted by the first mortgage bondholders on the ground that they were bona fide purchasers of those bonds without notice of the unrecorded conditional sale made by the Arctic Company of the three ice-manufacturing machines. While that controversy was pending, no further steps were taken with reference to the foreclosure and sale. Ultimately the point at issue between the first mortgage bondholders, represented by the Central Trust Company, and the Arctic Company, reached this court, and the case is reported in 77 Md. 202. Bearing in mind that the precise question controverted between the contending parties to that appeal was whether the holders of the first mortgage bonds were in fact bona fide purchasers thereof without notice or knowledge of the title set up by the Arctic Company to the three machines erected by it under the contract made by Hammond and Sturgis on March 15, 1890, the pertinency of the conclusions reached on that subject in that case to the questions involved in the pending appeal will be apparent. After a full, able and elaborate argument at the bar, we held that the London & New York Investment Corporation and Poor and Greenough, who, it then appeared, together owned $245,000 of the $250,000 of the first mortgage bonds of the Maryland Company, and who, it now appears, between them own the entire issue, were in fact, with Hammond and Sturgis, the actual promoters of the scheme which resulted in the purchase of the property from the Hoopers, the making of the contract with the Arctic Company, the formation of the Maryland Ice Company, and the issue of its first and second mortgage bonds. It was distinctly decided that the London Corporation and Poor and Greenough had notice and knowledge of the provisions of the contract between the executors of Hooper on the one hand and Hammond on the other, wherein the latter agreed, in behalf of himself and his associates, that betterments to cost from

$130,000 to $150,000 should be placed upon the property; that they knew how and by what means the Hoopers were to be paid the amount of the agreed purchase money, and that they further knew the provisions of the contract between Hammond and Sturgis and the Arctic Company, which was subsequently assigned to the Maryland Ice Company. And they were held to have known these facts because, in the opinion of this court, the London & New York Investment Corporation and Poor and Greenough were the real parties to these several contracts executed in their behalf by their accredited agents, Hammond and Sturgis. "It was," we said in 77 Md. 231, "for the London Corporation, and at its instance, that Hammond negotiated the purchase with Hooper, and it was for it and for its benefit that he incurred the obligation to erect the three additional machines thereon; and it was to advance its interests that he and Sturgis entered into the contract with the Arctic Company. He and Sturgis were, therefore, in fact the agents of that corporation, employed to develop the project for it; and the attempts to disguise their real connection with the London Corporation are, whilst numerous and adroit, none the less transparent and obvious. . . . The priority asserted by the Central Trust Company for the holders of the Maryland Ice Company's first mortgage bonds is a priority claimed in behalf of the very persons whose agents and associates purchased the machines and contracted for the preservation of the vendor's lien thereon. The London Corporation and Poor and Greenough, who are stockholders of the Maryland Company, claim, as creditors of the very company which they organized and control, and whose obligations they were aware of, a priority over the vendor of the machines, notwithstanding the knowledge and information which they had and were chargeable with when they took the bonds, and notwithstanding the fact that the very priority which they are now seeking to defeat was one created by their own agents, even before the bonds were issued. No court has ever yet held that parties thus situated could successfully maintain such a position. It is the worst of bad faith. . . . As bondholders, they have no standing to destroy or to impair the lien which as projectors of the company they, through their own agents, established in favor of some one else." Page 234, 77 Md.

Under the contract between Hammond and the Hoopers of February 28, 1890, it was stipulated that Hammond should furnish a guaranty from Poor and Greenough, bankers of New York, that the betterments and additional machinery provided for would be placed upon the property on or before the 1st day of the succeeding July. The object which the Hoopers had in view in insisting on these betterments is obvious. They desired to add to the security of the second mortgage bonds, which, in consideration of these betterments and improvements being made, they agreed to take as part of the purchase price for the property. And the object which the purchasers obviously had in view in giving the guaranty was to induce the vendors to waive their lien for the unpaid purchase money so as to let in the first mortgage as a prior lien. Accordingly, before the delivery, and as a condition of the delivery by the vendors of the deed to the Maryland Ice Company, which had just been substituted in the executor's report of sales to the orphans' court as purchaser of the property in the place and stead of Hammond and his associates, who made the contract of purchase in contemplation of the incorporation of the company, and before the grantors waived their vendor's lien in favor of the first mortgage bonds, guaranty in the words hereinafter set forth was signed by Poor and Greenough, and was given to the Hoopers.

Having determined in 77 Md. 202, that the holders of the first mortgage bonds (who, together with Sturgis and Lane, are also the holders of the stock of the Maryland Ice Company) were not bona fide purchasers of those bonds without notice of the claim or lien of the Arctic Company, and that they were accordingly bound by the provisions in the latter company's contract of March 15, 1890, and were subordinated to the vendor's lien asserted by that company, the case was remanded for further proceedings and proof respecting another branch of the controversy. It came here twice afterwards (*Maryland Ice Co.* v. *Arctic Ice Machine Mfg. Co.*, 79 Md. 103); and when the amount due to the Arctic Company was finally and definitely settled a portion of it was paid and $50,000 of it were advanced by the London Corporation, which took from the Arctic Company an assignment of the latter company's decree to that extent. Whether this decree, in the hands of the London Corporation under the assignment from the Arctic Company, is a prior lien to that of the second mortgage, is one of the questions involved in the pending appeals.

From the day the original bill was filed down until about the 6th day of June, 1893, various sums were borrowed by the receiver on certificates issued under authority conferred by the circuit court. The money, aggregating over $90,000, was furnished by the London Corporation. The Hoopers, who held then, and still hold, the second mortgage bonds, never assented to the issuing of these certificates. Whether these receiver certificates held by the London Corporation are a prior lien to the second mortgage is another of the questions now before us for decision.

After the controversy between the Arctic Company on the one side and the holders of the first mortgage bonds and the Maryland Ice Company on the other side, had been finally disposed of as above stated, the Hoopers, still holding the $110,000 of second mortgage bonds, came into the foreclosure proceeding case by petition, and were finally made parties defendants. They obtained leave to file, and did file, a cross-bill, and they also answered the original bill. They incorporated the averments and statements of the cross-bill in their answer as parts thereof, and by both answer and cross-bill they insist that the holders of the first mortgage bonds are not entitled to a priority over

the holders of the second mortgage bonds, for reasons to be stated later on; and they further claim that before the holders of the first mortgage bonds shall be allowed any part of the proceeds which may arise from a sale of the mortgaged premises they, the first mortgage bondholders, shall, as stockholders of the Maryland Ice Company, pay to the receiver thereof the sum which the par value of the stock held by them amounts to in excess of the sum due to them on the first mortgage bonds. And these are the other questions presented on this appeal. The cross-bill concludes with a prayer for general relief, and it was answered by the Central Trust Company, by the Maryland Ice Company, and by Hammond, the receiver. Considerable testimony was taken and thereafter the cross-bill was dismissed by a *pro forma* decree, from which the pending appeal was taken.

At the outset it is insisted that the relief sought by the cross-bill is so foreign to and irreconcilable with that which the original bill invoked that the *pro forma* decree should, for that reason, be affirmed. It is undoubtedly true that a subject which is not germane to pending controversy cannot, by means of a cross-bill, be injected into the litigation. A cross-bill is a mere auxiliary suit, and a dependency of the original. Story, Eq. Pl. § 399. Where a decree on the plaintiff's bill will not determine the litigation, the imperfection may be remedied by one or more cross-bills filed by one or more of the defendants against the plaintiffs; and, if this has not been done, and the difficulty appears at the hearing, the cause may be directed to stand over for the purpose. Adams, Eq. *402. The cross-bill may set up additional facts not alleged in the original bill where they constitute part of the same defense, and relate to the same subject-matter. *Underhill* v. *Van Cortlandt*, 2 Johns. Ch. 355, 1 L. ed. 407. And, though its allegations must relate to the subject-matter of the original bill, it is not restricted to the issues under it. *Nelson* v. *Dunn*, 15 Ala. 501. It is generally considered as a defense, or as a proceeding to procure a complete determination of a matter already in litigation in the court, and therefore the plaintiff is not, at least as against the plaintiff in the original bill, obliged to show any ground of equity to support the jurisdiction of the court. Adams, Eq. *403; Story, Eq. Pl. § 399; Mitford, Eq. Pl. (by Jeremy) 80–88. But the answer specifically relies by way of defense to the original bill upon the same matter set forth in the cross-bill, and these, if sustained, present an insuperable bar to the relief prayed in the original bill filed by the Central Trust Company, in so far forth as respects the alleged priority of the first mortgage bonds. With a single exception, which will be adverted to hereafter, the relief sought, or the defense relied on in the cross-bill, is necessary to a complete determination of the relative priorities of the several liens now asserted; and that issue as to these priorities (which is of vital importance in the controversy) cannot be adjusted under the original bill unaided by the cross-bill.

As we have stated, the original bill was filed to procure a foreclosure of the first mortgage, and it prayed that the proceeds of the foreclosure sale might be applied to the payment of the principal and interest unpaid upon the first mortgage bonds, together with interest or overdue interest down to the time of sale; and then, if there should be any surplus, that it should be applied to the payment of the second mortgage bonds. Now, the defenses set up and relied on by the appellants present insuperable obstacles to the granting of so much of this relief as would give the first mortgage bondholders a preference over the second mortgage bonds. These defenses, set up in the cross-bill and in the answer, assail the priority of the receiver's certificates, the priority of the Arctic Company's decree in the hands of the London Corporation, and finally the priority of the first mortgage bonds in the hands of that corporation and in the hands of Poor and Greenough.

If the holders of the first mortgage bonds by any fraudulent device procured for their own benefit the execution and delivery of the deed by the Hoopers for the mortgaged property, and by the same means, and for their own advantage, secured a waiver by the grantors of their lien for the unpaid purchase money, so as to let in the first mortgage as the first lien, then, upon the plainest principles of natural justice, they will not be allowed in a court of equity to enforce this lien of their own creation in their own favor to the prejudice of, or even in preference to, the lien of the vendors for the purchase money represented by the second mortgage bonds, even though the second mortgage bonds on their face declare that issue to be subject to the lien of the first. It is scarcely necessary to cite adjudged cases in support of a proposition so plain and self-evident as this. Courts of equity will never allow the mere form in which a transaction is clothed or disguised by the parties who have projected it for their own gain to control or defeat the legal or equitable rights of others; particularly where an adherence to form and a disregard of substance would result in the successful consummation of a palpably fraudulent scheme. 2 Pom. Eq. Jur. § 879. To fully appreciate the relevancy of the defenses made by the cross-bill and by the answer we must rapidly sketch the further connection of these first mortgage bondholders with the Maryland Ice Company enterprise, and trace them through its various developments, down to the present period. After the contract of February 28, 1890, had been made, containing the stipulation respecting betterments and additional machinery, and the further stipulation providing for the guaranty by Poor and Greenough, and there had been inserted in the deed of April 5 a recital with regard to the contemplated betterments, which recital, embodying the agreement in this particular of the projectors, became in fact a part of the consideration of the conveyance, the further organization and development of the Maryland Ice Company was progressed with. The London Corporation, Poor and Greenough, and Sturgis fixed

the capital stock of the company at $500,000; not one dollar on which has ever been paid by them or by any one else, except possibly $1,000 for ten shares, put in the names of five individuals on March 24, 1890, for the purpose of effecting a formal organization. As one of the methods resorted to for the purpose of concealing or cloaking the real transaction, an agreement was entered into between Hammond and the London Corporation on the 4th of March, 1890, whereby he contracted to turn over to the Maryland Ice Company, when formed, the property purchased four days previously from the Hoopers; and to so turn it over for $250,000 of first and $110,000 of second mortgage bonds and $500,000 of stock; but not one of the bonds went into his hands, or was ever intended to go there, and a certificate for 4,990 shares of stock remaining after ten had been issued as just stated was nominally issued to him, but in fact was merely handed to him with a request that he sign a transfer in blank on its back. This transfer he signed as directed, and it now appears filled out as an assignment of 1000 shares to the London Corporation, 440 shares to Poor and Greenough, 1000 shares to Greenough, trustee, 850 shares to Sturgis, 850 shares to W. C. Lane, and 850 shares to Hammond. Only a few days subsequently a certificate for 850 shares was presented to Hammond by Sturgis with a request that he assign that also in blank, which was done, and it was then returned to Sturgis; and Hammond never saw it afterwards. No money or other consideration of any kind was paid to Hammond for this stock by the parties who received it; nor did Hammond ever pay or give to the Maryland Ice Company anything for it himself. As in fact the stock, with the exception of the ten shares before alluded to, all went to the promoters of the concern precisely as it was intended that it should go from the beginning, there was nothing due to Hammond for it, and consequently nothing was paid or given him. So completely was he a mere figurehead, that even the $5,000 paid to the Hoopers when the contract of February 28, was made, was paid through Sturgis by the London Corporation. The stock purports to be full-paid, nonassessable stock, and professes on its face to have been "issued for property purchased." The property, however, was purchased for $250,000, through Hammond, but by the very parties who procured the stock; and the stock was not issued for the purchase at all, and no part of it was used therefor. The purchasers of the property,—the London Corporation, Poor and Greenough, and Sturgis,—through their selected representatives, who held the ten shares, voted that the stock be issued to Hammond merely that he might immediately transfer it back to them; and this he did. Thus, in effect, they issued it through a crafty device, to themselves as full-paid, nonassessable stock, though they paid nothing for it at all. They consequently owe the Maryland Ice Company for this stock, and by no subterfuge or artifice, however cunning, can they evade their liability in this respect when that liability is sought to be fastened upon them by a party entitled to resort to it to secure payment of a claim due by the Maryland Company. "It has again and again been decided that the unpaid subscriptions to the capital stock of a corporation constitute a trust fund for the benefit of the general creditors of the corporation, and that this trust cannot be defeated, or the fund impaired, by a simulated or pretended payment for the stock taken, nor by any device short of actual payment in good faith. Any arrangement, therefore, among the stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not, in fact, getting the benefit of the price in good faith, will be regarded as a sham and not a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscribers." *Crawford* v. *Rohrer*, 59 Md. 604; *Camden* v. *Stuart*, 144 U. S. 105, 36 L. ed. 363; *Lloyd* v. *Preston*, 146 U. S. 630, 36 L. ed. 1111; *Richardson* v. *Green*, 133 U. S. 30, 33 L. ed. 516; *Hatch* v. *Dana*, 101 U. S. 205, 25 L. ed. 885.

As against a creditor of the Maryland Ice Company, this acquisition of alleged full-paid, nonassessable stock without the payment of a single cent would be grossly fraudulent; and to permit holders of such stock, who, as promoters of the company occupied the position of agents in procuring for the projected company the property upon which its mortgages were afterwards fastened, to claim and recover in the capacity of first mortgage bondholding creditors of that company, from that company, an amount equal to the sum due by them to the same company, and due in their capacity of stockholders for stock actually issued, but not paid for, without requiring them first to pay what they themselves owe, would be a flagrant injustice to the vendors of the mortgaged property, if the lien of the latter for unpaid purchase money were thereby put in jeopardy. It is true, as a general principle, that to render a stockholder individually liable to the extent of his unpaid subscription at the suit of a creditor of the corporation upon a debt due by the corporation to the creditor, the stockholder must have been such at the time the debt was contracted. *Weber* v. *Fickey*, 47 Md. 196, 52 Md. 500; *Handley* v. *Stutz*, 139 U. S. 417, 35 L. ed. 227; *First Nat. Bank of Deadwood* v. *Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676; *Hahn's App.* (Pa.) 5 Cent. Rep. 187; Morawetz, Priv. Corp. §§ 832, 833. But we are not confronted with that question, because no decree is asked against the stockholders to require them to pay the second mortgage bonds, but merely a decree directing the receiver to collect the unpaid subscriptions, to be applied by the Maryland Ice Company, when collected, to the extinguishment of the first mortgage bonds. Nor, for the same reason, does the provision in the second mortgage bonds to the effect that no liability on that bond shall ever be enforced against the individual estate of any stockholder of the Maryland Ice Company interpose any difficulty as the case now stands. If suits should be brought hereafter by the receiver or by creditors to enforce payment

for these unpaid shares, the law of the corporation's domicil would govern and control. *First Nat. Bank of Deadwood* v. *Gustin Minerva Consol. Min. Co. supra.* But this branch of the subject is not before us now, and need not be discussed, because this feature of the relief sought by the cross-bill is obviously foreign to the object of the original bill, and such relief could not properly be granted in the pending proceeding, though the improvident joinder of this particular subject will not affect the jurisdiction of the court to decree relief as to the subjects which are properly included in the cross-bill. Code, art. 16, § 161. The fact of the indebtedness to the Maryland Ice Company by its first mortgage bondholders in their capacity as its stockholders, while furnishing no ground in this proceeding for a decree directing the receiver to collect the amounts not paid on the stock, is a circumstance which reflects strongly in a court of equity on the good faith of these same bondholders in pressing for a sale of the mortgaged property while they are largely indebted to the company; and it is a circumstance which exhibits them in the light of attempting to shut out the second mortgage altogether at the very time when, being thus indebted, they are seeking equitable relief in their own behalf, though refusing to do equity themselves. These first mortgage bondholders are the real plaintiffs to the original bill. They were in fact the real purchasers of the property bought from the Hoopers. They were the promoters of the Maryland Company, and, though they did not get possession of the certificates of stock until April 7, 1890, yet, under the contract of March 4 between Hammond and the London Corporation, and under the antecedent arrangements between the same parties and the other promoters of the scheme, they were from the beginning to become owners of the stock without giving an equivalent therefor. As the real purchasers of the property, they owe to the vendors the balance of the purchase money which they contracted to pay. Through the Maryland Company, which they organized and own, they have become holders of $250,000 of its bonds that are on their face a first lien upon the property which they bought; and they now seek, as though they were total strangers to the original transaction, and were only connected with the Maryland Company as bona fide holders of its bonds, to sell for their own benefit the mortgaged property, to the obvious prejudice of the subsequent lien held by the vendors and created by these same projectors, though as stockholders they owe the company quite as much as they now endeavor in the capacity of bondholders to recover from it. If, while they are largely indebted to the company for the stock thus acquired by them without any consideration paid or promised, they be permitted, as holders of the first mortgage bonds, to sell the property, and thereby strike down the second lien, which they themselves created, and which is held by persons from whom they bought the property, which was bought under stipulations they have not complied with, as will be pointed out further on, the device to which, in the very inception of the undertaking, they deliberately resorted "to evade the law and accomplish that which is forbidden" (*Memphis & L. R. R. Co.* v. *Dow*, 120 U. S. 287, 30 L. ed. 595), will succeed under the very eyes, and still worse, by the potent aid, of a court of equity. The Hoopers, while not seeking by their answer or by their cross-bill to recover a decree against the stockholders for the payment of the second mortgage bonds out of the amounts due on the stock, resist the claim of the holders of the first mortgage bonds to have the property sold so long as the latter owe the Maryland Company the par value of this unpaid stock. In a word, they invoke the familiar and salutary doctrine that he who seeks equity must do equity. This doctrine in its broadest sense may be regarded as the foundation of all equity, and as the source of every rule of equity jurisprudence; since it is undeniable that courts of equity do not recognize and protect the equitable rights of litigant parties, unless such rights are, in pursuance of the settled juridical notions of morality, based upon conscience and good faith. "Whatever be the nature of the controversy between two definite parties, and whatever be the nature of the remedy demanded, the court will not confer its equitable relief upon the party seeking its interposition and aid, unless he has acknowledged and conceded, or will admit and provide for, all the equitable rights, claims, and demands justly belonging to the adversary party, and growing out of or necessarily involved in the subject-matter of the controversy." 1 Pom. Eq. Jur. § 385.

The guaranty given by Poor and Greenough is in these words:

"New York, March 31st, 1890. Messrs. Wm. J. Hooper *et al.*—Gentlemen: Referring to a contract between yourselves and Ormond Hammond, Jr., dated February 28th, 1890, wherein it is stipulated that we shall arrange a guaranty that the proposed Maryland Ice Company shall erect additional machinery for manufacturing ice to the extent of one hundred and fifty tons per day, to be placed at once upon the property herein described, we now try to state that the Arctic Ice Machine Manufacturing Company has entered into a contract for the furnishing of ice machines in accordance with the stipulation, and E. J. Cood Co. have entered into a contract to supply boilers, etc., completing the manufacturing outfit; which contacts, together with the improvements now being made, will aggregate a cost in excess of $180,000. These contracts, we are assured, are from thoroughly responsible people, and supply the guaranty which you desire. We remain, gentlemen, very truly, yours, Poor and Greenough.

"P. S. New York, April 5th, 1890. The Maryland Ice Company has deposited with us the funds called for by the within-described contract, and we hereby agree that they shall be applied in accordance therewith. Poor & Greenough."

This execution of this guaranty was a condition, and a material condition, upon which the Hoopers were induced to allow the lien of the first mortgage to take precedence over

their vendors,' or, more properly speaking, their grantors', lien for the deferred purchase money. This is placed beyond doubt by the statement contained in their report of sales to the orphans' court of Baltimore city, and by the recital in their deed to the Maryland Ice Company, and by all the circumstances surrounding the whole transaction. By the explicit terms of the guaranty and by the recital in the deed, the grantors, the Hoopers, were entitled to have the additional security contemplated by both the guaranty and the deed. It was upon the faith of the assurance given by Poor and Greenough in the guaranty of April 5, that they then had in their hands sufficient funds of the Maryland Ice Company to pay for the betterments and additional machinery, that the Hoopers let in the lien of the first mortgage in favor, as it now turns out, of the very parties who purchased, and now, under the name of the Maryland Ice Company, still hold, the property. If, as we have heretofore held,—and there is nothing in the present record to induce a change or modification of our former opinion,—the London Corporation was one of the promoters of the Maryland Company, and was therefore a party to all that was done in the organization of that concern, and in the acquisition for it of the property purchased from the Hoopers, then the London Corporation was not only aware of the guaranty given by Poor and Greenough, but is bound by it, and is affected equally as they are with all the consequences resulting from a deception practiced upon the vendors by means of any false statements contained in that guaranty. If the holders of the first mortgage bonds secured for themselves, under and by the first mortgage, a priority over the lien, representing the unpaid purchase money due to the vendors, and secured that priority by inducing the vendors to let in the first mortgage lien because of the assurance given by Poor and Greenough for and in behalf of all the projectors that they, Poor and Greenough, had in hand sufficient funds of the Maryland Ice Company with which to pay for the stipulated betterments, when in point of fact that assurance was utterly untrue, and they did not have those funds in hand at all, it surely cannot be that a court of equity will, at the instance of the holders of a first lien procured by themselves in that way, allow the mortgaged property to be sold to the detriment of the vendors who have been thus deliberately imposed on and deceived. A first lien obtained over the vendors' or grantors' lien by means of a false representation of such a material inducement leading the vendors to postpone the priority of their purchase-money lien is nothing less than flagitious fraud, which, upon its being unmasked and exposed, no court will countenance or suffer to prevail. The equity acquired by a party who has been misled is superior to the interest in the same subject-matter of the one who willfully procured or suffered him to be thus misled. 2 Pom. Eq. Jur. § 686. The priority resulting from order of time merely, or that resulting from the superior nature of the equity itself, or that belonging to a legal title, may be postponed or defeated in various manners and by various incidents, among which the most important are notice given to or fraud or negligence of the holder of the interest which would otherwise have been preferred. Id. §§ 716, 726, 781.

Was the guaranty untruthful? It is clear beyond controversy that when Poor and Greenough gave the guaranty in the postscript of April 5 they did not have, and had not had, in their hands, and never did have afterwards, and they certainly never did apply, the funds which they declared they then had and that they would thereafter apply in payment for the machinery mentioned in the contracts to which the guaranty made reference. It was not until that declaration contained in the postscript heretofore quoted had been actually reduced to writing and had been signed that the Hoopers allowed the Maryland Company, which is merely another name for the bondholders, to have the property. It is perfectly clear that a large part of the money borrowed from the London Corporation on receiver's certificates was used to pay in part for this very machinery which Poor and Greenough declared in the guaranty they then held sufficient of the Maryland Company's money to pay for. It is further disclosed by the record that the $50,000 which the London Corporation claims as a prior lien over the second mortgage bonds by virtue of the Arctic Company's decree that was assigned to the London Corporation as heretofore stated, constitute nearly one half of the total contract price agreed to be paid to the Arctic Company for the three ice-manufacturing machines, which are the identical machines that Poor and Greenough unequivocally declared in the guaranty of April 5 they had at that time in their hands the money of the Maryland Company to pay for. We have not overlooked that part of Greenough's testimony where he undertakes to explain away the evident meaning of the guaranty by saying it was perfectly well, understood by the Hoopers and himself that the guaranty only had reference to the cash payments to be made for the machinery, and did not include the deferred payments. But this will not stand the test of investigation for the plain reason that the cash payment to the Arctic Company had been made on April 3, two days prior to the date of the postscript, as shown by a statement of expenditures furnished by Greenough himself; and according to Sturgis' diary the payment had been made on March 15. Whichever statement as to the time of making the payment be accepted, the cash payment to the Arctic Company had been made before the guaranty was given, and therefore, obviously, the declaration that Poor and Greenough had in their hands or on deposit with themselves the funds called for by the contracts, meant, and could only have meant, all the funds agreed to be paid for the machinery. If the testimony of Sturgis, as contained in the first record that came before us, be true, the Maryland Company never did have at any time any funds on deposit with Poor and Greenough, and consequently the statement in the postscript of April 5 was absolutely false. So far, then, from the guaranty being true, much of

the money claimed by the London Corporation under the receiver's certificates, and all of the money claimed by it under the Arctic Company's decree, are sums which ought to have been paid absolutely and unconditionally according to the guaranty, to strengthen the lien of the second mortgage. They were not mere loans, which should take precedence over that lien. The attempt to collect them in advance of the second mortgage is a direct, continuing breach of the guaranty.

Now, the vendor's lien exists for unpaid purchase money even though a deed has been executed and possession of the property has been delivered. *Schwarz* v. *Stein*, 29 Md. 112. Perhaps it would be more technically accurate to call the lien a grantor's lien after the deed has been delivered. 3 Pom. Eq. Jur. § 1249, *note*. The vendor's or grantor's lien is not waived by a recital in the deed that the consideration has been paid (*Thompson* v. *Corrie*, 57 Md. 200; 2 Story, Eq. Jur. § 1225); and it prevails against the grantee and his heirs and other privies in estate, and against those claiming as volunteers, or even as subsequent purchasers for value, if they have notice that the purchase money, or any part thereof, remains unpaid (*Schwarz* v. *Stein*, *supra*). The London Corporation and Poor and Greenough and their associates created a lien in their own favor,—the first mortgage lien. They created it on a condition insisted on by the grantors, and inserted in a guaranty and in the deed, for the grantors' benefit. They, the parties giving the guaranty and accepting the deed, have violated that condition, and in spite of this they now ask a court of equity to enforce their lien, thus procured, and to enforce it over and in preference to a grantor's lien, which was only waived or postponed in favor of the first mortgage upon a condition which the holders of the first mortgage bonds made and have flagrantly disregarded. No authority has been cited in support of such a demand as this, and we apprehend none can be found under any system of jurisprudence where the most elementary precepts of ethics pervade the administration of justice. "If the facts relied on show deception,—as where misrepresentations were intentionally made for the purpose of deceiving the defendant, and he relied upon and was deceived by the same, and thereby was induced to enter into a contract which, but for the fact of such deception, he would not have done,—a court of equity will relieve against the contract, and refuse to enforce the same, whether it be accompanied by damage or not." 2 Warvelle, Vendors, 752. And this is so upon the theory that a court of equity will not make itself an instrument to carry out fraud.

It is, therefore, we think, obvious that these first mortgage bondholders, who acquired a prior lien over the grantor's lien by means of the false representations made by Poor and Greenough in behalf and with the knowledge of all the parties who were intended to take and did take the entire issue of those bonds, should not be allowed to profit by the fraud of which they were guilty; and that in the distribution of the funds which may arise and be realized on a sale of the mortgaged property these first mortgage bonds must be subordinated to $100,000 of the second; that is to say, that $100,000 of the second mortgage bonds must be first paid in full with their accrued interest and interest on overdue interest coupons before the first mortgage bondholders shall be permitted to receive any part of the proceeds of sale. It is no answer to say that some time after the 1st day of July, 1890, the guaranty was complied with to the extent of there being on the premises ice-manufacturing machines which produced daily the quantity of ice specified in the contract with the Hoopers. The other features of the guaranty have never been observed. The Hoopers were entitled to rely on the guaranty as it was written, and, having waived their lien, or deferred it only because the guaranty was given, if the material statements in that guaranty are false, and were false when made, and have not been complied with, the deceived and defrauded vendors are not bound by their waiver, and may assert their lien against the land in the hands of those who were parties to the whole transaction, and fully cognizant of all its details. You cannot hold them to their waiver of their lien except upon the terms on which they agreed to waive it, and you cannot make some other and different terms, and then say to the vendors that these are as beneficial as those actually agreed to. The vendors are not obliged to accept other conditions, and, as those upon which their waiver was founded have been broken, they may reassert their lien in preference to the lien of the first mortgage, which will accordingly be displaced. *Slide & Spur Gold Mines* v. *Seymour*, 153 U. S. 509, 38 L. ed. 802; *McDole* v. *Purdy*, 28 Iowa, 277; *Dayton, X. & B. R. Co.* v. *Lewton*, 20 Ohio St. 401.

We attach no importance to the fact that the bonds held by the Hoopers are declared on their face to be subject to the prior lien of the first mortgage, because that is precisely the relation they would have held but for the fraud and deception to which we have adverted. Nor do we consider the action of the commissioners appointed to make partition of the estate of William Hooper, deceased, in affirming no value to these bonds, as at all bearing on the questions before us. It is perfectly clear that the London Corporation cannot assert as against the Hoopers the lien of the Arctic Company's decree. That decree was obtained, as we have said, against the Maryland Company for the balance of the money due for the very machines which, under the contract made by Hammond, on February 28, 1890, in behalf of the London Corporation and Poor and Greenough, with the Hoopers, were to be placed upon the property by the 1st day of July. When ultimately placed there, the Arctic Company obtained a decree for the balance of the purchase money due for them, and the London Corporation, one of the original projectors, and in fact one of the actual purchasers of these very machines, advanced $50,000 of the amount decreed to be paid, and took an assignment of the decree. When the London Corporation paid this sum of $50,000 to the Arctic Company, it did merely what, as the real pur-

chaser of the machines, it was legally bound to do,—it simply paid its own debt; and it cannot, by taking an assignment of, instead of a receipt for, that debt, convert itself from a debtor of the Arctic Company into a creditor of the Maryland Company as against the second mortgage bondholders, whatever may be its rights, under the assignment, as between itself and the Maryland Company.

With reference to the receiver's certificates we have no difficulty. When the property of private corporations or of individuals has been placed in the hands of a receiver, all expenses for safe-keeping and preservation are properly payable out of the income, if there be any; or, if there be none, then out of the proceeds of the corpus of the estate when sold. But this necessary power by no means includes authority in such instances to allow the creation of liens through the medium of receiver's certificates, which will take priority over existing antecedent liens. "Extensive as are the powers of courts of equity, they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances." *Farmers Loan & T. Co.* v. *Grape Creek Coal Co.* 50 Fed. Rep. 481, 16 L. R. A. 603. It is only against railroad mortgages that the Supreme Court of the United States has sustained orders giving priority to receiver's certificates, and then only on principles having no application to a mortgage executed by a private corporation owing no duty to the public. In *Wood* v. *Guarantee Trust & Safe Deposit Co.*, 128 U. S. 421, 32 L. ed. 478, the Supreme Court said: "The doctrine of *Fosdick* v. *Schall*, 99 U. S. 235, 25 L. ed. 339, has never yet been applied in any case except that of a railroad. The case lays great emphasis on the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out." And in *Kneeland* v. *American Loan & T. Co.*, 136 U. S. 89, 34 L. ed. 379, the same tribunal, in speaking of the power of a court of equity to displace the lien of a railroad mortgage, said: "Upon these facts we remark, first that the appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens." Because, in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company, or to work for it; and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subsequently displacing the priority of the mortgage lien. It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens. See also *Bound* v. *South Carolina R. Co.* 50 Fed. Rep. 312; *Fidelity Ins. Trust & Safe-Deposit Co.* v. *Roanoke Iron Co.* 68 Fed. Rep. 623. It would be exceedingly dangerous to concede to a court of equity the power to displace, in favor of receiver's certificates, subsisting liens on the property of private corporations or of individuals. No mortgage lien would ever be secure if it were liable to be postponed to subsequent obligations created by a receiver. If the power exists at all apart from the case of a railroad mortgage, there is no reason for denying its applicability to every species of mortgage, and a mortgagee might suddenly discover that what he believed to be an ample security has been utterly destroyed and swept away by intervening liens created subsequently by an order of the court. We are unable to give our assent to such a doctrine.

In concluding this opinion it is proper to observe that the $10,000 of second mortgage bonds, which formed no part of the consideration of the purchase from the Hoopers, but which related to another and distinct transaction, while subordinate to the first mortgage bonds, because not representing unpaid purchase money, are entitled to priority over the Arctic Company's decree in the hands of the London Corporation, and to priority over the receiver's certificates.

As a result of the views we have expressed, the *pro forma* decree dismissing the cross-bill will be reversed, and the cause will be remanded, that a decree may be passed directing a sale of the mortgaged property, and giving to the appellants, in the distribution of the funds arising from the sale, a priority over the first mortgage bonds as to $100,000 of the second mortgage bonds, with the overdue interest thereon and interest on that overdue interest down to the day of sale; and likewise giving to the appellants, as to said $100,000 of second mortgage bonds, with accrued interest and interest on overdue interest

a priority over the receiver's certificates and over the Arctic Company's decree in the hands of the London Company, or any one claiming under it; and further giving a priority as to the remaining $10,000 of second mortgage bonds over the receiver's certificates and the said Arctic Company's decree.

Pro forma decree reversed, with costs above and below, and cause remanded that a decree may be passed in conformity to this opinion.

Earl P. MASON *et al.*, *Appts.*,
v.
UNION MILLS PAPER MFG. CO., and BALTIMORE & OHIO R. CO., Garnishee.

(.....Md.....)

1. **A nonresident of the state whose obligation is sought to be enforced by another nonresident through garnishment** of funds in the hands of a resident is within the provisions of a statute that any person liable to an action who is absent from the state when it accrues shall have no benefit of the statute of limitations while the absence continues.

2. **A foreign contract between nonresidents may constitute a cause of action** within the meaning of a statute providing that if any person liable to an action shall be absent from the state when it accrues he shall have no benefit of the statute of limitations while such absence continues.

(June 19, 1895.)

APPEAL by plaintiffs from a judgment of the Superior Court of Baltimore City in favor of defendant in a garnishment proceeding brought to reach its property in the hands of the Baltimore & Ohio Railroad Company. *Reversed.*

The facts are stated in the opinion.

Mr. **William Reynolds,** for appellants:

A court is not warranted in arbitrarily interpolating into this section a proviso that it has no application to cases where both the parties are nonresidents, and the contract sued upon is not one to be performed in this state.

Dugan v. *Gittings*, 3 Gill, 164, 43 Am. Dec. 306; *Hartley* v. *Crawford*, 12 Neb. 471; *Kemps* v. *Bader*, 86 Tenn. 189; *Power* v. *Hathaway*, 43 Barb. 214.

The decisions of this court are clearly inconsistent with the allowance of the construction contended for by the appellees.

Fairfax Forrest Min. & Mfg. Co. v. *Chambers*, 75 Md. 604; *Hysinger* v. *Baltzell*, 3 Gill & J. 158; *Campbell* v. *Morris*, 3 Harr. & McH. 554.

The right to interpose the defense of limitations to a claim just upon its face is neither a natural, nor a moral, nor even a common-law, right, but is purely a privilege granted by statute; one which is not favorably regarded by the courts; which is never extended by implication, but is always strictly construed.

Poe, Pl. § 618; *Wall* v. *Wall*, 2 Harr. & G. 79; *Eschbach* v. *Pitts*, 6 Md. 71; *Gemmell* v. *Davis*, 71 Md. 461.

The universal construction put upon these statutes is that under them limitations do not begin to run until there may be found within the jurisdiction of the forum whose statute is pleaded a person capable of being sued.

Hysinger v. *Baltzell*, 3 Gill & J. 161; *State* v. *Reigart*, 1 Gill, 1, 39 Am. Dec. 628; *Kirkland* v. *Krebs*, 84 Md. 97; Wood, Limitations, §§ 224–248, 250, and cases there cited; *Olcott* v. *Tioga R. Co.* 20 N. Y. 210, 75 Am. Dec. 393; *Larson* v. *Aultman & T. Co.* 86 Wis. 281; *Bulger* v. *Roche*, 11 Pick. 36, 22 Am. Dec. 359; *Goetz* v. *Voelinger*, 99 Mass. 504; *McCann* v. *Randall*, 147 Mass. 81; *Ruggles* v. *Keeler*, 3 Johns. 263, 3 Am. Dec. 482.

Messrs. **John K. Cowen, E. J. D. Cross,** and **George Dobbin Penniman,** for appellee:

The *lex fori* governs as to the statute of limitations to be followed.

1 Wood, Limitations, 2d ed. p. 29; Angell, Limitations, 6th ed. § 65.

If the nonresident creditor elects to sue in a state whose statute has barred his claim, he cannot set up the nonresidence of the debtor as a defense to the statute.

Lingan v. *Henderson*, 1 Bland, Ch. 272.

If the theory of the appellant is correct there is no quieting of the affairs of any large wholesale merchant or manufacturer who is extending his business from state to state.

There could be no real barring of a debt by limitations; each new state would give a new right of action for the period limited by its statute, and a merchant would never be safe from the annoyance of defending old stale claims, if he extended his business into other states.

Of course, every state has a right to protect its own citizens, and if a nonresident debtor owes a resident creditor, the state can protect its resident creditor in his right to his own tribunal, by providing that the nonresident debtor must so come within the state that suit could be brought before the statute will begin to run in favor of the debtor.

Hysinger v. *Baltzell*, 3 Gill & J. 158.

But a nonresident creditor who elects to bring a nonresident debtor into the courts of any particular state, in order to recover a debt, cannot claim the benefit of this exception, as to the statute not running against nonresident debtors, because the reasons for its existence do not apply to him.

It is the duty of a debtor to seek his creditor for the purpose of paying his debt.

Jones v. *Ricketts*, 7 Md. 117.

A foreign corporation is not bound, under our statutes, to submit itself to the jurisdiction of the courts of this state in a suit by a nonresident brought upon a foreign contract.

Fairfax Forrest Min. & Mfg. Co. v. *Chambers*, 75 Md. 614.

All statutes of limitations proceed upon the policy comprised in the maxim, *interest re-*

NOTE.—An unusual question under the statute of limitations, which is at the same time one of general interest, is decided in the present case. Under the rules of this decision a defendant would have no protection by the statute of limitations except in the state of his residence.

As to what constitutes "residence out of the state" within the meaning of such statutes, see *note* to Kerwin v. Sabin (Minn.) 17 L. R. A. 225.

ipublica ut sit finis litium, that some lapse of time must be prescribed, in order to give quiet to human affairs.

Lingan v. *Henderson*, 1 Bland, Ch. 272.

The statute of limitations has justly been denominated "a statute of repose" and is one of the most important and beneficial legislative enactments which our statute book contains.

Green v. *Johnson*, 3 Gill & J. 394.

Fowler, J., delivered the opinion of the court:

The question presented by this appeal relates to the construction of section 5 of article 57 of the Code, title "Limitations of Actions." Both parties are nonresidents of this state, the defendant being a Pennsylvania corporation, and the plaintiffs are citizens of and doing business in the state of Rhode Island, under the name of Mason, Chapin & Co. The plaintiffs sued out of the superior court of Baltimore city, on the 7th of February, 1894, a foreign attachment against the defendant, the cause of action being a breach of contract by the latter. This attachment was laid in the hands of the Baltimore & Ohio Railroad Company, as garnishee, and the defendant corporation voluntarily appeared in the short-note case, and filed four pleas, upon three of which issue was joined, and to the fourth, which was the plea of limitations, the plaintiffs replied "that the said defendant was, at the time said cause of action accrued to the plaintiffs, absent from the state of Maryland, to wit, in the state of Pennsylvania, and thereafter was and continued to be, and remained, absent from this state, up to within three years before bringing this suit." To this replication the defendant rejoined that "the alleged cause of action accrued more than three years before the institution of this suit, outside of the state of Maryland, and at the time of the accruing of said cause of action both the plaintiff and defendant were nonresidents of the state of Maryland, and have never ceased to be nonresidents, and said contract, on which this suit was instituted, was not made in this state, nor was any part of it to be performed in this state." The plaintiffs demurred to this rejoinder, and the court below overruled the demurrer and gave judgment therein in favor of the defendant. From this judgment the plaintiffs have appealed.

The precise question is whether section 5 of article 57 of the Code applies to cases where both plaintiff and defendant are nonresidents, and where the cause of action accrued outside of this state, and the contract sued on is a foreign contract. On the part of the plaintiffs it is contended that they have the same rights and occupy the same position as to the right to rely upon the provisions of our code relative to limitations of actions that any resident of this state has, and that if a citizen of Maryland could not be successfully met by a plea of the statute by a foreign debtor who is a resident of Pennsylvania, no more can such a plea be so set up against them. On the other hand, the defendant contends that the provisions of section 5 of article 57 were made for and relate alone to debtors who are citizens of Maryland, and that a nonresident creditor who elects to bring a nonresident debtor into the courts of Maryland in order to recover on a foreign contract cannot avoid a plea of limitations by pleading the absence out of the state of such nonresident in the terms of said section 5.

It will be observed that the validity of the replication of the plaintiff must depend upon the construction placed on section 5 of article 57. That section provides that "if any person liable to any action shall be absent out of the state at the time when the cause of action may arise or accrue against him, he shall have no benefit of the limitation herein contained, if the person who has the cause of action shall commence the same after the presence in this state of the person liable thereto within the times herein limited." This language is certainly broad enough to include within its terms the defendant. It could not be much broader than it seems to be made by the words "any person liable to any action." But, comprehensive and all-embracing as it may seem to be, yet the language used in the statute must be construed and taken in the sense in which it appears to be used by the legislature. The defendant suggests that an investigation or historical study of the origin and growth of the statute will show that its contention is the proper one; but, after a careful examination of the old statutes,—the original Statute of 21 Jac. I., chap. 16, and 4 Anne, chap. 16, § 19, as well as the several statutes adopted by this state, all of which are based upon and in many respects similar to or modifications of the provisions of the old English statutes just referred to,—we have arrived at a different conclusion. In the Statute of James there was a provision in favor of "any person or persons . . . beyond the seas," and the same provision appeared on our own statute until 1818, when the act of that year (chap. 216) repealed it. It is true that the words "any person . . . beyond the sea," both in the Statute of James and our old statute, related to persons who were entitled to sue; but there was a similar provision in regard to defendants to be found in 4 Anne, chap. 16, § 19, by which it is provided that the statute should not run in their favor during their absence from the realm. And so the words in section 5 of article 57 of the Code relate to absent debtors, and the whole section is doubtless a modification of section 19 of the Statute of Anne. If these words or similar ones have been uniformly held, when used in the English statute of limitations, from which ours is derived, to include both residents and nonresidents,—subjects and foreigners alike,—then a like construction should be given to them or similar words when they appear in our statute. In Angell on Limitations (sec. 21) the correct rule is laid down for construing these statutes. He says, in speaking of the Statute of Jac. I., as modified by that of 4 Anne: "Where any difference appears between the provisions of that statute in respect to personal actions and those of American statutes of limitations, it will be seen to be more in words than in substance, the end of one and all of them being one and the same.

. . . And the mere change of phraseology in the revision of the statute before in force will not work an alteration in the law previously declared, unless it undisputably appears that such was the intention of the legislature." See authorities cited in *note*. In the case of *Strithorst* v. *Graeme*, 2 W. Bl. 723, which was an action of assumpsit, the defendant pleaded nonassumpsit and limitations. The plaintiff, who was a foreigner, replied that he had been beyond seas, etc., in Germany, and so remained, etc. Counsel argued that the replication was bad; because, if the law stood so, foreigners who reside always out of England would have the same or greater advantage than natives, and that the exception in the statute was meant for Englishmen who occasionally go beyond seas. But Wilmot, *Ld. Ch. J.*, said: "The exception in the statute is general, and therefore there must be judgment for plaintiff." This case is also reported in 3 Wils. 145, and the opinion of the chief justice is there given more fully to the same effect. Also, *Le Veux* v. *Berkeley*, 5 Q. B. 836, which was tried before *Lord* Denman. And in the later case of *Lafond* v. *Ruddock*, 13 C. B. 813, it was again contended that the proviso of section 7 of Stat. 21 Jac. I., relating to creditors "beyond the seas" could not apply to foreigners coming to England for the first time. Jervis, *Ch. J.*, again applied the liberal construction and said: "The proviso in favor of persons under disabilities in Stat. 21 Jac. I., chap. 16, applies as well to foreigners who have never been in this country as to parties residing abroad at the time of the accruing of the cause of action, and returning afterwards to England." As we have seen, this same exception in favor of absent creditors was, until 1818, a part of our statute; and it was then repealed because it was not considered fair, as suggested also in the old English cases we have cited, that citizens of other states and subjects of foreign countries should have greater advantages than our own citizens. And that this was the object intended by the repeal of the proviso in favor of absent creditors is evident from what was said by Archer, *J.*, in delivering the opinion of the court of appeals in the case of *Frey* v. *Kirk*, 4 Gill & J. 521, 23 Am. Dec. 581: "The unlimited latitude," he said, "given to persons beyond seas, was considered by the legislature as unreasonable, and it could constitute no actual grievance or just cause of complaint if they were reduced to the same standard as our own citizens." And again he says, in the same case, that the construction the court had placed on this same act was such as put all suitors, foreign and domestic, upon the same footing. See also, *Pancoast* v. *Addison*, 1 Harr. & J. 350, 2 Am. Dec. 520. It is apparent, therefore, that the saving or exception in favor of creditors has always in England, and in Maryland also as long as it was a part of our law, been held to apply to both foreign and domestic creditors. And, if that be so, why should not the like provision in section 5 of article 57 have the same liberal construction? In England, under the Statute of 4 Anne, chap. 16, § 19, a foreign defendant could not plead the statute of limitations unless he had returned and been in England during the statutory period of limitations. *Forbes* v. *Smith*, 11 Exch. 161; *Fannin* v. *Anderson*, 7 Q. B. 811. And it has been uniformly held that the words "beyond the seas" is equivalent to "out of the state," "out of the jurisdiction" (so held by this court in *Maurice* v. *Worden*, 52 Md. 291); and, therefore, if section 5 should be read as construed in that case, it would read as follows: "If any person, etc., shall be out of the state, beyond seas, or out of the jurisdiction of the state" at the time the action accrues, etc., he shall have no benefit, etc. So read, section 5 would be identical with section 19 of Stat. 4 Anne, chap. 16, which has always been held in England to include both residents and nonresidents. *Fannin* v. *Anderson*, *supra*; *Towns* v. *Mead*, 16 C. B. 128; *Forbes* v. *Smith*, *supra*. Then, according to the terms of this section, thus read, a citizen of Pennsylvania may be sued in our courts; and it is conceded that, as against one of our citizens, a citizen of Pennsylvania cannot successfully plead the statute when sued here, if the former shall commence his action after the presence here of the latter within the statutory period, for it was so held in *Hysinger* v. *Baltzell*, 2 Gill & J. 158. In *White* v. *White*, 1 Md. Ch. 57, it was held that the circumstance of the defendant in that case being a nonresident did not deprive him of the benefit of the statute of limitations of Maryland, because it was clearly shown that he had been in Baltimore more than three years before the action was commenced. And, of course, if he had not been here during the statutory period, he could not have relied upon limitations as a defense. It would also seem to be clear that the plaintiffs, who are citizens of another state, have the same right to sue here that a citizen of this state has, and it is difficult to understand upon what principle of justice or fairness the nonresident debtor should be allowed to plead limitations against a nonresident creditor and not against one of our own citizens. All should be on the same footing. *Frey* v. *Kirk*, *supra*. And this would accord not only with justice, but would seem to be giving to nonresidents nothing more than they have a right to demand; for it would not do to say that our citizens and citizens of other states would enjoy the same rights and privileges here, when, under our law, the latter would be absolutely barred from recovery by a plea of limitations, while it would not avail against the former. *Paine* v. *Drew*, 44 N. H. 314. And inasmuch as the right to set up limitations as a defense has no existence except by virtue of statute, we should not allow it to prevail any more in the one case than in the other, unless it can be clearly shown that there is some statutory provision requiring such a distinction to be made.

It was urged that the course of the plaintiffs is somewhat inconsistent, in that they seek to avoid the effect of defendant's plea because of the nonresidence of the latter, while the very action by which the defendant was forced into a Maryland court is founded upon the same fact. While it is true the at-

tachment proceedings were based on the nonresidence of defendant, yet this is another case in which, as the plaintiffs contend, the question of residence or nonresidence is not involved, but only the question of the absence or presence in this state of the defendant, without regard to residence. Nor is it correct to say that the defendant was compelled to appear to this action. On the contrary, its appearance was entirely voluntary. *Fairfax Forrest Min. & Mfg. Co.* v. *Chambers*, 75 Md. 604. Such appearance was not even necessary to enable it to plead limitations or make any other defenses, for the same defenses which could have been made in this case would have been as well made on its behalf by the garnishee in the attachment case, without any appearance on the part of the defendant in this case. Poe, Practice, §§ 540, 543. But there does seem to be some inconsistency in the position assumed by the defendant. Because it is a nonresident it claims the benefit of that part of the statute of limitations which is in its favor, and denies, for the same reason, that section 5, which is not in its favor, has any application whatever to it. It would seem but fair that our statute should apply altogether, or not at all, to the defendant. If altogether, the rejoinder of the defendant was bad and the replication of the plaintiff was good; and if not at all, the defendant's plea was bad, and in either case the judgment on the demurrer should have been against the defendant.

We may now briefly consider another question raised by the demurrer, namely: The cause of action having accrued, and the contract having been made outside the state, does such contract constitute such a cause of action as is contemplated by section 5 of article 57? It was contended by the defendant that foreign contracts are not contemplated by this section, but that it relates only to contracts made in this state and to be performed here. But we think such a construction would be strained; and it was said by Jervis, *Ch. J.*, in *Lafond* v. *Buddock*, *supra*: "The rejoinder now proposed is that the plaintiff is a Frenchman domiciled in France, and that the cause of action accrued there, so as to negative inferentially that the plaintiff returned to this country within the meaning of the proviso. It seems to me," he continued, "that is seeking to put too strict a construction upon this statute;" and it was held that "the mere circumstance of the cause of action accruing in France, and the plaintiff being a domiciled Frenchman" was no answer to the replication that at the time the cause of action accrued the plaintiff was beyond seas, and had commenced his action within the period limited, next after his return, etc. Nor is there anything in the language of the section under consideration which would seem to compel us to adopt the narrow construction suggested by the defendant. In *Fairfax Forrest Min. & Mfg. Co.* v. *Chambers*, *supra*, it was held that: "Our courts have jurisdiction in regard to contracts whether made in or out of this state; and where the suit is brought by a nonresident against a nonresident defendant upon a foreign contract, if the defendant voluntarily appears, and the case is tried upon its merits, the validity of a judgment rendered in such a case cannot be questioned." There, as here, the defendant was a nonresident corporation, and the proceedings were begun by suing out a foreign attachment. If, then, our courts have jurisdiction in respect to, and the section in question is general enough to include, foreign contracts, we can see no reason why they should not be held to be embraced within its terms. To exclude them would be to deprive citizens of other states of rights and privileges to which they are entitled. *Le Roy* v. *Crowninshield*, 2 Mason, 157, Fed. Cas. No. 8,269; *Paine* v. *Drew*, *supra*. But it was urged that to adopt the liberal construction, and thus assume jurisdiction over foreign litigants, would make the courts of this state the battle ground on which would be waged a never-ending war. The danger, if any, is more imaginary than real. In *Paine* v. *Drew*, *supra*, Sargent, *J.*, who delivered the opinion of the court in that case, said: "The objection that our courts will be crowded with stale claims from abroad, to the exclusion of their legitimate business, is purely imaginary. The fact that this question is now for the first time directly raised is a sufficient answer to the objection." No authority has been produced to sustain the defendant's position. On the contrary, a number of courts of the highest authority have held, in construing statutes more or less like ours, that the more liberal construction is the more reasonable and just one. We will examine a few of them, though the language of the statutes construed differs more or less from each other, and also from our own statute, so that decisions based upon them cannot always be accepted as of controlling authority. The case, however, just cited (*Paine* v. *Drew*, *supra*) is so similar in all its facts to the one at bar, and the opinion of the court is so full and clear, that it deserves more than ordinary consideration. The statute of New Hampshire (Pub. Stat. 1891, chap. 217) provides that "if the defendant at the time the cause of action accrued or afterwards was absent from or residing out of the state the time of such absence shall be excluded," etc. It was held (*Paine* v. *Drew*) that, a citizen of Maine suing a citizen of Massachusetts in the courts of New Hampshire, the latter could not avail himself of the statute of limitations, in any other manner than as though the plaintiff were a citizen of New Hampshire; in other words, that the statute would not protect him until he had been in New Hampshire long enough to allow the plaintiff to sue within the time limited. In commenting upon provisions of statutes of the various states like our section 5 of article 57, it was said: "It has been held almost uniformly that these words, 'absence,' 'return,' 'leaving property,' etc., are not confined in their application to those who have once been inhabitants, but are equally applicable to those who have never before been in the state,—to foreigners as well as citizens;" and that whether the statute runs against a claim or not depends entirely on the presence or absence of the defendant,

and that it matters not whether the plaintiff be resident or nonresident, absent or present, in the state. In the case of *Ruggles* v. *Keeler*, 3 Johns. 264, 3 Am. Dec. 482, *Chancellor* Kent took the same view, and that, too, upon the construction of a statute substantially like ours. He said: "Whether the defendant be a resident of this state and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso." The proviso referred to is that "if the defendant shall be out of the state" he shall have no benefit of the statute, etc.; and in the case just cited both parties were nonresidents. In *Graves* v. *Weeks*, 19 Vt. 181, it was held that the statute of that state extended to the case where both parties were residents of another state and the debtor is within the state of Vermont for temporary purposes. The statute was that limitations should not run "when the debtor at the time the action accrued was out of the state." To the same effect are *Hartley* v. *Crawford*, 12 Neb. 471; *Kempe* v. *Bader*, 86 Tenn. 189; *Power* v. *Hathaway*, 43 Barb. 214; *Olcott* v. *Tioga R. Co.* 20 N. Y. 210, 75 Am. Dec. 393; *Larson* v. *Aultman & T. Co.* 86 Wis. 281; *Bulger* v. *Roche*, 11 Pick. 36, 22 Am. Dec. 359; *Goetz* v. *Voelinger*, 99 Mass. 504; *McCann* v. *Randall*, 147 Mass. 81. In Angell on Limitations (sec. 205) the author says: "The acts of limitations of Maryland of 1715 and 1765 are by judicial construction to be taken together, and to receive an interpretation to carry into effect the plain and obvious intent of the legislature, which was that limitations should not attach against a creditor where the debtor was absent from the state." And he cites *Hysinger* v. *Baltzell*, *supra*, where the defendant was a resident of Pennsylvania when the cause of action accrued, and it was held he could not plead the statute, because he had not been here long enough to afford the plaintiff an opportunity to prosecute his writ. It is true that in *Hysinger* v. *Baltzell* the plaintiff was a resident of this state, but, as we have seen, both residents and nonresidents stand upon the same footing in this respect (*Frey* v. *Kirk*, *supra*), and the absence or presence in the state of the plaintiff has no effect whatever upon the running or not running of the statute. *Paine* v. *Drew*, and *White* v. *White*, *supra*. In conclusion, we will refer to the case of *Maurice* v. *Worden*, *supra*, which we think gives a clear and satisfactory construction of section 5, entirely confirming the views here expressed. The whole question raised by the defendant here is whether that section applies to it. The contention is that the section referred to will be so construed as to restrict it to resident debtors; and reliance was placed here, as there, upon section 4 of the same article of the Code, and its relation to section 5, the argument being that inasmuch as the former related only to residents, the latter, which was claimed to be a supplement to it, had no other or greater significance. This court, however, seems to have placed very little reliance upon section 4 for any purpose, and declared it to be so ambiguous that it is practically useless,—so useless that it was said the profession did not seem ever to have relied on it. But in regard to section 5 it was said that the meaning of the phrase therein used, namely, "out of the state," is identical with the well-known expressions "beyond the seas," or "out of the actual jurisdiction," "beyond the reach of process of the state." We have already seen that the words "beyond the seas," whether used in statutes of limitations in regard to creditors or debtors, have always been held to apply to both residents and nonresidents, unless otherwise provided,—as, for instance, in the Illinois statute. "Without undertaking," said this court, in the case just cited, "to review all the cases which have construed the words 'beyond the seas' and 'out of the state,' there is in reality no conflict among them, and they all tend to ascertain whether or not in the particular case the party could be reached by the process of the court." If he can be reached by process, it matters not whether he be resident or not; for in either case he will be protected by the statute unless his creditor sues him within the time limited,—and this without regard to whether the creditor be present or absent from this state. And, on the other hand, if the debtor cannot be reached by process, he is "beyond the seas," "absent out of the state," and, therefore, although a defendant, may be actually within the tribunal limits of the state, if he is, within the meaning of the statute, "out of the state." *Maurice* v. *Worden*, *supra*; *Sleght* v. *Kane*, 1 Johns. Cas. 76.

Judgment reversed and cause remanded for new trial.

Robinson, *Ch. J.*, and **Bryan** and **Briscoe**, *JJ.*, dissent.

IOWA SUPREME COURT.

BIBBINS, *Appt.*,
v.
W. W. CLARK *et al.*

(.....Iowa.....)

1. **Individual real estate of a partner** is subject to the lien of a tax assessment upon the personal property of the partnership under a statute making taxes due from any person a lien upon any property owned by him.
2. **A statute simply making personal property taxes a lien** on the real estate of the owner does not give them priority over mortgage liens existing at the time they attach.
3. **Suit for the refunding of an illegal tax** cannot be maintained against the county until the claim has been presented to the board of supervisors under a statute providing that that board shall direct the treasurer to refund illegal taxes.
4. **Members of a partnership the personal taxes of which have been levied on the real estate of their copartner** cannot be compelled to reimburse a mortgagee of such real estate who to protect his own interests has been compelled to pay the taxes.
5. **A mortgagor who permits his personal property taxes to become a lien** on the mortgaged land can be compelled to reimburse the mortgagee who is compelled to pay them to protect his own interests.
6. **An objection that a suit should have been brought at law** instead of in equity cannot be taken by demurrer.

NOTE.—*Priority of claims for taxes against the assets of a debtor.*

I. *Scope of note.*
II. *Upon what based.*
III. *Constitutionality and construction of provisions for.*
IV. *What is included in the right.*
 a. *Taxes generally.*
 b. *Claims against collectors.*
V. *Nature and extent of priority.*
VI. *Subrogation of persons paying the tax.*
VII. *What amounts to a divestiture of the right.*
VIII. *Enforcement of the right.*

I. *Scope of note.*

The design of this note is to treat of the priority of claims for taxes with relation to claims for prior payment out of some particular fund only, and questions as to the priority of tax liens generally, and the superiority of tax titles derived therefrom, have been omitted.

As to priority of tax liens, see *note (Taxes made a lien on real property: priorities)*, to New England Loan & T. Co. v. Young (Iowa) 10 L. R. A. 478.

As to claims on bonds for duties, see *note* to State v. Foster (Wyo.) *ante*, 226.

II. *Upon what based.*

Taxes, though not regarded as debts, have been deemed to be within the principle of the prerogative right of the sovereign power to priority of payment of debts due it.

Thus in Dennis v. Maynard (1854) 15 Ill. 477, holding that county taxes create a lien and take precedence to and priority over judgments, it was said that all the principles applicable to the prerogative right of priority of the crown in this respect equally apply to the public dues for taxes.

And in Central Trust Co. v. New York City & N. R. Co. (1888) (N. Y.) 13 Cent. Rep. 404, the court reiterated a statement made in *Re* Columbian Ins. Co. (1866) 3 Abb. App. Dec. 239, that there is great force in the claim that the state has succeeded to all the prerogatives of the British crown so far as they are essential to the efficient exercise of powers inherent in the nature of civil government, and that there is the same priority of right here in respect to the payment of taxes which existed at common law in favor of the public treasury.

As to the succession of the states to the prerogative right of preference of the crown, see *note* to State v. Foster (Wyo.) *ante*, 226.

As a general rule, however, taxes are regarded as a lien upon the property of the taxpayer or are made so by statute. In such case the right of priority of payment is dependent upon the priority of the lien, and when the right of priority is conferred by statute it is limited and confined to that actually conferred and dependent upon the proper construction of the terms of the statutes.

Thus unpaid county taxes are not taxes due the state entitled to priority in the distribution of the estate of a decedent next after the expenses of administration under the Georgia statute providing for preference of unpaid taxes or other debts due the state or United States. Hargrove v. Lilly (1882) 69 Ga. 326.

And the state has no priority in the disbursement of an insolvent decedent's estate for the payment of taxes assessed against lands included in the estate, under Virginia Code 1873, chap. 126, § 25, giving priority to taxes and levies assessed upon the decedent previous to his death, except for the taxes due from the insolvent himself individually as a taxpayer which had been assessed on his property, and has no lien on his estate as a deceased defaulting sheriff for taxes collected and unaccounted for by him. Spilman v. Payne (1888) 84 Va. 435.

As to the right of the state to priority when taxes are regarded as a lien or made so by statute, see *infra*, under heading, *Nature and extent of priority.*

As to taxes as a lien on real property, see *note* to Miller v. Anderson, 11 L. R. A. 317, 1 S. Dak. 539.

III. *Constitutionality and construction of provisions for.*

The constitutionality of provisions for the priority of payment of taxes does not appear to have been questioned.

And in Geren v. Gruber (1874) 26 La. Ann. 694, it was said to be competent for the sovereign power to provide how taxes shall be collected and say whether the right of preference shall exist and for what length of time.

And in Aikin v. Dunlap (1819) 17 Johns. 77, it was said that it cannot be doubted that congress has the right to stipulate for preference in their contracts for securing the public revenue.

And in Jack v. Weiennett (1885) 115 Ill. 105, 56 Am. Rep. 129, it was said that the constitutional provision requiring the general assembly to provide such revenue as shall be needful renders it indispensable that taxes shall have priority over individual debts.

Re Columbian Ins. Co. (1866) 3 Abb. App. Dec. 239, 3 Keyes, 121, is the only case found turning directly upon the construction of these provisions. In this it was held that 2 N. Y. Rev. Stat. 470, § 79, regulating the distribution of the assets of insolvents, is not to be so construed as to extinguish the rights of the government enacting it to priority of payment from the assets, of taxes due it.

It is to be observed, however, that all the de-

See also 35 L. R. A. 352; 41 L. R. A. 351.

(February 2, 1894.)

APPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendants in an action brought to annull a tax sale and to recover the amount which plaintiff had been compelled to pay to protect his property therefrom. *Reversed.*

The facts are stated in opinion.

Mr. **William H. Baily** for appellant.

Messrs. **Spurrier, Dowell & Parrish** for appellee Polk county.

Messrs. **Dudley & Coffin** for other appellees.

Kinne, J., delivered the opinion of the court:

1. The facts in this case are that during the years 1886, 1887, and 1888 defendants W. W. Clark, Lavina W. Clark, and A. W. Ford were copartners doing business in the city of Des Moines under the firm name of W. W. Clark & Co.; that one half of the taxes upon the personal property of W. W. Clark & Co. for 1887 were not paid by them, and the entire taxes upon their personal property for 1888 were not paid by them; that November 1, 1888, M. W. Bibbins sold and conveyed to W. W. Clark certain lots in Lee township, city of Des Moines, subject to a mortgage of $10,000 and interest, which grantee assumed and agreed to pay as a part of the purchase price of said property; that as a part of said transaction, and simultaneously with the execution of said deed, W. W. Clark, for a part of the purchase price of said lots, executed and delivered to Bibbins a purchase money mortgage on said lots

cisions upon the statutory portions of the subject, though bearing particularly upon the specific subjects herein treated, consist generally of an interpretation of those provisions.

IV. *What is included in the right.*

a. *Taxes generally.*

Both counties and municipal corporations in levying taxes are instrumentalities of government, the claim of neither having priority over the other, and a purchaser at a tax sale for a county tax takes the property subject to the city tax; though when the property is not of sufficient value to pay both, the sale first rightfully made will devest the lien of the other governmental agency. Justice v. Logansport (1884) 101 Ind. 326.

And when land is sold for state, county, and municipal taxes, and the proceeds are insufficient to pay all, the state cannot as sovereign assert a prior right of satisfaction when the lien given for taxes is without restriction or qualification, applying to all taxes authorized to be assessed by law, and counties and municipalities are governing agencies created by the state with power to levy and collect taxes. Nashville v. Lee (1883) 12 Lea, 452.

So both the taxes levied upon real estate and sums added thereto for failure to make prompt payment are entitled to priority of payment in the distribution of the proceeds of a judicial sale of such real estate under a mortgage, under Pa. Act of March 18, 1875 (Pub. Laws, 15), providing that taxes assessed and levied upon real estate shall be a lien thereon and have priority to any mortgage, and that if they remain unpaid for a specified period certain designated sums shall be added thereto. Titusville's App. (1885) 108 Pa. 600.

And South Carolina Act of 1788, imposing double taxes on all persons who refuse or neglect to make due return on oath of all their taxable property, provides for an increased tax after the time limited for making the annual return, and not a mere penalty indefeasible, and the addition is entitled to the same priority of payment out of the proceeds of a sale, of lands of the tax debtor under a judgment against him, over the judgment, as that to which the original tax is entitled. Butler v. Baily (1800) 2 Bay, 244.

So a fund arising from a sheriff's sale of an equitable interest under a contract for a conveyance of lands is subject to the lien of the city in which they are situated for taxes imposed. Van Arsdalen's App. (1877) 3 W. N. C. 468.

And Maine Stat. 1879, chap. 154, § 15, requiring city taxes to be paid in full out of an insolvent estate, applies to one in which no dividend had been made at the time the statute took effect although the insolvency proceedings were commenced prior to its enactment. Belfast v. Fogler (1880) 71 Me. 403.

b. *Claims against collectors.*

Taxes collected by a tax collector and unaccounted for cease to be taxes and become a debt to the town, upon a claim for which against his estate in insolvency the town is entitled to priority, under Massachusetts Pub. Stat., chap. 157, § 104, directing preference in the order for a dividend to all debts due to the United States, and all debts due for taxes assessed by the state, or any county, city, or town therein. Bent v. Hubbardston (1884) 138 Mass. 99.

And the claim of a widow of a deceased tax collector for dower, and liens by judgment or decree on lands of the decedent, have priority in the distribution of the decedent's estate, under the Georgia statute, over a claim of the county for taxes collected and not accounted for, though "unpaid taxes or other debts due the state" are thereby preferred over judgments, etc. Hargrove v. Lilly (1882) 69 Ga. 326.

But where moneys collected by deputies upon tax bills placed in their hands by the tax collector are paid over by them to his administrator after his death as "the state's money," the administrator may, within the reason of the rule of "ear marking" pay such moneys to the state in preference to the other creditors of the tax collector, though the state has no lien upon the estate for, or right of preference in, the payment thereof. Spilman v. Payne (1888) 84 Va. 435.

And a debt due to the United States from a deceased revenue officer is entitled to priority of payment out of the assets in the hands of his administrators in Pennsylvania, whether the debt was incurred before or after the passage of the Act of Congress of March 3, 1789, providing for the priority of the United States in the payment of debts due it, as it would have been entitled to such priority under the laws of that state previously existing. Com. v. Lewis (1814) 6 Binn. 266.

And a claim of the commonwealth against a defaulting collector of duties is a paramount claim upon the proceeds of a surety's lands, sold under the decree of the orphan's court over a mortgage subsequently executed, and claims of other creditors, under Pennsylvania Act of May 30, 1811, providing for the settlement of balances due the Commonwealth and making them a lien on the estate of the debtor and his sureties from the date of the settlement. Forney v. Com. (1849) 10 Pa. 405.

V. *Nature and extent of priority.*

A mere right to priority of payment of taxes gives the collector no power to seize and sell the property of the taxpayer. He has no right in the

(afterwards assigned to plaintiff), in which he covenanted that said premises were free from incumbrance except said mortgage of $10,000, and that he would warrant and defend the title of said premises against all persons lawfully claiming the same; that December 7, 1889, W. W. Clark conveyed the lots to Lavina W. Clark; that January 7, 1890, plaintiff obtained, in Polk county district court, against W. W. Clark and Lavina W. Clark, a decree foreclosing said purchase money mortgage, and under a special execution thereon the lots were sold to her at sheriff's sale, February 19, 1890, for the full amount of the mortgage debt; that December 7, 1890, the treasurer of Polk county sold said lots at tax sale to A. C. Miller for the said unpaid personal property taxes of W. W. Clark & Co., amounting to $399.23, and executed to him a tax-sale certificate; that February 20, 1891, plaintiff received a sheriff's deed for said property, and on March 23, 1891, brought this action; that in January, 1891, after the sheriff's sale to plaintiff, the Clarks having failed to pay interest on the $10,000 mortgage, the holder brought suit to foreclose said mortgage, and in June, 1891, after the present suit was brought, plaintiff, to prevent loss, and obtain an extension and renewal of said mortgage, was compelled to pay said personal property taxes and redeem from said tax sale to Miller; that at all of the times aforesaid W. W. Clark and Lavina W. Clark were the owners of certain real estate described, which was primarily liable for said personal property taxes. Plaintiff prays judgment against Polk county, W. W. Clark & Co., W. W. Clark, Lavina W. Clark, and A. W. Ford, and each of them, for the amount of said taxes, interest, and costs; that the tax sale be set aside, annulled, and ordered returned and refunded; that defendants' said property be decreed primarily liable for said taxes, and a special execution issue for the sale thereof; that plaintiff have such other and further relief as in equity she ought to receive. To the amended petition all of the defendants demur, alleging

property itself, though he has a right of prior payment out of the proceeds when sold. Anderson v. State (1852) 23 Miss. 459.

And the right of prior payment given by Mississippi Acts 1841, 1844, and 1846, providing that the taxes thereby imposed shall be preferred to all judgments, executions, incumbrances, and liens of any description whatsoever, does not of itself constitute a lien upon the property of the taxpayer, and if before the right of priority attaches there is a bona fide transfer, it is lost. *Ibid.*; Bailey v. Fuqua (1852) 24 Miss. 497.

And a mortgagee of personal property who takes possession under his mortgage and sells the property either directly or through the decree or order of a court before any distraint for taxes is made is entitled to the proceeds so far as may be necessary to pay his claim as against the taxes assessed against the mortgagor, where the taxes are not declared by statute to be a lien on personalty. Maish v. Bird (1884) 23 Fed. Rep. 180.

And a tax assessed against the capital stock of a corporation, which is sought to be charged by the collector against a parcel of its real estate after it had given and recorded a trust deed thereof, is a personal property tax which does not become a lien on realty until the collector upon failure to collect from the personalty has charged it thereon, and is a subsequent lien to such trust deed and not entitled to priority of payment out of the proceeds of sale thereof under such deed. Parsons v. East St. Louis Gas Light & Coke Co. (1884) 108 Ill. 380.

Nor are taxes assessed upon real estate subsequent in point of time to a mortgage upon the same premises entitled to priority of payment over the mortgage out of the proceeds of sale upon foreclosure of the mortgage where the legislature has not given preference to the lien for taxes over other liens. Gormley's App. (1856) 27 Pa. 49.

And a mortgage made by a collector of revenue to his surety on his official bond to secure him against liability thereon and on existing and future indorsements for the mortgagor, is valid and effectual as against the claim of the United States on such bond, though he could not pay all his debts when the mortgage was given and the mortgagee knew he was largely indebted to the United States. United States v. Hooe (1805) 7 U. S. 3 Cranch, 73, 2 L. ed. 370.

New England Loan & T. Co. v. Young (1890) 10 L. R. A. 478, 81 Iowa, 732, holds that the lien for personal property taxes imposed upon real estate by Iowa Code, section 865, providing that taxes due from any person on personal property shall be a lien upon any real estate owned by him, is superior to liens of individuals previously acquired upon such real estate, and that such taxes assessed against a mortgagor of lands after foreclosure sale thereof are a lien on the mortgaged lands.

But this case was squarely overruled by the principal case.

So, property of a national bank organized under the Act of June 3, 1864, cannot be subjected to a claim for a tax which was levied after the bank became insolvent and which was not a lien upon that particular property but a mere debt of the bank at the time of the appointment of a receiver, as against the claim of such receiver subsequently appointed. Woodward v. Ellsworth (1879) 4 Colo. 580.

But the delivery of the tax warrant binds the property of the taxpayer when followed by a levy and takes precedence over an execution subsequently issued though first levied. Evans v. Walsh (1879) 41 N. J. L. 281, 32 Am. Rep. 201.

And the lien acquired by the state by the issue of a warrant for taxes takes precedence over the equitable claims of the creditors of a corporation where its property is subsequently brought into the custody of the law. *Re* Columbian Ins. Co. (1866) 3 Abb. App. Dec. 289, 3 Keyes, 123.

Where taxes are regarded as a lien upon the property of the taxpayer, or are made so by statute, however, the nature and extent of the right of the state to priority of payment are governed by the character of the lien.

Thus it was held that the payment of taxes must of necessity be a paramount obligation, taking precedence over all private contracts between individuals, in Butler v. Baily (1800) 2 Bay, 244; Jack v. Weiennett (1885) 115 Ill. 105, 56 Am. Rep. 129.

And that a state has, in her sovereign capacity, a prior lien on all her realty for taxes which may be enforced to the prejudice of any claim due by her citizens whenever acquired, in *Re* Brand (1869) 3 Nat. Bankr. Reg. 324.

And that a claim of a county for taxes is entitled to priority over individual debts and is a charge upon the property without reference to ownership, and that it may be seized and sold though there are prior liens and incumbrances upon it, in Dunlap v. Gallatin County (1853) 15 Ill. 7.

So a tax laid upon real estate for the purpose of opening or improving a street in the city of New

that the facts stated do not entitle plaintiff to the relief demanded, and defendant W. W. Clark further alleging that if, upon the facts stated, defendant is liable to plaintiff for said taxes, plaintiff has a complete and adequate remedy at law. The district court having sustained the demurrers, plaintiff elected to stand upon her petition as amended, and from the rulings on the demurrers and the judgment dismissing her petition and for costs, she brings this appeal.

2. Our statute provides that "taxes upon real property are hereby made a perpetual lien thereon against all persons except the United States and this state; and taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire a title, and the treasurer is authorized and directed to collect the delinquent taxes by the sale of any property upon which the taxes are levied, or any other personal or real property belonging to the person to whom the taxes are assessed. Code, § 865. The taxes in controversy were assessed on personalty of the firm of W. W. Clark & Co. The real estate sought to be holden for said taxes, and which was sold therefor, had been deeded by one M. W. Bibbins to W. W. Clark, a member of said firm. It is claimed that, as the taxes were assessed against the firm on its property, and as the lots had been deeded to Clark individually, the case is not within the statute above quoted, which makes taxes "due from any person a lien upon any property owned by such person;" that in fact the owner of the property and the person from whom the taxes are due are not the same. The question thus presented is, May taxes assessed against a firm on its personal property become a lien on the individual real estate of a partner? While it is true that taxes assessed on firm property are a demand against the partnership as such, they are also a demand against each member of the copartnership. Each copartner is liable individually for the firm debts and obligations, and these include taxes. These taxes, being due from Clark

York takes preference under 2 N. Y. Rev. Laws, p. 420, § 186, p. 442, § 259, over a prior mortgage, being itself equivalent to a senior mortgage or judgment. Dale v. McEvers (1823) 2 Cow. 118.

And in Butler v. Bally (1800) 2 Bay, 244, it was held that a claim for delinquent taxes due the state is entitled to priority in payment over a judgment against the tax-debtor out of the proceeds of a sale of his lands under execution issued on such judgment.

And that a lien for taxes is not displaced by a pre-existing judgment or decree, and a purchaser at a mortgage sale cannot withhold any of the moneys derived therefrom to pay taxes then a lien on the property sold unless authorized to do so by the terms of the sale, was held in Osterberg v. Union Trust Co. of New York (1876) 93 U. S. 428, 23 L. ed. 964.

So in Jenkins v. Newman (1889) 122 Ind. 99, it was held that a tax lien upon which a decree of foreclosure has been rendered is superior to a judgment lien.

And money of a debtor in the hands of the sheriff will be directed to be paid in satisfaction of an execution against such debtor for taxes held by the sheriff under Georgia Act of 1804, section 14, providing that the taxes thereby imposed shall be preferred to all securities and incumbrances whatever, in preference to a senior *fi. fa.* in favor of individuals in his hands, the dates of the contending claims not being material. State v. Pemberton (1831) Dudley (Ga.) 15.

And where lands held by one person as trustee of the legal title for the use of another are sold to a third person, and subsequently sold at sheriff's sale under a judgment against the person for whose benefit they were formerly held for the purpose of questioning the title of the purchaser, who perfected his title by purchasing at the sheriff's sale, taxes assessed against the judgment debtor while the lands were in the hands of the trustee are entitled, under Pennsylvania Act of February 8, 1824, making taxes a lien having priority over judgments, to be first paid out of the proceeds of the sheriff's sale before payment of the judgment, though the judgment debtor never had any title to the land, either legal or equitable, in his own name. Dungan's App. (1879) 88 Pa. 414.

So a claim of the commonwealth against a surety of a defaulting collector of duties is a paramount claim upon the proceeds of his lands sold under a decree of the orphan's court, over a mortgage subsequently executed and the claims of other creditors, under Pennsylvania Act of May 20, 1811, providing that the amount of balances settled agreeably to that act, due the commonwealth, shall be a lien on the real estate of the persons indebted and their sureties from the date of the settlement. Forney v. Com. (1849) 10 Pa. 405.

And a claim of the United States for an unpaid tax on distilled spirits is entitled to priority of payment out of the proceeds of a sheriff's sale under execution on a judgment in favor of a third person, of property used in the distillery and in distilling, over a claim of the landlord of the distiller for rent, under the Act of Congress of July 20, 1868 (15 Stat. at L. 125, § 1) making such tax a first lien upon the spirits distilled and the stills, vessels, fixtures, and tools therein. Dungan's App. (1871) 68 Pa. 204, 8 Am. Rep. 169.

So an assessment for paving, imposed under Pennsylvania Act of February 8, 1824, relating to taxes on real estate in the city and county of Philadelphia giving priority over all other obligations or responsibilities, is superior to a mechanic's lien and is entitled to priority of payment out of the lands to which the liens attached under a *venditioni exponas* over claims of mechanics and materialmen and judgment creditors. Pennock v. Hoover (1835) 5 Rawle, 291.

But a county tax in order to have priority over a real estate mortgage under Delaware Statute of March 15, 1875, providing that a state or county tax shall be paramount to all other liens, must have been levied upon the mortgaged real estate before its conversion into personalty by a sale under the mortgage. Rhoads v. Given (1876) 5 Houst. (Del.) 183.

And a municipal lien filed by the city of Pittsburgh for grading and paving is not entitled to priority of payment out of the proceeds of a sale of real estate of the tax debtor over a mortgage of a prior date and record, under Pennsylvania Act of February 8, 1824, applicable to Philadelphia and subsequently extended to Allegheny county, as the Act of April 18, 1857, with the supplementary Act of April 22, 1858, relating to setting curbstones and raising sidewalks therein, provides an entirely different system of procedure and makes no provision for priority. Pittsburgh's App. (1861) 40 Pa. 455.

So a tax lien, under Conn. Gen. Stat., § 3890, providing that the estate of any person in any portion of real estate which is by law set in his list for tax-

as a copartner as well as from the firm, would become a lien upon his real estate. See *Chapin* v. *Streeter*, 124 U. S. 360, 31 L. ed. 475.

8. It is conceded by counsel that the facts in this case present for our determination the same question as that involved in the case *New England Loan & T. Co.* v. *Young*, 81 Iowa, 732, 10 L. R. A. 478. It was there held that taxes on personal property which became a lien upon mortgaged real estate after foreclosure and sale of the mortgaged premises, and prior to the expiration of the period of redemption, were a lien superior to any right acquired by the holders of the mortgage by virtue of the foreclosure and sale of the property. On a rehearing, the majority of the court as then constituted adhered to the doctrine announced in the original opinion, *Justices* Granger and Robinson dissenting. The writer, who has since become a member of the court, while appreciating the importance of the question presented, and being fully impressed with the necessity of adhering to established precedents, is nevertheless unable to concur in the opinion of the majority of the court as then constituted in so far as it relates to the priority of liens. Taxes become liens by virtue of statute only, and, when created, the lien is not to be enlarged by judicial construction. Cooley, Taxn. 444; Desty, Taxn. p. 734; *Jaffray* v. *Anderson*, 66 Iowa, 719; *New England Loan & T. Co.* v. *Young*, 81 Iowa, 738, 10 L. R. A. 478. Now, our statute does not provide, either expressly or by implication, that taxes due upon personal property shall be a lien upon real estate owned by such person, superior to any lien then existing thereon. It simply says, as to such taxes, they shall be a lien upon any real estate he owns, or which he may afterwards acquire. To hold that a mere statutory creation of a lien upon real estate, without more, is equivalent to, and to be construed as, creating a lien superior to existing liens thereon, is, as it seems to us, not only overriding all rules of construction, but it is inconsistent with our

ation shall be subject to a lien for that part of his taxes which is laid upon the valuation of said real estate as found in said list when finally completed, has priority over a mortgage upon lands of the person taxed so far as the valuation of that particular tract is concerned only and not with reference to taxes on his other property. Conn. Gen. Stat., § 3899, providing that no real estate incumbered by mortgage shall be sold for the payment of any taxes except the tax laid upon the assessed valuation of such real estate unless the sale is made subject to such mortgage. Meyer v. Burritt (1891) 60 Conn. 117.

VI. *Subrogation of persons paying the tax.*

The right of priority of payment seems to be confined strictly to the state or municipality imposing the tax, and not to be extended to a third person paying it unless he was compelled by law to do so.

Thus a tax collector who has paid over taxes which were not paid but which were made a lien by statute prior to all others charged upon the premises, for the amount of which the taxpayer confesses judgment in favor of the collector and afterwards dies, has no right of priority over liens against the estate which preceded his judgment; the collector having paid voluntarily, is not subrogated to the rights of the state. Wallace's Estate (1868) 59 Pa. 401.

And the assignee of a mortgagor who pays delinquent taxes upon the mortgaged premises proved by the collector as a preferred claim against the mortgagor's estate after the property has been sold under the mortgage subject to existing liens cannot recover the amount thus paid from the mortgagee. Brown v. Holyoke Water Power Co. (1892) 157 Mass. 280.

So payment of taxes by a lessor upon his own lands occupied by a lessee who had become a bankrupt, under contract to pay all taxes assessed upon the demised premises, does not entitle the lessor to claim the amount of such payment as a preferred debt against the estate of the lessee under section 28 of the Bankruptcy Act. *Re* Parker & Peck (1872) 6 Ben. 284.

VII. *What amounts to a divestiture of the right.*

When the receiver of taxes presents claim for personal taxes to the assignee for the benefit of creditors of the insolvent tax debtor and appears before the referee upon the accounting by the assignee he is not entitled to preference over other creditors, but must be regarded as having elected to come in under the assignment, and must be treated as any other creditor in the absence of a preference in his favor. *Re* De Frece (1898) 6 Misc. 274.

And where lands are sold for city taxes and the purchase moneys brought into court and distributed, the city making no claim for taxes subsequently assessed, it cannot enter a lien against the property and again sell it where the proceeds of the first sale would have been sufficient to pay both, the statute preserving the lien only where the proceeds are insufficient to pay the whole. Smith v. Simpson (1869) 60 Pa. 168.

And where the state fails to assert its right of preference in payment of taxes due it from the estate of an insolvent who has assigned for the benefit of creditors, a mortgagee of lands upon which the taxes are a lien cannot assert it and require the assignee to pay them. *Re* Lewis (1880) 81 N. Y. 421.

But an assignee in bankruptcy cannot, by a sale of the bankrupt's property, devest the right of a state to enforce payment of her taxes on the property wherever found though the state refused to come into the bankruptcy court and claim them under provisions of the bankrupt law for the payment thereof, no power existing to compel her to do so, or to sell the property free of incumbrance in case of refusal. Stokes v. State (1873) 46 Ga. 412, 12 Am. Rep. 588, 9 Nat. Bankr. Reg. 191.

And the relinquishment by the collector of a distress for taxes upon the goods of a tenant on the premises taxed is not a release of the priority of taxes over mortgages and other incumbrances, so as to postpone the taxes to other incumbrances; though the rule is probably different when the goods distrained are the property of the owner of the estate taxed. Parker's App. (1844) 3 Watts & S. 449.

Nor does a claim of the commonwealth for taxes against the estate of one who has assigned for the benefit of creditors which by Pennsylvania Acts of June 7, 1879, section 14, and of June 1, 1889, § 31, is made a preferred claim to be first allowed before any other claims are paid, lose its preference by reason of noncompliance with the provisions of Pennsylvania Act of April 14, 1887, § 4 (Purdon, Dig p. 1386) requiring the auditor-general to transmit to the respective counties, to be by them entered of record, certified copies of the liens therefor. *Re*

holding in the construction of other statutes where similar language is employed. The statute provides that judgments of the supreme and district courts of this state "are liens upon the real estate owned by the defendant at the time of such rendition, and also upon all he may subsequently acquire for the period of ten years from the date of the judgment." Code, § 2882. It has never been claimed under that statute that a judgment was thereby made a lien prior to an existing lien upon the real estate of the party. Yet, applying the rule of the majority opinion in the *Young Case*, it could be said with as much reason as in the case at bar, that the lien thus created by statute was superior to all existing liens against the real estate of the judgment debtor. So it is provided in bastardy proceedings that upon filing the complaint "a lien shall be created upon the real property of the accused," etc. Code, § 4717. Was the claim ever made that such a lien was superior to all others then existing against the land of the accused? In these and other cases which might be cited the language used to give the lien is general, as in the case at bar. In none of them is it said that the lien shall be prior to existing liens, but in each case the priority of the lien is left to be determined by the rules of law applicable to all liens in the absence of special provisions. An examination of our statutes will show that when the legislature has intended to create a lien which should take precedence of existing liens, apt language has been used to express such intention. See Code, § 1558, and chapter 100, Acts 16th Gen. Assem. The section under consideration makes a clear distinction between liens upon real estate for taxes assessed thereon and liens upon real estate for taxes assessed upon personal property. In the former case the lien is "against all persons," and "perpetual;" in the latter it is simply declared that there shall be a lien. Now, in the opinion referred to this language of the statute is so enlarged by construction that in effect the statute is made to say that this lien upon real

Goodwin Gas Stove & Meter Co's Assigned Estate (1895) 166 Pa. 296, aff'g (1894) 3 Pa. Dist. Rep. 483, 15 Pa. Co. Ct. Rep. 65.

Nor is a claim against the surety of a defaulting collector lost by such noncompliance. Forney v. Com. (1849) 10 Pa. 409.

And the prior lien given to all city and county taxes in Allegheny city and county upon real estate upon which taxes are assessed, by Pennsylvania Acts of April 5, 1844, and February 27, 1860, is not lost by the default of the collector in not making the taxes out of the personal property found on the premises during the life of the warrant, so as to postpone the taxes to a mortgage and entitle it to be first paid out of the proceeds of a sale thereunder. Germania Sav. Bank's App. (1879) 91 Pa. 345.

But municipal liens for taxes are cut off by a judicial sale under Pennsylvania Act of January 6, 1864, § 19, relating to municipal liens in Pittsburg where enough is realised to pay them, and they are to be paid from the proceeds in preference to prior liens. Pittsburg's App. (1871) 70 Pa. 142.

And the prior lien of municipal taxes in the city of Allegheny, given by Pennsylvania Act of February 27, 1860, is devested by a sale of the lands upon which they are assessed by foreclosure of a prior mortgage, and the lien creditors are remitted to the proceeds of sale for payment of their respective claims. Shaw v. Allegheny (1887) 115 Pa. 46.

But though property upon which a tax due the United States is a prior lien which is sold under process of a state court does not pass to the purchaser subject to such lien, the lien attaches to the proceeds of the sale and is to be first paid and satisfied therefrom. Dungan's App. (1871) 68 Pa. 204, 8 Am. Rep. 169.

A city tax, however, the lien of which attaches to land of the person assessed, cannot, upon the subsequent transfer, and its sale by the sheriff as the property of the vendee under a judgment for the purchase price, be satisfied out of the proceeds of such sheriff's sale as the lien of the tax attached to all the vendor originally had and was not devested by the subsequent transactions, while the lien of the judgment attached to what the vendee acquired only. Freeman v. Atlanta (1881) 66 Ga. 617.

The question whether the right to prior payment of taxes is devested by an assignment for the benefit of creditors has been differently decided. It is thought, however, that the question as to the existence of a lien for the tax is controlling upon the question of divestiture.

Thus in State v. Rowse (1872) 49 Mo. 586, it was held that the state has a right in the nature of an equitable lien on the property of a taxpayer for the payment of taxes on personal property which is not discharged by an assignment of the property of the taxpayer for the benefit of creditors.

And in Wright v. Wigton (1877) 84 Pa. 163, it was held that an assignment for the benefit of creditors does not exempt real estate assigned from liability for taxes assessed upon it, whether imposed before or after the assignment.

And in Cones v. Wilson (1860) 14 Ind. 465, it was held that the assignment of property to trustees for the payment of debts is not such a transfer as will devest the lien of the state thereon for taxes.

And that an assignment for the benefit of creditors does not constitute such a change of possession of personal property remaining on the lands included in the assignment as to exempt it from liability to seizure for taxes assessed upon such lands, was held in Wright v. Wigton, *supra*.

And that creditors in case of assignment under the Illinois insolvency laws were held not to acquire such vested rights in the property assigned that it could not be thereafter taken or appropriated for the payment of taxes levied before the assignment but which had not then become a lien upon the property assigned, in Jack v. Welennett (1885) 115 Ill. 105, 56 Am. Rep. 129.

And that payment by preference out of the proceeds of an insolvent's movable property of taxes on personalty was held rightfully ordered when proceeds of his real estate were not included therein, and that, there being no legislation requiring registration to secure a lien for the payment of taxes on personal property, the lien existed independent of registration, in Mullan v. His Creditors (1887) 39 La. Ann. 807.

So a water tax made a lien by statute upon the property, upon which it is assessed, imposed upon lands in the hands of an assignee in bankruptcy, should be paid in full by the assignee when he has sufficient funds in his hands as a part of the proper expenses of his administration of the estate. *Re* Moller (1876) 3 Ben. 526, affirmed (1877) 14 Blatchf. 207.

And taxes in New York where they are made a personal debt of the owner of the premises against which they are assessed collectible out of his property, laid before the commencement of proceedings in bankruptcy against such owner, should be paid in full by the assignee in bankruptcy when he has

estate for personal taxes shall be superior to all other liens then existing against said real estate. The statute does not say so, the legislature has not so declared, nor can any such result be reached by applying to this provision of the statute the same rule of construction applied to like language used elsewhere in the code. Why should a special rule of construction be created for this particular statute? What reason is there for saying that this provision, simply creating a lien, means more than it says? In the *Young Case* it is said in the majority opinion: "It is a general principle in our system of taxation that when taxes are made a lien upon real estate they become prior and superior to all mortgage or judgment liens." As to taxes assessed against personalty and by statute made a lien upon realty, without provisions for priority, the above statement, in our judgment, finds no support in the authorities. Touching this question, the supreme court of South Dakota, in the recent case of *Miller* v. *Anderson*, 1 S. Dak. 539, 11 L. R. A. 317, said: "But, reading the entire section 1612 together, it is inexplicable to us why, if the legislature intended to put both real and personal taxes on a common footing, and make them both liens to the same extent and of the same rank, they should not have used terms at least suggestive of such intent. If by force of a general principle, as stated in the majority opinion of the supreme court of Iowa, hereinafter referred to, the lien declared was necessarily a first one, why was it not as safe to rely upon that principle in the case of real estate taxes as in the case of personal property taxes? As to the former,

sufficient funds in his hands, and not be charged against the proceeds of a sale of the property under a prior mortgage. *Ibid.*

And Iowa Laws of 1876, chap. 14, providing that assessments or taxes shall be entitled to priority or preference and be first paid in full, charges an assignee for the benefit of creditors with the duty to pay taxes levied against the debtor to the extent of the property coming to his hands, though no levy had been made and no claim filed or demand made. Huiscamp Bros. v. Albert (1883) 60 Iowa, 421.

The right of the state to priority of payment of taxes is defeated, however, by a bona fide transfer of his property by the taxpayer before it attaches, when the tax is not a lien thereon. Anderson v. State (1852) 23 Miss. 459; Bailey v. Fuqua (1852) 24 Miss. 497.

And the property of a national bank organized under the Act of June 3, 1864, cannot be subjected to a claim for a tax which was a mere personal debt of the bank and not a lien upon the property sought to be subjected at the time the bank became insolvent and a receiver was appointed as against the claim of such receiver. Woodward v. Ellsworth (1879) 4 Colo. 580.

And in Lyon v. Guthard (1883) 52 Mich. 271, it was held that in Michigan there is no law making personal taxes a lien until a levy is made, and a personal tax upon which no levy has been made, against one who has made a valid assignment for the benefit of creditors cannot be satisfied from the stock in the hands of the assignee upon any terms other than those to which other creditors are entitled, as to permit the seizure of such property would be to permit the property of one to be taken to pay the tax of another.

And in *Re* Ranger (1893) 6 Misc. 274, it was held that a claim for personal taxes against an assignor for the benefit of creditors is not entitled to preference over other claims filed with the assignee where it is not preferred in the assignment and its priority is not provided for by statute.

So it was held that taxes imposed under the laws of the state of New York upon real estate will not be required to be paid in case of an assignment by the taxpayer for the benefit of creditors in preference to the private creditors of the assignor where they are not preferred in the assignment and the taxes are not claimed out of the particular real estate upon which they are imposed, in *Re* Lewis (1880) 9 Daly, 220.

And that the court has no power to direct an assignee for the benefit of creditors to pay taxes on lands included in the property assigned in preference to other debts of the assignor where the assigment contained no provision with relation to the taxes except as they were included in the general unpreferred debts the authority of the assignee and the control of the court over him being limited by the express terms of the assignment, in *Re* Lewis (1880) 81 N. Y. 421.

In *Re* Lewis (1880) 9 Daly, 220, the court drew a distinction between cases of distribution under the bankruptcy laws and by an assignee for the benefit of creditors, saying that in the one case the distribution is made by law, taking all discretion in the matter away from the debtor; in the other case the distribution is made according to the will of the debtor as expressed in the deed of assignment.

VIII. *Enforcement of the right.*

The state is not bound to wait until the estate of an insolvent in the hands of trustees is administered for the collection of a claim for taxes and then participate in the distribution of the proceeds but may at once enforce payment to the exclusion of all other creditors. Dunlap v. Gallatin County (1858) 15 Ill. 7.

Formal proof of debt in respect to claims for taxes and water rates against a bankrupt estate is not necessary. *Re* Moller (1876) 8 Ben. 526, affirmed (1877) 14 Blatchf. 207; Huiscamp Bros. v. Albert (1883) 60 Iowa, 421.

And town and school taxes are a preferred claim against an insolvent estate of a deceased person under the Maine statute which need not be presented to or proved before commissioners of insolvency, but may be recovered in an action of debt against the administrator without presentment. Bulfinch v. Benner (1874) 64 Me. 407.

So a city, which has a privilege for the payment of taxes upon the property of a succession which is sold by order of the court of probate, may make direct claim for the sum due out of the proceeds of sale in the hands of the executors for distribution, such sale transferring the privilege from the property to the proceeds. Dupuy's Succession (1881) 33 La. Ann. 256.

And when the tax is a prior lien the register in bankruptcy may direct the payment of debts due the state and all taxes and assessments made under her laws out of the bankrupt taxpayer's estate to the prejudice of a creditor having a prior lien. *Re* Brand (1869) 3 Nat. Bankr. Reg. 324.

So the duty is charged upon an assignee for the benefit of creditors by Iowa Laws of 1876, chapter 14, providing that assessments or taxes shall be entitled to priority or preference and be first paid in full, to pay taxes levied against the debtor to the extent of the property coming into his hands though no levy of the taxes had been made on the goods and no claim had been filed for the taxes against the assignee, or demand made. Huiscamp Bros. v. Albert (1883) 60 Iowa, 421.

And the right of the state in the nature of an equitable lien upon the property of the taxpayer

they were careful to state that the lien was 'against all persons;' thus definitely fixing its rank as a lien; and then, in direct contradistinction as to personal property taxes, they provide that they shall simply be a lien. Gathering the meaning and intent of this act from its language, (and this is a primary rule of construction), we conclude that that part of said section 1612 which relates to personal property taxes gives a lien for the same to the tax creditor from the time they became due upon any real property then owned or subsequently acquired by the tax debtor, subject, however, as in case of other liens created by law, to general statutes governing questions of priority or rank." A majority of the court as now constituted is in full accord with the views expressed by *Mr. Justice* Granger in his dissenting opinion in the *Young Case*. The writer has given this question a careful investigation, and is convinced that the rule of the majority opinion in the *Young Case* is wrong, and that by it the letter and spirit of the statute is unwarrantably extended by judicial construction, to the great detriment of other lien holders, and an effect given to that part of the statute never contemplated by the legislature. All the statute provides as to personal tax being a lien upon real estate is that it shall be a lien, and as such it must be held to come within the general rule that its priority is to be determined as of the time the lien attached. In view of the very full discussion of this question in the *Young Case* we need not say more. The mortgage lien of plaintiff, having attached to the lots prior to the time the taxes on the personalty became a lien thereon, must be held to be

for the payment of taxes upon personal property may be enforced after an assignment by the taxpayer for the benefit of creditors, by the seizure and sale of property in the hands of the assignee under Wagner's Mo. Stat., 1186, section 26, authorizing such seizure and sale of the property of the person liable for the taxes, it being regarded for such purpose as the property of the assignor. State v. Rowse (1872) 49 Mo. 586.

Likewise the state having a paramount right to collect taxes imposed upon a railroad company under the New York corporation tax act out of moneys in the hands of a receiver thereof appointed by the court is not confined to the proceedings provided by that act for their collection, but may make a direct application for an order requiring the receiver to pay in the foreclosure proceeding in which he was appointed, making the corporation and the receiver parties. Central Trust Co. v. New York City & N. R. Co. (1888) (N. Y.) 13 Cent. Rep. 404.

And when a railroad corporation liable to taxation under the New York corporation tax act is operated under the corporate franchise by a receiver appointed by the court, and he has in his hands money arising from the gross earnings sufficient to pay the taxes accrued under that act, the state has a paramount right to collect such taxes from such money. *Ibid.*

And the state has a right paramount to other creditors under Missouri Acts 1881, § 7, p. 180, to be paid taxes due it out of the assets in the hands of a receiver of the taxpayer, and the court should see that such taxes are paid before distribution to other creditors though the demand therefor was not presented by the collector within the time prescribed for the presentment of claims. Greeley v. Provident Sav. Bank (1889) 98 Mo. 458.

So N. Y. Rev. Stat., 7th ed. 2298, § 27, making taxes assessed upon the estate of a deceased person previous to his death a preferred claim against his estate in the second order of preference, furnishes the rule by which personal representations must be governed in ascertaining and paying the debts of the deceased. *Re* Babcock (1889) 115 N. Y. 450.

And executors and administrators are held under Maryland Code, art. 81, § 72, making taxes a preferred claim, as affected with notice of all taxes due upon all the property in their custody; and it is their legal duty to ascertain and discharge the same, next after funeral expenses, before proceeding to the further administration of the estate. Bonaparte v. State (1885) 63 Md. 465.

And demands for taxes due the state preferred in the distribution of the estate of a decedent under Maryland Code, art. 81, § 72, are not within the jurisdiction of the orphan's court, the scrutiny and approval of which is a safeguard applicable and appropriate to claims essentially of a private nature. *Ibid.*

Taxes required by Maryland Code, art. 81, § 72, to be paid by administrators as preferred debts to the exclusion of all others except necessary funeral expenses are not within the purview of Maryland Code, art. 93, § 109, relieving the administrator from liability for a claim of which he had no notice exhibited after he had paid away and distributed the estate according to law, or section 117 thereof providing that he is not bound to take notice of claims unless they are exhibited legally authenticated or unless allowed by the orphan's court, or unless suit is pending thereon, or section 93 thereof providing that no administrator shall be allowed in his account for any claim discharged by him unless he produce the claim passed by the orphan's court or proven as therein directed, or section 83 thereof providing the method of proof of debts and forbidding the discharge of any claims unless passed upon in the prescribed manner. *Ibid.*

And where property subject to a lien for a tax due the United States to which priority is given is sold under process issued from a state court, that court will distribute the proceeds and recognize the priority of the claim of the United States. Dungan's App. (1871) 68 Pa. 204, 8 Am. Rep. 169.

So Mo. Rev. Stat., § 6758, providing for the collection of taxes on personalty by distraint, and section 6836, providing for the collection of taxes on realty by action, do not prevent the presentment of tax bills for allowance in probate court in the third class under Mo. Rev. Stat., § 184, providing for the presentment of all debts including taxes due the state or any county or incorporated city or town. State v. Donaldson (1887) 28 Mo. App. 190.

And that a tax is not a debt in the legal sense of the term does not prevent its presentment for allowance in probate court against the estate of a deceased person in class three, under Mo. Rev. Stat., § 184, providing for the division of all demands against estates, class three expressly including taxes due the state, a county, or an incorporated city or town. *Ibid.*

Nor is a tax a debt,—an action for the collection of which can be stayed pending proceeding in bankruptcy against the taxpayer under section 5106 of the Bankruptcy Act, providing that no creditor whose debt is provable shall be allowed to prosecute suit thereon to final judgment. *Re* Duryee (1880) 2 Fed. Rep. 68.

Where the dissolution of a corporation has been adjudged the intervention of the attorney-general to enforce the right of the state to priority in the payment of taxes due it out of the assets is unnecessary. *Re* Columbian Ins. Co. (1866) 3 Abb. App. Dec. 239, 3 Keyes, 123. F. H. B.

superior to the tax lien. The case of *New England Loan & T. Co.* v. *Young*, heretofore referred to, in so far as it holds that taxes assessed against personal property, and which become a lien upon real estate, are a lien thereon prior and superior to existing liens thereon, must be and is overruled.

4. Can the plaintiff recover from the county the amount of taxes paid, with interest thereon? Plaintiff seems to base her right to recover upon section 870 of the Code. That section provides: "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax, or any portion of a tax, found to have been erroneously or illegally exacted, or paid, with all interest and costs actually paid thereon, and in case any real property subject to taxation shall be sold for the payment of such erroneous tax, interest, or costs as above mentioned, the error or irregularity in the tax may at any time be corrected as above provided, and shall not affect the validity of the sale, or the right or title conveyed by the treasurer's deed, if the property was subject to taxation for any of the purposes for which any portion of the taxes for which the land was sold was levied, and the taxes were not paid before the sale, and the property had not been redeemed from sale." If it be conceded that plaintiff's case is within the provisions of this statute, still she cannot recover as against Polk county. The demurrer is the one usually interposed in equitable actions, and by it the sufficiency of the facts stated to constitute a cause of action against the county are questioned. Under our statute, before one holding an unliquidated demand against a county can sue thereon, he must present the same to the board of supervisors of the county and demand payment thereof. This is preliminary to his right to prosecute an action against the county. It is not alleged in the bill in this case that this claim was ever presented to the board of supervisors, and payment demanded. Code, § 2610. If we treat the claim for a refunding as a liquidated claim or demand against the county, then it seems to us under the wording of Code, § 870, heretofore quoted, it must be presented for allowance to the board before suit can be instituted. It says the board of supervisors shall direct the treasurer to refund, etc. Clearly the statute contemplates that the board shall have an opportunity to refund without suit, and without being compelled to pay further costs incident to litigation, which they might be willing to avoid by refunding if they were asked so to do before an action was commenced. Here is a party claiming a refunding of certain money paid in redemption from tax sale. It is reasonable that the board should have an opportunity to pass upon the justness of his demand before the county can be put to the payment of costs. *Brownlee* v. *Marion County*, 58 Iowa, 488; *Dickey* v. *Polk County*, 58 Iowa, 289; *Richards* v. *Wapello County*, 48 Iowa, 510.

5. Is plaintiff entitled to a judgment against the other defendants? It was the duty of these defendants to pay these taxes, and, as we have held in another division of this opinion, that duty rested upon them as a copartnership and also as individuals. Plaintiff redeemed from a tax sale of the real estate for these taxes, being compelled to do so to protect her interest in the land, and to procure an extension of the insurance company's mortgage on the premises which was prior to her own mortgage. The case is peculiar. As to all these defendants (except W. W. Clark) we discover nothing from which we can say that a promise or contract to refund the amount paid by plaintiff can be inferred. They were under no obligations to the plaintiff to pay these taxes, only in so far as that as good citizens it was their duty to do so. The taxes were not assessed against this land. The title to the land was not in dispute. No benefit was conferred upon their title because plaintiff made redemption, for they claimed no title to the land. The only conceivable benefit of the redemption to them was that thereby an obligation due from them to the government was discharged. If one could make another his debtor by simply paying his debt, then justice would require that these defendants should be held liable to plaintiff for the amount of their debt which she has paid. But it is said that one cannot thus make another his debtor without the latter's request or consent. *Iowa Homestead Co.* v. *Des Moines Nav. & R. Co.* 84 U. S. 17 Wall. 166, 21 L. ed. 628; *Garrigan* v. *Knight*, 47 Iowa, 527. The case is unlike *Goodnow* v. *Stryker*, 61 Iowa, 261, or any other called to our attention, for the reasons above given. So far as these defendants (except W. W. Clark) are concerned, there is no obligation resting upon them to reimburse plaintiff for the amount paid by her in redemption of these lots.

6. It seems to us that W. W. Clark is impliedly bound to reimburse the plaintiff for the amount she has expended in redeeming these lots from tax sale with interest and costs. He knew these taxes were unpaid. He knew that they would in time become a lien upon these lots. The payment of these taxes, as we have said, was a matter of necessity for plaintiff in order to preserve her lien. It was in no sense a voluntary payment. In these taxes she was not meddling with that which did not concern her. Clark was the owner of the lots. He owed it to the state and county to pay these taxes. As a mortgagor of plaintiff's assignor, he ought not to be permitted to take advantage of his own negligence in failing to pay these taxes, which were outstanding when he executed the purchase money mortgage, and which, although technically not liens against the lots at the time that mortgage was executed, were nevertheless claims against Clark which would ripen into liens in due time, impairing the value of the security he had given plaintiff.

We think, under all the facts of this case, plaintiff should recover from Clark. It is said that, even if plaintiff is entitled to recover of Clark, she has adopted the wrong kind of proceedings; that she should have brought her action at law. That question cannot be raised by demurrer. Having failed

to move to transfer the cause to the proper side of the calendar in the court below, defendants have waived the error, if any, in the form of the proceedings. Code, § 2519.

The court erred in sustaining the demurrer of the defendant W. W. Clark, and for that reason *the decision below is reversed.*

Given and **Rothrock, JJ.**, dissent as to third division of opinion.

MICHIGAN SUPREME COURT.

Martin V. MONTGOMERY, Admr., etc., of John O. Grinnell, Deceased,

v.

LANSING CITY ELECTRIC R. CO., *Plff. in Err.*

(....Mich.....)

1. **Whether or not a motorman used due care is a question for the jury** where with his lever in next to the fastest notch until within a few feet of it he overtook a band playing while parading the streets knowing that some of the men were in close proximity to the track.
2. **The negligence of a bandman in walking close to an electric railway track while playing his instrument** cannot as a matter of law be said to be the proximate cause of his injury by a car overtaking him where the evidence would justify a finding that the motorman was guilty of reckless and wanton conduct as to the speed with which he approached the band.
3. **Permanent lung trouble need not be specifically alleged** to admit proof of it in an action for damages for personal injuries if the injuries are alleged to be permanent and the evidence shows that the lung trouble would probably result from the injury received.

(December 18, 1894.)

ERROR to the Circuit Court for Ingham County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence from the effects of which the injured person subsequently died. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Moore & Moore**, with *Messrs.* **Smith, Lee & Day**, for appellant:

There was no evidence to go to the jury, upon the subject of gross negligence.

Denman v. *Johnston*, 85 Mich. 387; *Schindler* v. *Milwaukee, L. S. & W. R. Co.* 87 Mich. 400; *Frost* v. *Milwaukee & N. R. Co.* 96 Mich. 470; Cooley, Torts, 2d ed. p. 811; *Belt R. & Stock Yard Co.* v. *Mann*, 107 Ind. 89; *Louisville, N. A. & C. R. Co.* v. *Bryan*, Id. 51; *Louisville, N. A. & C. R. Co.* v. *Ader*, 110 Ind. 376.

It was the duty of the plaintiff under the circumstances to look out for this car. The rule requires the same diligence in this regard, as it does for people about to cross a railroad track.

Carson v. *Federal Street & P. V. R. Co.* 15 L. R. A. 257, 147 Pa. 219; *Ehrisman* v. *East Harrisburg City Pass. R. Co.* 17 L. R. A. 448, 150 Pa. 180.

This being the clear duty of the plaintiff, the motorman had a right to assume that he would get out of danger had he seen him.

Noyes v. *Southern Pac. R. Co.* (Cal.) 24 Pac. Rep. 927.

He should not have been permitted to recover for the injury to his lung, without having averred it in his declaration, so that the defendant might have been prepared to meet such a claim.

Shadock v. *Alpine Pl. Road Co.* 79 Mich. 7; *Wilkinson* v. *Detroit Steel & Spring Works*, 73 Mich. 405; *Kuhn* v. *Freund*, 87 Mich. 545; *Thompson* v. *Quincy*, 10 L. R. A. 784, 88 Mich. 178; *Palmer* v. *Michigan Cent. R. Co.* 17 L. R. A. 636, 93 Mich. 363; *Finn* v. *Adrian*, 93 Mich. 504; *Fuller* v. *Jackson*, 92 Mich. 197.

Messrs. **M. V. Montgomery** and **R. A. Montgomery** for appellee.

Long, J., delivered the opinion of the court:

May 29, 1893, John O. Grinnell, the deceased, and eight others, constituting the Frank Tucker Theatrical Company, were engaged in giving a street parade in Lansing. They had gone to North Lansing, and had returned on a street-car, getting off the car a few blocks below Michigan avenue, where the car stopped. They passed ahead of this car, four walking on one side of the car track, single file, about six feet apart; the others walking on the other side of the track, in the same order. Mr. Grinnell was on the east side, and near the track. Six were ahead of him, each playing a wind instrument, and two behind him playing snare and bass drums. He was playing a cornet. The car from which they alighted followed soon after, and overtook them just as they reached Michigan avenue. The platform of the car passed Grinnell, but the body of the car struck him on the shoulder, knocking him down. Mr. Grinnell on the trial testified: "I was very near the car track, but not between the rails. I remember something striking me. I heard nothing; heard no bell indicating any warning. I recollect something struck me, and after that the first thing I knew I was on my feet, and people were holding me up. I was struck about the point of the right shoulder blade, and knew that I was hurt when I first came to my senses. They took me to the hotel. Two of my teeth were loose, beside one that was knocked out. After getting to the hotel, while being confined there, I noticed the injury to my back, my arm, and my right side, and slight injury to my right hip.

NOTE.—The question of negligence in running a street-car which strikes and injures a person on the street has been treated, so far as it relates to injuries to children, in a *note* to Wallace v. City & Suburban R. Co. (Or.) 25 L. R. A. 668.

As to collision of street-car with vehicles or horses, see *note* to Hicks v. Citizens R. Co. (Mo.) 25 L. R. A. 508.

See also 34 L. R. A. 350.

I got hurt on Monday, and got out on Friday. Before leaving the hotel I noticed a sore spot on my right chest, perhaps two or three days after the accident. It was followed by spitting of blood. I never had anything of the kind before. This spitting of blood continued for about two weeks. At the end of two weeks, or perhaps a little longer, I had a dry cough started,—hacking cough,—and I have had it ever since up to about five weeks ago, and from that time until now I have been coughing very bad, and it is growing worse all the time. When I was hurt I weighed one hundred and thirty-two pounds; now I weigh one hundred and nine pounds. Aside from whooping cough and scarlet fever, which I had when quite small, I have never been sick." He was asked: "State to the jury whether you were thinking about or looking out for any indication that the car was coming. *A.* Yes, sir; I always did, because I always had to work so close to the track. I was playing at the moment I was hurt. I thought I was far enough from the track to be out of the way. I was looking out for the car, and was positive that I would hear a signal, if there was any near." On further examination, Grinnell testified that he knew the car could not pass without hitting him, but that he was looking out for it, and had no doubt that he could hear the bell and get out of the way. Some considerable testimony was given tending to show that no bell was rung or other warning given when the car approached Michigan avenue, where the accident happened, and there was testimony also that the car was running at a rate of speed greater than usual, and that it did not slow down when it reached Michigan avenue. Just what rate of speed it was going plaintiff's witnesses do not state, but many of them say that it was faster than the car usually ran, and some say it was running rapidly. One witness testified that he had been in the employ of the defendant company before that time. He noticed the car approaching the band, and, when within half a car length of Grinnell, he noticed the lever in the fourth notch,—that is, next to the last notch,—the last notch giving the car the fastest speed it could attain, and that no bell was sounded. Both the motorman and the conductor, as well as others, testified that the bell was sounded, and that they were going slow, the motorman saying, "Not more than three miles an hour." The conductor testified, further, that his orders were to slow down at the Michigan avenue crossing. The motorman testified that a high wind was blowing from the west, and, as he saw the members of the band ahead of him, his attention was directed to the man carrying the bass drum, as he feared he would be blown upon the track. He saw Grinnell. Saw him brace up against the wind, but did not pay so much attention to those on the east side, as he was afraid the wind would carry those on the west side onto the track. He says that when about five or six feet from Grinnell he saw him. He was walking along blowing his horn, and as the wind came down Michigan avenue he leaned over to protect himself against it, and that was the reason the car struck him. If Grinnell had continued to walk the same distance from the track, the car would not have struck him. The motorman denies that the lever was in the fourth notch, and says that he did not have any current on when he crossed Michigan avenue, but that he ran about 84 feet after he struck Grinnell. On his cross-examination he was asked: "Suppose you had run up behind these people carefully and slowly, until you had attracted their attention by your bell, that would not have been a difficult job? *A.* No, sir."

Under this testimony, the court directed the jury: (1) That Grinnell was guilty of negligence, and "under some circumstances this would prevent a recovery, but in this case it may or may not, as you may determine regarding certain other facts to which I shall call your attention." (2) "The car which struck the plaintiff had that same forenoon carried the band to North Lansing. The same conductor and motorman were in charge. They knew that the band paraded Franklin street. They had brought this band from the Franklin street parade down Washington avenue to Ionia street, and there let the band off. The band from that point had proceeded down Washington avenue, to the knowledge of the street-car men, had passed the street-car in front of the bank, was in plain view of the motorman when the car started, and the motorman knew what the purpose of the plaintiff and the other members of the band was in being on the street. It was not a case where the injured party was supposed to be crossing the street, but it is a case where the motorman in charge of the car knew that the band was parading the street, knew that their backs were toward him, knew the positions of the members of the band, and knew the noise they were making with their instruments. It is sometimes very correctly said that if one discovers another to have been negligent he must take precaution accordingly, omitting which he is liable to the other for the damages which follow from his own want of care; for, however nearly related two separate negligences may be, the one cannot bar an action for the other unless it is contributory, and though an unseen position might contribute to an accident, a discovered one cannot. The plaintiff, Grinnell, was not a trespasser upon the street-car tracks in any sense. The right of the street railway in the street is only to use the street in common with the public. It has no exclusive right of travel, even upon its track; and it is bound to use the same care in preventing a collision as is the driver of a wagon or other vehicle. Street-cars have precedence necessarily in the portion of the way designated for their use. This superior right must be exercised, however, with proper caution and due regard for the rights of others; and the fact that it has a prescribed route does not alter the duty of the defendant to the public, who have a right to travel upon its tracks until met or overtaken by its cars. There is no question made in this case but that the motorman saw this band. He says that he saw the plaintiff, and he says that because of the wind he was watching the man

with the bass drum, on the west side of the track. If the plaintiff, Grinnell, and other members of the band, were, or if the plaintiff, Grinnell, alone was, when viewed from the motorman's position on the car, in a place of danger, either on or near the track, it was the duty of the motorman, taking into consideration his knowledge of the situation and of the purpose and intention of the band,—it was the duty of the motorman to run his car with corresponding care, and in a manner reasonably safe under the circumstances, both as to speed and control; and if, under these circumstances and such duty, the motorman intentionally ran his car at what he knew was a high and dangerous rate of speed, not, indeed, intending to injure any one, nor wishing to injure any one, but in reckless disregard of the consequences to the plaintiff and members of the band, and if because thereof the plaintiff was injured, then the company was to blame, and the defendant railway company is liable to the plaintiff for whatever injury it so caused him. If the plaintiff, Grinnell, was not in a place of danger, as viewed from the motorman's position, then the railway company is not liable. If the car was not running at a rate of speed which the motorman knew, or a reasonable man ought to have known, dangerous and improper under the circumstances, the company is not liable. If the company, through its agents and servants, was not wanton and reckless under the circumstances, it is not liable. Whether the company is or is not liable you are to determine. In other words, you are to determine whether or not the plaintiff has shown, by a preponderance of the evidence, that, under the facts and circumstances known to the motorman, and in view of things as they appeared to him, this car was run at a high and dangerous rate of speed, with a reckless or wanton disregard of consequences, and whether the injury was caused thereby. If these things have not been so shown, the defendant is not liable; if they have been so shown, it is liable."

We think this charge justified by the evidence. The motorman knew that the band was ahead of the car. He recognized the danger of those on the west side being blown upon the track. He saw Grinnell, and knew he was in close proximity to the track; heard the band playing, and knew that the noise of the approaching car would be liable to be drowned by the noise of the band; yet, if the testimony of the plaintiff's witnesses be true, he did not slacken his speed. He kept the lever in next to the fastest notch, at least until within a few feet of these parties; and the testimony shows the car must have been under considerable speed, as it ran over 80 feet after causing the injury, though the motorman claims to have stopped it as soon as he could after it struck; while if he had had it under control it is plain, from his own testimony, he could have prevented the injury, and if going at the usual speed he could have stopped it within ten or fifteen feet. It was a question for the jury to determine whether he used that care and caution under the circumstances he was bound to exercise, in view of the danger as he must have seen it. Defendant's counsel contend that the evidence establishes the fact that Grinnell's negligence alone caused the accident. We do not think this can be said as a matter of law. There was evidence from which the jury might well find that the motorman was guilty of reckless and wanton conduct in driving his car at a high rate of speed as he approached these people on Michigan avenue. Counsel for defendant cite a long line of cases, holding that one may be guilty of such gross carelessness as to bar recovery; such as driving upon a track in front of an approaching car without looking around until the car runs into the vehicle. *Wood* v. *Detroit City Street R. Co.* 52 Mich. 402, 50 Am. Rep. 259; *Kelly* v. *Hendrie*, 26 Mich. 255. In *Michigan Cent. R. Co.* v. *Campau*, 35 Mich. 468, the deceased, walking on a railroad track, stepped out of the way of an approaching train, and was struck by another train from behind; and in *Graf* v. *Chicago & N. W. R. Co.*, 94 Mich. 579, cars were being shunted onto a siding, and the deceased attempted to pass in front, and was killed. Other cases of like character are cited, but each case cited depended upon its own peculiar facts. It is settled that, when one attempts to cross in front of an approaching train in plain view, he takes his chances of being injured, and cannot complain. In the late case of *McGee* v. *Consolidated Street R. Co.*, 102 Mich. 107, 26 L. R. A. 300, the plaintiff attempted to cross the street in front of an electric car, and was injured. It was held that he was bound to look for the approach of the car, and, not having looked, he was guilty of such carelessness that he could not recover. In the present case it is conceded that Grinnell was careless, and, but for the gross carelessness of defendant's servants charged in the declaration and proved on the trial, he could not recover. It is quite a different case than where one attempts to cross in front of the car. Here the motorman saw the situation. He apprehended the danger to those in the street, and yet, if plaintiff's testimony be true, he did nothing to avoid the accident. The court, in directing the attention of the jury to this branch of the case, stated the rule as to gross negligence as laid down in *Richter* v. *Harper*, 95 Mich. 221. In that case it was said: "It is true that the contributory negligence of the plaintiff does not prevent recovery in a case where the defendant who knows, or ought, by the exercise of the most ordinary care, to have known, of the precedent negligence of the plaintiff, by his subsequent negligence does plaintiff an injury." As stated by *Mr. Justice* Cooley, in his work on Torts (page 674): "In such cases it may well be said that the negligence of the plaintiff only puts him in position of danger, and was therefore only the remote cause of the injury, while the subsequent intervening negligence of the defendant was the proximate cause." In *Hanlon* v. *Missouri Pac. R. Co.*, 104 Mo. 388, the court, after stating that one going upon the track of a railroad should observe all such precautions for his own safety as reason and prudence dictate, and if disaster comes upon him by reason of a failure

to do so he must bear the consequences, says: "This has, however, a qualification which is founded upon principles of humanity, and is universally recognized. This qualification enjoins upon the railroad company the duty of using all reasonable effort to avoid injury to one who has negligently placed himself in a position of danger, if the peril is known, or, under certain circumstances by reasonable care might have been known. A failure to observe this requirement renders the company liable, notwithstanding the previous negligence of the person injured." In *Hicks* v. *Citizens' R. Co.*, decided in July, 1894, by the Missouri supreme court, and reported in 124 Mo. 115, 25 L. R. A. 508, this case in 104 Mo. 388 was cited and approved; and it was there said, substantially, that the court could not say, as matter of law, that the plaintiffs were not guilty of contributory negligence; but defendant's gripman saw plaintiffs in their dangerous and exposed situation, and the question was whether after that he acted with due care towards them. The cases do not attempt to define these acts as gross negligence, but place the right of recovery upon the ground that the proximate cause of the injury is the act of the defendant. In the present case the testimony shows that the motorman saw the danger Grinnell was in. It is common knowledge, and not disputed on this record, that when the electric car and its appliances are in proper condition the motorman has perfect control over it. He may run it at so slow a rate of speed that it can be stopped at once,—almost in an instant. Here the motorman saw the danger. He should have slowed down, and, if necessary to avoid the danger, stopped his car. In any view which may be taken of the case, we think there was testimony to warrant the charge, and that the charge as given is within the well-recognized rules, and that it fairly left to the jury the question as to the proximate cause of the injury.

We think there is but one other question which merits discussion. In the opening of counsel for plaintiff he stated to the jury that the accident caused an injury to plaintiff's lung. When one of the witnesses was called to testify to the injuries which the plaintiff had sustained, defendant's counsel objected to any evidence of injury to the lung, as such injury is not alleged in the declaration, and that it is not alleged in the declaration that plaintiff had a disease of a lingering character. Some comment was made by the court upon the declaration, and a suggestion was made to amend, but finally counsel for plaintiff insisted that the declaration was sufficient to admit the proofs offered in regard to the condition of the lung. These proofs were admitted under objection and exception of defendant's counsel. Two physicians were called who had examined Mr. Grinnell a few days before the trial, and who testified to his then condition; that they found tenderness of the spine, depression of the right chest, and tenderness showing a solidification or hepatized condition of the right lung. They also testified to some other conditions. One of the physicians was then asked to state "if either, and which, of the conditions which you now find and describe would naturally result from a severe injury to the back and spine occurring the latter part of May last. *A.* The condition of the lung,—chronic inflammation of the lung,—and the condition of his spine, I think, might result. It is fair to suppose that it did." Their testimony tended further to show that by reason of the injury his lung was affected, and consumption had resulted. The court, in its instruction to the jury, stated substantially that if they found for plaintiff he was entitled to recover for the injury to his lungs. It is insisted by counsel that this was error; that, if this claim was insisted upon, the defendant had the right to look up Grinnell's past history, and they had no opportunity to do so, as the trial was then in progress. It does not appear that after the court concluded to admit this class of testimony the defendant asked a continuance. When it was proposed to amend the declaration, the court stated that, if the amendment were allowed, he should grant a continuance. The proposition to amend was withdrawn, and the proofs taken under the declaration as it stood. When the court announced this ruling, no motion was made for continuance, and no further claim made that defendant was taken by surprise. The only question, therefore, which arises is whether the declaration was sufficient to admit this proof. Counsel for defendant contend that it has been settled by many cases in this court that the plaintiff cannot recover for injury to his lung, and for consumption resulting from the injury, without an allegation to that effect in the declaration. The declaration alleges: "That, when said car so struck said plaintiff as aforesaid, the blow and collision resulting therefrom seriously hurt, wounded, and crippled said plaintiff; his eyes were badly bruised and discolored; his face and head badly bruised, and some of his teeth loosened, and his lips cut and lacerated; his arms seriously bruised and strained thereby; his back and spine seriously hurt, crippled, bruised, and sprained, and injured and he was by said blow and collision rendered immediately insensible, in which insensible condition he continued for a long space of time next thereafter, to wit, for the space of one day. That said injuries so inflicted upon his head, face, lips, teeth, arm, back, and spine were permanent and lasting, and each and all are incurable." The cases relied upon by defendant's counsel, showing these proofs inadmissible under this declaration, are: *Fuller* v. *Jackson*, 92 Mich. 197; *Kuhn* v. *Freund*, 87 Mich. 545; *Shaw* v. *Hoffman*, 21 Mich. 151; *Brink* v. *Freoff*, 44 Mich. 69; *Allen* v. *Kinyon*, 41 Mich. 281; *Krueger* v. *Le Blanc*, 62 Mich. 70; *Hatt* v. *Evening News Asso.* 94 Mich. 119; *Bateman* v. *Blake*, 81 Mich. 227; *Wilkinson* v. *Detroit Steel & Spring Works*, 73 Mich. 405; *Shadock* v. *Alpine Pl. Road Co.* 79 Mich. 7. We think none of these cases support this contention. The case of *Johnson* v. *McKee*, 27 Mich. 471, lays down the true rule, and has never been overturned. Some language has been used in later decisions which, upon a casual reading, might seem to have modified the former ruling; but, upon an ex-

amination of the exact questions involved in each instance, the distinction will be observed. The declaration in *Johnson* v. *McKee* is substantially that "defendant assaulted plaintiff, and struck him a great many violent blows on and about the face, nose, head, and body, thereby severely wounding the plaintiff upon the face, head, and body, breaking the cartilage of the nose, and inflicting great and permanent injuries upon and to his face, head, and body; by means of which several premises said plaintiff was then and there greatly hurt, bruised, and wounded, and became and was sick, sore, and disordered, and so remained for a long space of time, to wit, from the time of said assault to the present; whereby the said plaintiff was obliged to and did necessarily pay, lay out, and expend five hundred dollars in an endeavor to be cured of the burises, wounds, sickness, soreness, and disorder aforesaid, occasioned as aforesaid." *Mr. Justice* Campbell for the court said: "The battery consisted in striking McKee with a chair, whereby certain injuries were inflicted on his face and head, and in consequence of which he was seriously, and, as is claimed, permanently, affected. Among other results, there was evidence that he suffered from a urinary difficulty caused or aggravated by the blow. It was claimed this injury was not within the terms of the declaration, and could not be shown without express averment. If the evidence showed any such resulting injury, it showed it to have been as closely connected with the blow as any of the other evil consequences. It was a sickness produced by it in the same way as the swelling and soreness in the head and eyes, and the other grievances about which no question was made on the trial. The declaration charges sickness and pain to have been among the sufferings caused by means of the assault, and we do not think the rules of pleading require any more specific description than was given. We need not inquire how far it was requisite to go in declaring for consequences not necessarily following such an injury, because these consequences are very clearly set forth. When the defendant was informed that damages were sought for sickness and disorder, and their attendant expenses, as well as for wounds and bruises, he was bound to expect evidence of any sickness the origin or aggravation of which could be traced to the act complained of." It will be seen that the rule thus laid down does not require plaintiff to aver all the physical injuries which he sustained, or which may have resulted or be aggravated by the tort, even though they do not necessarily result from the original injury. If such injuries can be traced to the act complained of, and are such as would naturally follow from the injury, they need not be specifically averred. The testimony in the present case shows that the injury to the spine and back might, and probably would, result in injury to the lungs. *Johnson* v. *McKee* was cited and followed in *Welch* v. *Ware*, 32 Mich. 77. In *Elliott* v. *Van Buren*, 33 Mich. 51, 20 Am. Rep. 668, the court, in speaking of the objection to the evidence tending to prove the continued result of the assault in bodily weakness and malady, and the fact of the plaintiff's suffering from fits, said: "Upon the first of these points the case is covered entirely by the decision of *Johnson* v. *McKee*, 27 Mich. 471." Again, in *Keyser* v. *Chicago & G. T. R. Co.*, 66 Mich. 400, the case of *Johnson* v. *McKee* is cited and approved. The rule of the case of *Johnson* v. *McKee* is but the reiteration of the rule laid down by the law-writers upon this subject, and adopted by other courts as well as this. Sutherland, in his work on Damages (vol. 3 [2d ed.] pp. 2661, 2662), says: "The general rule in tort is that the party who commits trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done. Plaintiff may show specific, direct effects of the injury, without specifically alleging them, as that he was thereby made subject to fits. If they were a part of the result, the plaintiff may recover for such damage without specially alleging it, as well as the pain and disability which followed. *Tyson* v. *Booth*, 100 Mass. 258. The obvious probable effect of the injury may be given in evidence, though not laid in the declaration." In this connection *Judge* Sutherland cites *Johnson* v. *McKee*. This rule has been followed in the following cases: *Ohio & M. R. Co.* v. *Hecht*, 115 Ind. 443; *Ehrgott* v. *New York*, 96 N. Y. 264, 48 Am. Rep. 622; *Delis* v. *Chicago & N. W. R. Co.* 51 Wis. 400; *Schmidt* v. *Pfeil*, 24 Wis. 454; *Birchard* v. *Booth*, 4 Wis. 67; *Morgan* v. *Kendall*, 124 Ind. 460, 9 L. R. A. 445; *Sloan* v. *Edwards*, 61 Md. 98; *Hussey* v. *Ryan*, 64 Md. 426; *Denver & R. G. R. Co.* v. *Harris*, 122 U. S. 597, 30 L. ed. 1146. In this last case it appeared that the plaintiff was injured by a gunshot wound in the hip. Among other things he was allowed to and did prove that one of the consequences of the wound was the loss of procreative power, resulting direct and proximately from the nature of the wound. *Mr. Justice* Harlan, speaking for the court, said: "Because of the fact that the loss did result directly and proximately from the nature of the wound, evidence of this fact was therefore admissible, though the declaration does not in terms specify such loss as one of the results of the wound." This rule does not in any sense overturn the well-established one, that where damages are special they must be specially averred in the declaration. In the case of *Heiser* v. *Loomis*, 47 Mich. 18, the declaration averred that "plaintiff was greatly hindered, and prevented from doing and performing his work and business, and looking after and attending to his necessary affairs and vocations." He attempted to recover because "he was bothered some about help, and cutting his hay was delayed because of his injury, and his crop damaged." This was held by the court to be in the nature of special damages, and not recoverable without special averments. If we turn, now, to the cases cited by defendant's counsel, which they claim uphold their contention as to the injury to the lung, we shall find that it was never intended to overrule *Johnson* v. *McKee*. In *Fuller* v. *Jackson* the declaration

did not aver that plaintiff had any difficulty with her breast which was aggravated by the injury. Plaintiff testified to having had such injury, and that after her fall her breast broke out again. She sought to show that this breaking out was caused by the fall. Defendant offered proof tending to show that the fall would not produce this particular infirmity. The court below instructed the jury that plaintiff could not recover for the injury to the breast, unless such injury might have been aggravated by the acts which resulted from defendant's neglect. This instruction was held to be erroneous, saying that, defendant's theory having been brought into the case for the purpose of accounting for some other trouble, it did not warrant the plaintiff to use it in aggravation of her damages, when there was no averment of any such claim of damages in her declaration. The case of *Shadock* v. *Alpine Pl. Road Co.*, 79 Mich. 7, was cited in support of that ruling. But the *Shadock Case* was written by *Mr. Justice* Campbell, who also wrote *Johnson* v. *McKee;* and the declaration in the *Shadock Case*, it was said, contained nothing more specific than that the plaintiff was hurt, bruised, and wounded; that the word "hurt" was so general as to give no information, while the word "bruise" did not indicate generally more than a temporary contusion; and that the word "wounded" was any injury, breaking, or cutting of the skin. It is true that the learned justice cited the rule laid down in 1 Chitty, Pl. 386, 4th ed. 347, that "whenever the damages sustained do not necessarily arise from the act complained of, and consequently are not implied in the law, in order to prevent surprise of the defendant, which otherwise might ensue on the trial, the plaintiff must, in general, state the particular damage which he has sustained, or he will not be permitted to give evidence of it. But this had especial reference to special damages, for the learned justice, in connection with the statement of this rule, says: "The rule which requires special damages to be alleged would be useless, unless so alleged as to give definite information." In *Kuhn* v. *Freund* none of the counts of the declaration contained any allegation of permanent injuries. It will therefore be seen that it was not intended to overrule *Johnson* v. *McKee*, and that it has not in fact been overruled.

The judgment must be affirmed.

PENNSYLVANIA SUPREME COURT.

Martha Jane IRVIN
v.
John IRVIN, *Appt.*

(169 Pa. 529.)

1. **Evidence of a contemporaneous agreement by a wife to procure a divorce from her husband is inadmissible** to defeat recovery by her upon a written agreement valid upon its face for the release of her dower rights in real property of the husband where she has performed the written agreement upon her part which of itself constitutes a consideration for the undertaking of the other party, and after such agreement she resumed marital relations with her husband, although proof of such an agreement would be admissible if the action were upon a bond, bill, or note to prove that the consideration was unlawful.

2. **It is not essential to the recovery of an installment of the amount agreed to be paid in consideration of a release of dower** rights that the plaintiff should have physical possession of a note which the contract contemplated should be given to represent such installment until the same become due.

(July 13, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Clearfield County in favor of plaintiff in an action brought to recover the amount alleged to be due on a contract by which plaintiff for a money consideration undertook to release her dower in certain real estate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **David L. Krebs** and **William Patterson**, for appellant:

Wherever a contract grows immediately out of, and is connected with, an act to be done which is against public policy, the contract is itself illegal and void, no matter how ingeniously drawn to conceal the illegal part.

Kilborn v. *Field*, 78 Pa. 194; *Armstrong* v. *Toler*, 24 U. S. 11 Wheat. 258, 6 L. ed. 468; *Johnson* v. *Hulings*, 103 Pa. 498, 49 Am. Rep. 131; *Holt* v. *Green*, 73 Pa. 198, 13 Am. Rep. 737; *Ham* v. *Smith*, 87 Pa. 63; *Bredin's App.* 92 Pa. 241, 37 Am. Rep. 677.

Where the welfare of society and the vindication of the law are the chief objects, the defendant may give in evidence the illegality of the contract as a bar to a suit to enforce it, and this to prevent the evil which would be produced by enforcing the contract or allowing it to stand.

Bredin's App. supra; Ormerod v. *Dearman*, 100 Pa. 561, 45 Am. Rep. 391.

The maxim, *in pari delicto*, etc., has no application.

National Bank of Oxford v. *Kirk*, 90 Pa. 49; *Unger* v. *Boas*, 13 Pa. 601; *Hatzfield* v. *Gulden*, 7 Watts, 152, 31 Am. Dec. 750; *Clippinger* v. *Hepbaugh*, 5 Watts & S. 315, 40 Am. Dec. 519; *Bowman* v. *Coffroth*, 59 Pa. 19; *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. 188, 8 Am. Rep. 159.

A mortgage, the consideration of which in whole or in part is the stifling of a prosecution for conspiracy to defraud an embezzlement as a bank officer is void.

Pearce v. *Wilson*, 111 Pa. 14; *Avery* v. *Layton*, 119 Pa. 604; *Filson* v. *Himes*, 5 Pa. 453, 47 Am. Dec. 422.

NOTE.—For illegality remotely connected with the consideration of a contract, see also Jackson v. City Nat. Bank (Ind.) 9 L. R. A. 657, and *note*, also Martin v. Richardson (Ky.) 19 L. R. A. 692.

Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change, or reform the instrument, and though omitted not by fraud, accident, or mistake.

Ferguson v. *Rafferty*, 6 L. R. A. 33, 128 Pa. 337; *Walker* v. *France*, 112 Pa. 203; *Phillips* v. *Meily*, 106 Pa. 536; *Hoffman* v. *Bloomsburg & S. Railroad*, 157 Pa. 175.

The condition attached, either in writing or orally, to the note when placed in the escrow, may be shown.

Carpenter v. *National Bank of the Republic*, 106 Pa. 170; *Altoona Second Nat. Bank* v. *Dunn*, 151 Pa. 228; 1 Randolph, Com. Paper, § 228.

Messrs. **Oscar Mitchell, S. R. Peale,** and **Frank Fielding,** for appellee:

The whole consideration mentioned in the contract was for the real estate and personal property conveyed by the deeds mentioned, and no part of it was in consideration that the plaintiff should procure a divorce from her husband.

The contract in this case was fully executed and the appellant had received all he was entitled to receive under it. Mrs. Irvin complied with every one of her takings fully and completely. This gave her an undoubted right to recover the purchase money upon the note for $4,000, and under the written contract.

Adams v. *Grey*, 154 Pa. 258; *Swan* v. *Scott*, 11 Serg. & R. 155; *Evans* v. *Dravo*, 24 Pa. 62, 62 Am. Dec. 359; *Hendrickson* v. *Evans*, 25 Pa. 441.

Chief Justice Paxson, said in *Irvin* v. *Irvin*, 142 Pa. 286: "I know of no decided case and no principle of law which permits an oral contract, made at the same time with a written contract under seal, and purposely omitted therefrom, to be set up, not only to contradict, but to destroy, it. The two agreements cannot possibly stand together; one or the other must fall. When parties without fraud or mistake have put their engagements in writing, that is not only the best, but the sole, evidence of their agreement.

Barnhart v. *Riddle*, 29 Pa. 92; *Lewis* v. *Brewster*, 57 Pa. 410; *Martin* v. *Berens*, 67 Pa. 459; *McClure* v. *People's Freight R. Co.* 90 Pa. 269; *Smith* v. *National L. Ins. Co.* 103 Pa. 177, 49 Am. Rep. 121; *Thorne* v. *Warfflein*, 100 Pa. 519; *Rowand* v. *Finney*, 96 Pa. 192; *English's App.* 119 Pa. 538; *Jessop* v. *Ivory*, 158 Pa. 71; *Hoffman* v. *Bloomsburg & S. Railroad*, 157 Pa. 174; *Wodock* v. *Robinson*, 148 Pa. 503; *Stull* v. *Thompson*, 154 Pa. 43; *Sanders* v. *Sharp*, 153 Pa. 555.

Dean, J., delivered the opinion of the court:

Plaintiff's suit, when brought at first, was founded upon a note, of which the following is a copy: "4,000. Curwensville, Pa., Oct. 8th, 1884. On or before November 1st, 1885, after date, I promise to pay to the order of Annie M. Irvin four thousand dollars at County National Bank, Clearfield, Pa., value received, with interest from December 1st, 1884. [Signed] John Irvin. [Indorsed] Annie M. Irvin." Plaintiff claimed to be the owner of the note, with the right to sue thereon. This was denied by the defendant. The plaintiff is the wife of James A. Irvin, who is a brother of John and Jared F. Irvin. Before and at the date of the note, they had been doing business as John Irvin & Bros., at Curwensville, Clearfield county. At the time, they owned a tract of about 600 acres of timber land, known as the "Elk Lick Tract," as tenants in common. For this they were offered $150,000. The price was deemed a good one, and they were anxious to sell. Shortly before this time there had arisen domestic difficulties between James A. and his wife, Martha Jane, this plaintiff, and she refused to join her husband in the execution of a deed to the purchaser, and the sale was imperiled. Her husband, then, for the purpose of divesting his wife's interest, confessed a judgment to his sister, Annie M. Irvin. On this, execution was issued, and his interest in the land levied on. Thereupon the wife filed a bill in equity against her husband, his sister, and the sheriff, averring that, as to her, the proposed sale was collusive and fraudulent, with the intent to divest her right of dower in her husband's land. The court awarded a preliminary injunction, restraining the sheriff from proceeding with the sale. Some months after this negotiations for harmony between the husband and wife were opened, and these resulted in a written contract between her and John Irvin, dated the 11th of September, 1884. Afterwards, by amendment, the suit was based on this contract. By this paper the wife agreed: (1) She would convey all her right in the Elk Lick tract to the purchaser; (2) that she would, within twenty days, convey to John Irvin, brother of her husband, all her right and title in all the remaining real estate of her husband, and in all his personal property, excepting only the personal property in the house wherein she then resided; (3) that she would, on or before December following, deliver up possession of the premises where she lived; (4) that, within twenty days, she would discontinue the equity suit to restrain the sheriff from selling the interest of her husband in the Elk Lick tract. As a consideration for all this, John Irvin agreed (1) to pay her $6,000, installments of $1,000 in hand, $1,000 in twenty days, when she delivered the second deed, and $4,000 on the 1st of November, 1885, for which last payment he was to give his negotiable promissory note, with interest from November 1, 1884, and with indorser approved by Murray & Gordon, the wife's attorneys, the note to be delivered to the attorneys as custodians for the parties to the agreement; (2) to pay to her $3 per week from the date of the agreement until December 1st, following, and, further, to pay all the docket costs in the equity suit; (3) to procure for her a formal transfer of the personal property in the house where she lived. Then follows this final stipulation by her: "Said Martha Jane Irvin agrees that, in any proceeding she may institute against her husband for divorce, she will not assign any other reason therefor than the desertion of her by her husband." In fulfillment of her agree

ment, she joined her husband in the deed of the Elk Lick tract, and was paid the $1,000. She also at once commenced proceedings for divorce against her husband on the grounds of desertion. The second deed was prepared, also note for $4,000, with an approved indorser, as well as formal transfer of the personal property, all of which, with the $1,000 in money, were tendered her at the expiration of the twenty days, the deed for execution, the note, transfer, and money for her acceptance; but for some reason, she then declined to do either. But on 28th March, 1885, she concluded to carry out her agreement, and delivered this paper to her attorneys: "Clearfield, Pa., March 28th, 1885. This is to certify that, after having considered the propriety of carrying out the arrangement in writing made with John Irvin in September last, and after consultation with my friends and other counsel, I have definitely determined to carry out the same; and I hereby authorize my said attorneys, Murray & Gordon, to discontinue the equity suit, proceed forthwith with the divorce case, and in all respects carry out the agreement according to its tenor and effect. Martha Jane Irvin." Then, on 24th April, 1885, she executed the second deed, and received the second $1,000, and the bill of transfer of the personal property. At the same time, the note on which this suit was first instituted, indorsed by Annie M. Irvin, her husband's sister, was delivered to her attorneys, Murray & Gordon, and they thereupon delivered to him this receipt: "This is to certify that we have this day had and received from John Irvin his negotiable promissory note, dated October 8th, 1884, for four thousand dollars, with interest from December 1st, 1884, indorsed by Annie M. Irvin, the same being received by us and delivered to us as custodians, in pursuance of an arrangement made September 11th, 1884, when a certain agreement was made between Martha Jane Irvin, wife of James A. Irvin, and said John Irvin, by which we are to hold the same until such time as said Martha Jane Irvin shall have procured a divorce from the bonds of matrimony without alimony from her said husband, and not to deliver the same to said Martha Jane Irvin until said divorce shall be obtained, provided that her procuring or obtaining said divorce is not hindered, delayed, or defended against by said James A. Irvin, and she shall, after proper exertions on her part, be prevented from obtaining it prior to November 1st, 1885. Witness our hands and seals this 24th April, 1885. Murray & Gordon."

It will be noticed this paper is dated more than six months after the agreement, and is not signed by her. Nothing further was done. Afterwards, there was a reconciliation between the husband and wife, and for a considerable time they lived together, but again separated. The note was not delivered to her by her attorneys. The suit was brought December 31, 1889, on the note, but, as already noticed, afterwards, on 17th September, 1890, the plaintiff amended her statement, and based her right to recover on the agreement of 11th of September, 1884. The case first came on for trial in the court below September 21, 1890. The plaintiff then offered in evidence the agreement, and proof of the execution and delivery of the deeds, discontinuance of the equity suit, and surrender of the premises in which she had lived; then called Mr. Gordon, one of her attorneys, as a witness to the agreement. When on the stand, on examination as a subscribing witness, he produced the note as the one referred to in the contract. Then the court, against the objection of plaintiff's counsel, permitted defendant's counsel to cross-examine him as to the circumstances attending the giving of the note, the nature and extent of the attorneys' custody. He stated that part of the contract was they were to hold the note until the wife had procured a divorce, provided the husband made no defense to it. The cross-examination further elicited evidence of a parol understanding or agreement at variance with the written one, and contradictory of it. The defendant, having offered in evidence the paper signed by the wife, dated March 28th, and the receipt by her attorneys of April 24, 1885, rested; and thereupon the court, being of opinion that a part of the consideration for the defendant's contract was a stipulation by the wife that she would procure a divorce, the contract was void as against public policy, directed, peremptorily, a verdict for defendant. On appeal by plaintiff to this court, the judgment was reversed. See *Irvin* v. *Irvin*, 142 Pa. 271. There were 32 assignments of error, but the reversal was on these grounds: (1) It was error to permit defendant to inject his defense by a cross examination of plaintiff's witness, called to testify to the written agreement. (2) That the testimony thus introduced was in direct contradiction of the written instrument, and, there being no allegation of fraud, accident, or mistake, was not admissible. On these two points the judgment was reversed, although there is a very strong intimation by Paxson, *Ch. J.*, who rendered the opinion, that even an attempt by defendant, in an orderly way, to have set up an unlawful or immoral transaction, to which he was a party, as a defense to his obligation, would not have availed him. The case having again come on to trial in the court below, plaintiff offered and read the agreement of 11th September, 1884, and gave evidence of the discontinuance of the equity proceedings, the execution and delivery of the two deeds, also the surrender of possession of the house, and the $4,000 note, and rested. The defendant then offered evidence to show a parol agreement between the counsel of the wife and John Irvin's counsel, with her consent that when the second $1,000 was paid, no more should be paid until the wife had procured a divorce, and that the $4,000 note was not to be surrendered to her until the decree of divorce was entered; that the contemporaneous parol agreement was the sole inducement to John Irvin's executing the written one,—this for the purpose of showing that plaintiff had no right to the possession of the note for institution of suit, and that the contract was void as against public policy. To this offer plaintiff objected, and the court

overruled it. Defendant then offered the two papers, dated respectively the 28th of March and 24th of April, 1885, which, on objection by plaintiff, were also rejected, and the court directed a verdict for plaintiff for the $4,000, with interest. Hence, we have this appeal by defendant. He assigns five errors, but they are practically three. The first two were settled by the decision of the court when the case was here before. The defendant could not introduce his defense by a cross-examination of plaintiff's witness, called merely to prove and identify papers. We could add nothing to what was so concisely said by *Chief Justice* Paxson, in his opinion on that point.

As to the third assignment, the rejection of the offer to prove there was a parol contract by which the $4,000 note was not to be delivered to plaintiff by her attorneys until she had procured a decree of divorce, the preliminary question for the court was, Had the plaintiff made out, clear of any taint of illegality, a contract by defendant to pay her $4,000? It will be noticed she offered in evidence the agreement of 11th of September, 1884. There is no semblance of an illegal consideration in this agreement. She only expressly stipulates she will not assign any other cause for the divorce than desertion. In this there was not only nothing unlawful, but there was nothing discreditable to either. From the very fact of excluding other causes there is a fair implication that the husband was conscious of the existence of others involving graver moral turpitude than desertion. A sense of shame in him still remained; and there was a willingness on her part to suppress that which would be disgraceful to him, and annoying to his brothers and sisters. This is all that can possibly be inferred from this particular stipulation, while all the other parts of the agreement bear witness to a perfectly good consideration. He owned very valuable lands, which it was impossible to dispose of at a satisfactory price unless she joined in the deed. This she agreed to do for the consideration of $6,000. She then, by formal seal and acknowledgment, released her interest in the Elk Lick tract for the consideration of $1,000, and her interest in sixteen other tracts for the consideration of $5,000, the two making the $6,000 consideration named in the agreement. She offered proof that afterwards she surrendered possession of the house she lived in, and discontinued the equity suit to restrain her husband from selling the land. She then offered evidence to identify the note delivered to her attorneys, and put it in evidence, and rested. How stood the case now? She had shown a perfectly valid contract with her husband's brother, by which she, for a valuable consideration, $6,000, had agreed to part with a right, worth, in case she survived her husband, far more than she was to get. This right, by two formal deeds, she proved she had relinquished. She had not procured a divorce from him, but this she had not agreed to do. She had instituted proceedings, which were then pending, in which she assigned but the single cause, desertion. Her case was complete in every particular, and, up to this stage, entitled her to a verdict. What is the defense? That the consideration for the $4,000, in part, was the procuring by her of a decree of divorce, and therefore the contract is avoided. As to this, the contract could not be reformed by interpolating the alleged suppressed consideration. While it is settled that when, by fraud, accident, or mistake, a material stipulation has been omitted from an instrument, equity will reform it, it will not do so when the omission is intentional. No chancellor would listen an instant to such a plea. But it is alleged the parol contract stipulated for an unlawful consideration on part of plaintiff, and therefore it would be against public policy to enforce the contract on her behalf. The rule invoked is well settled, and was recognized long before *Collins* v. *Blantern*, 2 Wils. 341, decided in England as early as 1765. That case only more clearly defined and sustained it, by reasons which, though often assailed, have been but little shaken by professional and judicial criticism since. There, the suit was on a bond for £700. The instrument, while lawful on its face, had been corruptly given to stifle a prosecution for perjury. The action was debt, and the plea special, setting out the unlawful consideration as a defense. The plaintiff demurred, and judgment was entered for defendant, Wilmot, *Ch. J.*, saying: "The present condition is for the payment of a sum of money, but that payment to be made was grounded upon a vicious consideration, which is not inconsistent with the condition of the bond, but strikes at the contract itself in such manner as shows that, in truth, the bond never had any legal entity." And the opinion closes in these words: "We are all of the opinion that judgment may be for defendant; that the averment pleaded is not contradictory, but explanatory, of the condition; that the bond was void *ab initio*, and never had any existence." In the numerous cases decided since, both in England and this country, the weight of authority has probably carried the principle beyond the limit of the leading case, and permitted a plea, not alone explanatory, but expressly contradictory, of the consideration in the bond, where the contract was of such illegality or immorality that its enforcement would be injurious to the public welfare. And a distinction has been taken between those contracts in which the consideration affects only the parties and those in which it affects the public. In this state it has been held that a note or bond given in fraud of creditors is valid as between the parties; and in *Evans* v. *Dravo*, 24 Pa. 62, 62 Am. Dec. 359, it was held, upon full consideration, that a bond given a husband on a collusive transaction to defraud his wife could be enforced, and the obligor would not be permitted to show his own turpitude to defeat a recovery. But, in that case, the court uses this language, by Woodward, *J.*: "I do not say the rule is applicable to contracts forbidden by statute, or which are *contra bonos mores;* they stand on their own ground, which it is now not necessary to examine." The ground on

which they stand is stated by Black, *J.*, in *Jenkins* v. *Fowler*, 24 Pa. 308, which was a contract between adjoining land-owners who, for their mutual advantage, agreed to fence in a public road: "The contract being wholly void, one of the parties cannot sue the other for a breach of it." The substance of the decision is that a contract between individuals which is necessarily prejudicial to the convenience and welfare of the public must not be enforced, no matter how flagrant and malicious the breach of it by one of the parties. So, while the rule laid down in *Evans* v. *Dravo*, *supra*, *Swan* v. *Scott*, 11 Serg. & R. 155, and other cases, that a demand on an illegal transaction will be enforced if the plaintiff can make out his case without disclosing the illegality, that rule has not been invariably applied to contracts where the illegal consideration is a violation of statute or an immorality detrimental to the public. In such cases the courts may overlook the parties, and consider the question one of public policy. As is said in Smith's Leading Cases, in *note* by Hare & Wallace (8th ed. vol. 1, p. 752), where most of the cases are carefully cited: "The better opinion seems to be that there is no universal rule, and that each case must be governed in some degree by its own circumstances. The maxim '*Nemo allegans turpitudinem suam audiendus*' is inflexible, as between the parties, but may yield to considerations of public policy and the duty of preventing the consummation of a fraudulent and illegal purpose." Nor, is the rule universal in its application to cases where the consideration is violative of a statute, as will be noticed from the cases cited to the leading case.

And this brings us back to the reasoning of Wilmot, *J.*, in the leading case, *Collins* v. *Blantern*, *supra:* Is the contract grounded upon a vicious consideration, which strikes at the contract itself in such a manner as shows that, in truth, it never had a legal entity? If the consideration for the payment of the $4,000 was that plaintiff should obtain a divorce from her husband, the consideration was a violation of statute by both. The second section of the Act of 1815 provides that in her petition or libel she shall set out the cause for the divorce, and, under oath or affirmation, state that it is not made out of levity or collusion. If this was the consideration for the $4,000, it was in violation of statute, and was so vicious that the contract never had a legal existence. *Kilborn* v. *Field*, 78 Pa. 194. That the plaintiff and defendant stipulate for a falsehood to the court, and contract that one of them shall commit perjury to bolster up the falsehood, clearly renders the contract void *ab initio*, if based on such iniquity.

In passing upon the correctness of the court's ruling, we must, however, consider how the case stood when this offer was made. The plaintiff had offered in evidence a written contract by which she agreed, by deeds, to relinquish her right of dower in a tract of land worth $150,000; also her right of dower in 16 other tracts, and any right she had in all his personalty; also, that she would deliver up possession of the house wherein she lived; that she would discontinue the suit to restrain the sale by his sister. For this he was to pay to her $6,000. She then proved that all she was to do she had done. The consideration in one deed was $1,000, and in the other $5,000, making $6,000, for which she had receipted, but he had only paid her $2,000. All this was proven beyond dispute, and the further fact appeared that, after the agreement, they had resumed marital relations, and lived together for several years. She had rested her case. The defendant then offers evidence, not in denial of a single fact established by her, but to show a contemporaneous parol agreement between her attorneys and his, that the $4,000 note was not to be delivered until she had procured a divorce,—this for the purpose of making void the written contract. That is, the offer is to prove that, with the knowledge of the clients, their eminent and reputable counsel, in utter disregard of their duty or fidelity to the court, and in plain violation of the law of the land, engaged in traffic in divorces, and, for a consideration passing between the parties, bargained for a collusive decree: There were presented to the court for consideration two rules, each founded on public policy: (1) A written contract cannot be contradicted, altered, or added to by parol, except for fraud, accident, or mistake. The reason for this rule is very concisely given in *Wodock* v. *Robinson*, 148 Pa. 503: "If it were not for the rule, no man would be able to protect himself, by the most solemn forms and attestations, against falsehood, misrepresentation, and perjury." The other rule is the one already noticed: (2) If an unlawful consideration for a contract be detrimental to public morals, the courts may permit a party to such contract to set up his own turpitude as a defense to a breach of it. It must be kept in mind the suit was not on a bond, bill, note, or mortgage expressing a nominal or money consideration, and which was met by an offer to prove the real consideration, as in nearly every reported case in which the question is considered. It was on a contract setting out in detail a full consideration on part of plaintiff for the money defendant was to pay,—a consideration which he had received, and for years had been in the enjoyment of, and which he did not pretend to deny. But he says to plaintiff: "True, the contract, as represented, was made. The purpose of that was not to obtain a divorce, but to free valuable lands of your claim upon them, that the title might be passed, and a favorable sale made. True, you paid the full consideration, and have not received what you were to get. This contract was a good one for me. It was fair, with no taint of illegality. But there was another, a verbal contract, not in writing, which is illegal, made by our attorneys, by which you were to get a divorce. That avoids the legal contract, and you cannot recover." This was the attitude in which defendant stood when the offers of testimony were made. Clearly, under the whole testimony,—that of plaintiff, which was heard, and that of defendant, which was offered,—the integrity of the established written contract could not be af-

fected by what, if true, was a collateral undertaking to do an unlawful act. The written contract did not, as in *Collins* v. *Blantern*, rest on a vicious consideration, which struck at the contract itself, so that it never had a legal entity. It rested on a perfectly good consideration, wholly independent of the merely collateral promise. No verdict against it, on such evidence, ought to have been or could have been sustained.

It must be remembered, when this offer was made the judge was sitting as a chancellor to administer equity. On the law, defendant had not the shadow of defense. He now becomes the actor, asking that in equity his written contract, the fruits of which he had in his pocket, be wiped out of existence. Why? Because, according to his own story, he and plaintiff had participated in a crime. Therefore he prays the chancellor to reach out his hand and save him from payment for the good bargain he has made with his brother's wife. Of course his conduct meets the indignation of the chancellor. He has suffered no wrong; only wants to perpetrate one; and therefore cannot be aided on the ground on which equity affords relief to other suitors. But the question for the chancellor is not what is his wickedness, but whether harkening to his appeal will tend to encourage or deter other evil-disposed persons from making illegal contracts. The answer to that question determines the public policy. We think, in view of the special facts in this case, to have listened to such a defense, instead of promoting the good of the public, would have tended to promote trickery and perjury, to evade payment of debts. While, if plaintiff had offered, to sustain her claim, merely a bond, bill, or note, and defendant had offered to prove the consideration was unlawful, the evidence would have been admissible, yet in view of the facts here, the court properly rejected the testimony.

The averment that, while there was no fraud in the making of the parol agreement, the plaintiff's use of the written agreement, before a decree of divorce, is a fraud upon him, is without foundation. Assume he entered into such agreement. He knew no such decree could be legally entered, because of that very agreement; and, further, he knew that, by resumption of the marital relation, after the libel for divorce had been filed, the wife condoned her husband's offenses prior thereto, and the cause for divorce at the date of the agreement ceased to exist, by reason of the condonation. This, according to his own showing, puts him in the attitude of attempting to defraud her out of the written consideration passing to her, after he has received every penny he was to get. Without infringing on any principle in any of the decided cases, we are entirely clear in our judgment that no policy of the law or regard for the public good requires us to aid defendant in the perpetration of such a wrong upon his brother's wife.

As to the note not being in plaintiff's possession at the time of suit brought, such physical possession of it was not necessary to sustain her action. If, as she clearly proved, she had done all she was required to do under the written agreement, she had a right to demand and have possession of the note. If it had not been produced at the trial, she could have recovered on the agreement, without it. The written stipulation was that she was to be paid $4,000 on 1st November, 1885, if she signed the deeds and performed the other conditions of the written agreement. This payment was to be evidenced by a note payable at that date. If the note had never been delivered to her attorneys, her right to recover would have been clear. If delivered and not handed to her, the agreement still evidenced her right to the money. All the assignments of error are overruled, and *the judgment is affirmed.*

CONNECTICUT SUPREME COURT OF ERRORS.

Mary J. DONOVAN, *Appt.*,
v.
HARTFORD STREET R. CO.

(65 Conn. 201.)

1. **The relation of carrier and passenger does not exist** between a street railway company and a person who has given a signal, which was seen and responded to, for a car to stop, but who was struck by the unexpected swinging of the car from its proper track onto a switch track.

2. **Striking from the complaint** in an action to recover damages for negligent injuries the allegation that defendant was a common carrier of passengers is not error unless other allegations show that the relation of carrier and passenger existed between plaintiff and defendant.

3. **The court will take judicial notice** that a street railway company is a common carrier of passengers.

4. **Negligence of a street railway company in not avoiding the deflection of a car** from the main track to a branch track so as to strike a person waiting to take it, is a question of fact upon which the decision of the trial court is conclusive.

5. **An accident to a person waiting for a street-car,** who is struck by the sudden switching of the car upon a side track, does not make a prima facie case of negligence on the part of the carrier.

(December 1, 1894.)

APPEAL by plaintiff from a judgment of the City Court of Hartford in favor of defendant in an action brought to recover

NOTE.—On the question when a person becomes a passenger before actually entering the carrier's vehicle, see Webster v. Fitchburg R. Co. (Mass.) 24 L. R. A. 521, and *note*.

damages for personal injuries alleged to have been caused by the negligence of defendant in permitting a car which she had signaled with the intention of becoming a passenger on it to enter upon a switch track upon which she was standing and come in contact with her. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Roger Welles** and **Uriah Case,** for appellant:

The allegation stricken out was a proper and legal description of the company. The forms adapted to suits of this character all contain such an allegation.

2 Ch. Pl. 359; Practice Act, pp. 57, 58, 59.

A street railway company is a common carrier of passengers, with duties and responsibilities similar to those of a railroad company.

Booth, Street Railway Law, § 324.

When the plaintiff was struck, the relation of carrier and passenger had begun between the parties.

Booth, Street Railway Law, § 326.

The company should be the last one to claim that she was not a passenger, and should not be sustained in such a claim.

Burbridge v. *Kansas City Cable R. Co.* 36 Mo. App. 669; 2 Am. & Eng. Encyclop. Law, p. 744.

The branch track was the "carrier's premises," so that the plaintiff was injured by the carrier, on the carrier's own premises.

Snow v. *Fitchburg R. Co.* 136 Mass. 552; *Dodge* v. *Boston & B. S. S. Co.* 2 L. R. A. 83, 148 Mass. 207; 25 Am. & Eng. Encyclop. Law, p. 1081, *note 5;* Amended Charter, 5 Private Laws, 493. § 9.

The accident proves negligence.

Knowles v. *Crampton,* 55 Conn. 336; *Johnson* v. *Hudson River R. Co.* 20 N. Y. 65, 75 Am. Dec. 375; *Davis* v. *Guilford,* 55 Conn. 351; *Farrell* v. *Waterbury Horse R. Co.* 60 Conn. 239.

A question of duty is a question of law.

Nolan v. *New York, N. H. & H. R. Co.* 53 Conn. 461.

As there was here a contractual relation existing between the parties, the rule of *res ipsa loquitur* applies to this case.

Lennon v. *Rawitzer,* 57 Conn. 587; *Carpue* v. *London & B. R. Co.* 5 Q. B. 747; *Le Barron* v. *East Boston Ferry Co.* 11 Allen, 317, 87 Am. Dec. 717; *Feital* v. *Middlesex R. Co.* 109 Mass. 398, 12 Am. Rep. 720; *Curtis* v. *Rochester & S. R. Co.* 18 N. Y. 534, 75 Am. Dec. 258; *Edgerton* v. *New York & H. R. Co.* 39 N. Y. 227; 2 Am. & Eng. Encyclop. Law, p. 709, *note 7.*

Messrs. **Robinson & Robinson,** for appellee:

Not until the car had stopped in response to a signal and for the purpose of accepting a person as a passenger, and until the person is attempting to get on, does he become a passenger.

Smith v. *St. Paul City R. Co.* 32 Minn. 1, 50 Am. Rep. 550; *Brien* v. *Bennett,* 8 Car. & P. 724; *Chicago, B. & Q. R. Co.* v. *Mehlsack,* 131 Ill. 61; Shearm. & Redf. Neg. § 262, and *note 2.*

The street is in no sense a passenger station for the safety of which the company is responsible.

Booth, Street Railway Law, § 326; *Platt* v. *Forty-Second Street & G. Street Ferry R. Co.* 1 Hun, 124.

Plaintiff's claim that she established a prima facie case of negligence by proving the accident without contribution was properly overruled.

Gibbons v. *Wilkes-Barre & Suburban Street R. Co.* 155 Pa. 279; Booth, Street Railway Law, §§ 323, 361.

The facts as found by the court below do not constitute negligence.

The switch, which was placed to direct the car up Asylum street, was turned by an accident unusual, not to be anticipated, and not imputable to the defendant.

White v. *Milwaukee City R. Co.* 61 Wis. 536, 50 Am. Rep. 154; *Carter* v. *Kansas City Cable R. Co.* 42 Fed. Rep. 87; Booth, Street Railway Law, § 332.

The speed of the car, not exceeding the pace of a man on a quick walk, was not sufficient to constitute negligence.

23 Am. & Eng. Encyclop. Law, p. 1022, *note 1.*

No negligence can be imputed to the defendant because of the appliances in use: (1) because no allegation to that effect is made, and (2) because they were the usual and so far as appears the only ones in use.

Unger v. *Forty-Second Street & G. Street Ferry R. Co.* 51 N. Y. 497; *Carter* v. *Kansas City Cable R. Co. supra.*

Running a car off the track, a possible and not uncommon contingency constitutes no negligence.

Altreuter v. *Hudson River R. Co.* 2 E. D. Smith, 151; 23 Am. & Eng. Encyclop. Law, p. 1031, *note 1; Macomber* v. *Nichols,* 44 Mich. 212; *Hazel* v. *People's Pass. R. Co.* 132 Pa. 96; *White* v. *Milwaukee City R. Co. supra.*

Running a car upon the wrong track does not constitute negligence.

Altreuter v. *Hudson River R. Co. supra;* 23 Am. & Eng. Encyclop. Law, p. 1031, *note.*

The company had a clear right to run its car on either track, and, as against pedestrians or other vehicles, had a superior right upon its own tracks.

Booth, Street Railway Law, § 303; *McKeever* v. *Market Street R. Co.* 59 Cal. 294.

Street railway companies are liable for injuries to pedestrians as any other vehicle is and in no other degree, and are held to ordinary care only.

Maryland Agr. College v. *Baltimore & P. R. Co.* 43 Md. 434; *Unger* v. *Forty-Second Street & G. Street Ferry R. Co.* 51 N. Y. 497; *Fath* v. *Tower Grove & L. R. Co.* 13 L. R. A. 74, 105 Mo. 537; Booth, Street Railway Law, § 309; *Pitcher* v. *People's Street R. Co.* 154 Pa. 560; *Ehrisman* v. *East Harrisburg City Pass. R. Co.* 17 L. R. A. 448, 150 Pa. 180; 23 Am. & Eng. Encyclop. Law, p. 1019.

Even if the plaintiff had been a passenger, she could not recover.

Booth, Street Railway Law, § 326.

The plaintiff's case has no standing in court because the question of the negligence involved is manifestly a pure question of fact for the determination of the trial judge or jury.

McDonough v. *Metropolitan R. Co.* 137 Mass. 210; *Farrell* v. *Waterbury Horse R. Co.* 60 Conn. 239; *O'Neil* v. *East Windsor,* 63 Conn.

154; *Ehrisman* v. *East Harrisburg City Pass. R. Co. supra: Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; Beach, Contrib. Neg. § 163.

As the court below did not impose upon the plaintiff any duty whatever, nor absolve the defendant from any duty which the law required of it, nor in any respect violate any rule or principle of law, this court will not review its conclusion.

Williams v. *Clinton*, 28 Conn. 264; *Daniels* v. *Saybrook*, 34 Conn. 377; *Congdon* v. *Norwich*, 37 Conn. 414; *Young* v. *New Haven*, 39 Conn. 435; *Brennan* v. *Fair Haven & W. R. Co.* 45 Conn. 284, 29 Am. Rep. 679; *Dexter* v. *McCready*, 54 Conn. 171; *Fiske* v. *Forsyth Dyeing, Laundering & Bleaching Co.* 57 Conn. 119; *Farrell* v. *Waterbury Horse R. Co.* 60 Conn. 239; *O'Neil* v. *East Windsor*, 63 Conn. 154.

Fenn, J., delivered the opinion of the court:

The plaintiff's first reason of appeal is that the "court erred in striking out of the original complaint, on the motion of the defendant, the allegation that the defendant was on October 25, 1890, a 'common carrier of passengers by horse railroad,' because it appears by other allegations in the complaint that at the time and place of the accident the relation of carrier and passenger existed between the parties, and that the plaintiff was injured while attempting to carry out, on her part, an implied contract between her and said car driver that she should take passage on said car at that point on said Asylum street where she was struck by said car, by its having been negligently turned from the track whereon it should have gone." The plaintiff, thus, it will be seen, bases her claim of error upon the concession of that which is manifestly true, namely, that the action of the court of which she complains could injure her only in case the other allegations of the complaint showed that the relation of carrier and passenger existed at the time of the injury, between the defendant and herself. In other words, the statement that the defendant was a common carrier of passengers would be irrelevant, in a complaint for personal injury, unless such complaint contained other statements showing that the person injured sustained such a relation to such common carrier as conferred the right, by reason thereof, and in no other way, to recover damages for such injury in an action based on contract, for failure to perform an implied promise, or in tort for the breach of an imposed duty. *McElroy* v. *Nashua & L. R. Corp.* 4 Cush. 400, 50 Am. Dec. 794; *Eaton* v. *Boston & L. R. Co.* 11 Allen, 500, 87 Am. Dec. 730; Buswell, Personal Injuries, § 5.

Our first inquiry, therefore, is, Does the complaint in this case contain such allegations? The gist of the averments in reference to the injury is, not that the plaintiff was hurt, either while riding upon the car of defendant, or while in the act of getting on or off such car. It is not even alleged that at the time of the injury the plaintiff was upon premises lawfully in the occupation or control of the defendant; but the statement is that the injury occurred while the plaintiff was at a safe distance from the track on which the car should go,—a place safe for the plaintiff, and convenient for her to get on board. It would seem from the complaint that the place where she awaited the car was the same from which she gave the signal that she desired to get on board,—a signal which, we are asked to infer, was seen and recognized although the complaint fails to aver that fact. Again, the injury is not alleged to have been received by reason of the failure of the defendant's servants to acknowledge or respond to, or to comply with the signal of the plaintiff, nor that they failed to use proper endeavors to stop, or in fact to stop, as soon as they should have done, in order to receive the plaintiff on board, at the place desired by her; but the allegation is that the car, while going, was so carelessly and negligently managed and directed as to turn from the track where it should have gone, and run against the plaintiff. Now, it is manifest that here is no allegation of a cause of action growing out of the relation of carrier and passenger, in express terms, and according to the rules of pleading, which require direct statements, and exclude those by way of argument or inference merely, which demand the averment of ultimate and issuable, not of probative or evidential, facts. While, therefore, what the plaintiffs counsel say in their brief, referring to the Connecticut Practice Act (pages 57–59), is correct, namely, that "the forms adapted to suits of this character all contain the allegation that the defendant was a common carrier," it is equally true that they all contain, also, other allegations making such averment relevant, showing a contract, undertaking, or duty, or a liability of the defendant to the plaintiff, growing out of the relation of the parties, which is here utterly wanting, so far as any direct or positive statement is concerned. But, more than this, the facts stated in this complaint are not such as even indirectly, and by way of evidence or inference, tend to indicate, either the existence of the relation of carrier and passenger between the parties, or, if we were to assume such relation, that the cause of action was in any way founded upon it. The negligence relied on was such as might just as well arise in any case where two persons were using the public street, each lawfully, but each independent of the other; and of course, in any such case, it would not matter that one of such persons was a common carrier. Even if it could be held—and no case, we think, can be found anywhere that would be a precedent for the ruling—that the defendant was under a special duty, imposed upon it by law, to stop its car so as to safely receive the plaintiff as a passenger, there is, as we have seen, nothing in the complaint adapted to recovery for a breach of such duty. It was not in fact claimed that any injury was so received, but instead it was claimed, in argument, that if the car had stopped before entering upon the switch, and before reaching the place where it would be necessary, in order to have taken the plaintiff on board, the deflection might have been prevented. Evidence, therefore, of an injury by failure to stop to allow the plaintiff to

get on board, would not have been admissible. *Shepard* v. *New Haven & Northampton Co.* 45 Conn. 54. "Under the practice act the right to recover rests upon, and is limited by, the facts alleged in the complaint." Loomis, *J.*, in *Powers* v. *Mulvey*, 51 Conn. 432. But, without further discussion of this matter, it must, we think, be evident that the ruling of the court could in no way have injured the plaintiff, provided, notwithstanding such ruling, the facts as to the situation of the parties were fully found as they appear and are conceded to be, and that such facts show that such relation of carrier and passenger did not exist at the time when the plaintiff was struck by the car. We think they do so show, for while, perhaps, more favorable to the plaintiff's contention on this point than the allegations of the complaint, since it appeared in evidence that the driver did see, and responded to, the plaintiff's signal; that he expected to stop for her to get on board; and that she advanced upon the crosswalk for that purpose,—such facts are not sufficient to establish the relation. *Creamer* v. *West End Street R. Co.* 156 Mass. 320, 16 L. R. A. 490; *Platt* v. *Forty-Second Street & G. Street Ferry R. Co.* 2 Hun, 124; Booth, Street Railway Law, § 326. A common carrier is bound to exercise a high degree of care towards those who have put themselves under his care as passengers, but not until they have thus put themselves under his care. Up to that time, although they may have contracted with him for their future transportation, he owes no more care to them than to any third party. His special duty begins when, by coming upon his premises, or in the act of entering his vehicle, the actual relation of passenger to carrier is assumed. We therefore think the plaintiff was not injured by the action of the court in this regard. Indeed, upon the facts alleged and shown, the court was bound, without this averment (therefore unnecessary, by the rules of both common-law and code pleadings), to take judicial notice that the defendant was a common carrier of passengers, if such fact was relevant. 5 Special Laws Conn. pp. 306, 492; Gen. Stat. § 1087.

The second reason of appeal is that the court erred in not holding upon the facts found, that the defendant was guilty of negligence in not avoiding the deflection of its car from its Asylum street track to and upon its branch track, which deflection caused the injury to the plaintiff. We think it clear that whether there was negligence in this respect must, under the exceptional circumstances of the case, be regarded as a question which can be determined by no standard save that of the conduct of a reasonable man of ordinary prudence under like circumstances; that is to say, the law can apply no precise measure or rule, and therefore the inquiry is one of fact, in regard to which the determination of the trial court is conclusive. *Farrell* v. *Waterbury Horse R. Co.* 60 Conn. 239; *Fritts* v. *New York & N. E. R. Co.* 62 Conn. 503; *O'Neil* v. *East Windsor*, 63 Conn. 154.

The remaining reason of appeal alleges error in overruling the plaintiff's claims of law upon the facts found; restating thus, in effect, the ground of the previous reason, adding, however, the claim that, it being found that there was no contributory negligence on the part of the plaintiff, the proof of the accident was prima facie evidence of negligence on the part of the defendant, which was not rebutted by the facts of the case. We think the law is otherwise. *Button* v. *Frink*, 51 Conn. 342, 351, 50 Am. Rep. 24; *Lennon* v. *Rawitzer*, 57 Conn. 583, 587.

There is no error in the judgment complained of.

The other Judges concurred, except **Hamersley, J.**, who dissented.

Hamersley, J., dissenting:

I cannot concur in the conclusion reached by a majority of the court.

1. The complaint, as originally drawn, alleged that the defendant was at the time of the accident a common carrier of passengers by horse railroad, and that the plaintiff had then occasion to take passage on one of the cars of the defendant, of the color and kind usually run on said line westward at said Ford street; that the plaintiff at said time was at the corner of Asylum and Ford streets, when a car of the defendant, westward bound, approached the place where the plaintiff was awaiting the same; that she gave to the servants of the defendant in charge of said car the usual and customary signal that she wished to board the car; that the plaintiff was then at a distance from the tracks of the defendant on which said car should go, such as to render it safe for the plaintiff, and convenient for her, to get on board the same, had it not been for the carelessness and negligence of the defendant and its said servants; that said servants so carelessly and negligently managed and directed said car that it turned from the track where it should have gone, and ran against the plaintiff with great force and violence; that by means thereof the plaintiff was injured, etc. Upon motion of the defendant the court ordered the allegation that "the defendant, at the time of the accident, was a common carrier of passengers by horse railroad, and that the plaintiff had then occasion to take passage on one of the cars of the defendant of the color and kind usually run on said line westward at Ford street," to be stricken from the complaint. This was error. It is evident the allegations expunged relate to the very gist of the plaintiff's special cause of action. She was not seeking redress on account of negligence in the driver of a private carriage or of an express cart. The negligence relied on was not such as might arise where two persons are using the public street, each independent of, and under no special duty towards, the other. It was the negligence involved in the performance of the duty imposed by law upon a common carrier of passengers, being a street-railroad corporation, towards a person having occasion to use a car of that company, and having duly signified a desire to use that car, and approaching the car, with the knowledge of its driver, for the purpose of entering the same. The fact that the defendant was running the car in question as a common carrier

of passengers, and that the plaintiff was exercising her legal right to approach and enter this car as a passenger, with the knowledge of the defendant, constituted material facts, on which the pleader relied. The conditions of an injury, the special relations of the persons at the time of the injury, and their special rights and duties towards each other, are material facts, on which the pleader has a right to rely in an action based on injury from negligence. In granting the motion to expunge, the court necessarily ruled that the fact that the injury was caused while the plaintiff was in the exercise of her legal right to approach and enter the car, and while the defendant was under a special duty, imposed upon it by law, to stop its car so as safely to receive the plaintiff as a passenger, could not be treated as a part of the transaction proper to be considered in determining what care was actually exercised by the defendant, but was wholly immaterial to the plaintiff's cause of action. I think such ruling was material error. It was suggested in argument that the allegation was immaterial, because the complaint did not directly allege that "the relation of carrier and passenger existed between the parties, and that the contract relation of carrier and passenger could not be inferred from the other facts alleged." This assumes that the allegation was material only as introductory to an allegation of the contract relation of carrier and passenger. This assumption is not true. The allegation was material, as supporting the duty implied by law from the fact alleged, viz., the duty to stop its car at the place mentioned, and with the care proper to enable a person who had started to board the car in the manner alleged to do so safely. That such duty is imposed on the corporation, as a corollary to the special privileges granted it, seems clear. Whether the obligations of that duty are analogous to, or the same as, the obligations involved in the contract relation of carrier and passenger, is immaterial to the question in hand; and it is therefore immaterial whether such contract relation may begin when a waiting passenger demands passage, and his demand is acquiesced in by the defendant, or must be postponed a few seconds, until the passenger's hand or foot is brought in actual contact with the car. It was also claimed that such error is not material because the court did in fact take judicial notice of the defendant's being a common carrier of passengers, and did receive all the evidence which the plaintiff could introduce under the allegations expunged. It seems to me that the same erroneous view of the law that induced the court to strike out the allegation entered into the finding of the court on the question of negligence, and injuriously affected the interests of the plaintiff, and is therefore sufficient ground for a new trial.

2. The conclusion drawn by the court from the facts found is an erroneous conclusion of law, which this court can properly review. If the fact of negligence hinged only on the prudence shown by this particular driver in the performance of an individual duty, definable only in connection with the special emergency of this one case, the finding by the trial court of no negligence might be conclusive, but the fact of negligence hinges wholly upon a ruling on two questions presented by the ascertained and admitted facts spread upon the record: (1) Was it the duty of the defendant corporation to adopt the precaution mentioned, and bring its cars to a stop at the place specified, in order to take on passengers who are there standing for the purpose of boarding the cars in pursuance of demand for passage made by the passengers, and accepted by the conductors of the cars? (2) Was it the duty of the defendant corporation to adopt such precaution for the purpose of preventing the unexpected deflection of its cars from their proper and apparent course at a crosswalk on a crowded street, and accident always involving danger, which occasionally happens at this place? The court below ruled that such was not the duty of the defendant, because, in the opinion of the court, the adoption of such precaution was not required by ordinary prudence. In this ruling I think the court erred, and fail to see how there can be any doubt but that ordinary prudence does require the taking of such precaution. The opinion of the majority of the court, however, rests on the assumption that, no matter how clear it may be that the court below erred, its action cannot be reviewed, because the wrong conclusion is an erroneous inference of fact, and not an erroneous ruling or "decision upon a question of law arising in the trial." I cannot come to such conclusion. It is unnecessary to attempt a reconciliation of the apparently conflicting results, and more conflicting *dicta*, to be found in our decisions on the question of negligence as one of fact or law. I doubt if consistency is possible until we recognize the fact that the arbitrary rule—which is the rule of ancient practice, changed into an absolute mandate by the constitutional provision that the right of trial by jury shall remain inviolate—which protects the province of the jury from the interference of a judge in a jury trial, is inherently incapable of full application to court trials, and ought not to be conclusive in distinguishing those inferences of the court which are produced in whole or in part by weighing evidence and the credit to be given witnesses, and so are inferences of fact, from the evidence to be finally settled by the trial court from those inferences which are drawn solely from the facts specifically found, in producing which facts the evidence has exhausted itself, and left nothing for the court but to draw its inference in the exercise of its legal judgment from the facts it has found, and so are inferences of law which can be reviewed by a court of errors. *Hayden* v. *Allyn*, 55 Conn. 289. This attempt is unnecessary, because the inference of the court below which determined its judgment is wholly based on the court's definition of a legal public duty arising from ascertained conditions affecting the general public, and such definition, in trials to the court, has repeatedly been held by this court to be a question of law. Negligence, as a fact, may depend on the degree of prudence exercised by an individual in a special emergency, or it may depend on the

existence of a duty to the public assumed by a corporation in accepting its charter and exercising the privileges granted thereby. In the latter case, where the facts are admitted, we have uniformly regarded the question of negligence as one of law. The right to occupy the streets of a city, given to a railroad corporation, clearly involves a legal duty to use such simple and appropriate precautions as will minimize the danger to the public caused by such occupation; and whether a particular precaution comes within that duty may be a question of law. And so, in this case, when the ascertained facts clearly established the danger (that of a car suddenly diverted from its course, without notice to the occupants of a crowded street, and in such manner as to so deceive a careful person that he cannot avoid collision), the remedy (a simple and appropriate precaution, in no way onerous, involving for the defendant no delay or trouble that is not a necessary incident to the use of its appliances), and the failure to adopt that precaution, the inference of a trial judge that such failure was not a violation of legal duty is a ruling or "decision upon a question of law," which this court should review. In *Farrell* v. *Waterbury Horse R. Co.*, 60 Conn. 255, we held that no general rule has yet been formulated, the application of which will determine with certainty, in every case, whether the inference as to negligence to be drawn from ascertained facts is one of fact or law. But the instances are many where a particular rule has been laid down, when the inference of negligence depends on the question of legal duty, and in that case the following cases in support of such particular rule were cited: *Gallagher* v. *New York & N. E. R. Co.* 57 Conn. 446, 5 L. R. A. 787; *Dyson* v. *New York & N. E. R. Co.* 57 Conn. 9; *Nolan* v. *New York, N. H. & H. R. Co.* 58 Conn. 461; *Beardsley* v. *Hartford*, 50 Conn. 529, 47 Am. Rep. 677. In *Gallagher* v. *New York & N. E. R. Co.* the duty of a railroad company to build a fence in a particular place was held to be a question of law, and the court says: "For these reasons we conclude that the defendant was under no duty to fence the road at the place in question, and so the entire foundation on which the trial court predicated the finding of negligence fails, and the judgment was erroneous." In *Dyson* v. *New York & N. E. R. Co.* the duty of a railroad to slacken speed at a particular place is held to be a question of law. In *Nolan* v. *New York, N. H. & H. R. Co.* the duty to slacken speed is held to be a question of law, as also the duty to build a fence in a particular place under particular circumstances; and the right of this court, in a case of negligence, to determine as a question of law, whether the facts stated disclose any duty which the defendant owed to the plaintiff, and which was neglected, is distinctly affirmed. In *Beardsley* v. *Hartford* a finding of negligence by *Judge* Beardsley was overruled, because the finding involved an erroneous view of the duty of the city to take a certain precaution against danger in a highway at the place and under the circumstances stated in the finding. To treat the determination, under fixed conditions, of the legal duty of individuals or corporations,—especially a duty that arises from considerations of public policy,—as a question of fact, to be finally settled in each case by a trial court, involves the surrender by this court of a most important jurisdiction, vital alike to the protection of individual rights and corporate interests. The refusal to review this judgment involves such a surrender. The record is conclusive that the judgment is based on an erroneous view of the defendant's duty under the conditions found and stated. There was no question of adequacy of performance. There was no question of the exercise of ordinary prudence in the face of sudden and peculiar emergency, and of conflicting considerations that might affect one in such emergency. The conclusive and sole inference on which the judgment is based is one that decides whether, under the ascertained and constantly recurring conditions found, the legal duty of the defendant requires it to take the precaution specified. This plainly appears from the finding. The injury occurred from the sudden swinging of a car from its proper track in a manner so unexpected as to strike and seriously injure the plaintiff, lawfully in the street, and exercising all due caution, and also in the exercise of a legal right to enter the car, in pursuance of an agreement between her and the conductor. This deflection of the car was caused by the defendant, in the use of its own appliances. The court finds that such accident "occasionally, but not frequently, happens," and that the only way to prevent the accident is for the driver of a car approaching the switch to "come to a full stop or slow walk, and examine the switch after the hind feet of the team have passed." Upon these facts, the plaintiff claimed, as a matter of law, that it was the duty of the defendant to instruct its servants "to approach such switches at a walk, or to come to a full stop, if necessary, so as to avoid such an accident," and that it was the duty of the defendant's servant, in this case, "to have looked and seen whether the switch was properly placed, or not, when the car struck it." Upon this claim of law the court held that the legal duty of the defendant did not require it to take such precaution, and, after finding that this precaution is not usually taken by drivers, said, "nor do I think ordinary prudence requires it." Whether ordinary prudence requires the defendant to use such a precaution, in the fulfillment of its duty to use its appliances in the public street so as to avoid all unnecessary danger to the public, is not a question of fact, for a car driver to pass upon in the first instance, and a trial court to finally determine, but a question of legal duty, involving grave considerations of public policy, whose determination by a trial court can be reviewed by this court. The precaution was a reasonable and simple one, necessary to avoid occasional accidents which might prove dangerous. It was the legal duty of the defendant to adopt such a precaution.

GEORGIA SUPREME COURT.

Mayor, etc., of SAVANNAH, *Plff. in Err.*,
v.
Thomas MULLIGAN.

(.....Ga.....)

***1. The municipal authorities of a city have no right to destroy the private property** of a citizen for the public good without compensating him for the loss thus occasioned, unless the property is itself a nuisance endangering the public health or safety. In that event it may be destroyed by such municipal authorities, without paying the owner its value, if the charter of the city confers upon them the power to abate such nuisances; but even then, unless the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities; and, when sued for its value, the burden is on them of showing that it was in fact a nuisance, and that its destruction was really necessary to the public health or safety. In cases of emergency the destruction may properly be ordered without a preliminary condemnation, but the municipal authorities will in that event carry the same burden.

2. In the present case the evidence showed conclusively and beyond question that the property destroyed was in fact a nuisance, endangering the public health, and that the mayor and aldermen of Savannah had due authority to abate it. Consequently the destruction of the property was lawful, and the owner was not entitled to recover its value from the city.

(January 23, 1895.)

ERROR to the Superior Court for Chatham County to review a judgment holding the City of Savannah liable for the value of certain property destroyed by its officers for the alleged prevention of the spread of a contagious disease. *Reversed.*

The case sufficiently appears in the opinion.

Mr. **Samuel B. Adams,** for plaintiff in error:

A city is not, generally, liable for the acts of its officers.

Attaway v. *Cartersville*, 68 Ga. 740; *Doster* v. *Atlanta*, 72 Ga. 233; *Hammond* v. *Richmond County*, Id. 188; *Wright* v. *Augusta*, 78 Ga. 241; *Ogg* v. *Lansing*, 35 Iowa, 495, 14 Am. Rep. 499; *Mead* v. *New Haven*, 40 Conn. 72, 16 Am. Rep. 14; *Brown* v. *Vinalhaven*, 65 Me. 402, 20 Am. Rep. 709; Mechem, Pub. Off. §§ 850, 851; Ga. Code, § 4875; MacDonnell's City Code, §§ 643 *et seq.*

Section 2226 of the Code does not cover this case.

There can be no liability unless this is "declared by express enactment."

There was no liability at common law in the cases mentioned in this section, or in similar cases.

*Headnotes by SIMMONS, *Ch. J.*

NOTE.—On the question as to the right to compensation for property destroyed in abating a public nuisance, see *note* to Orlando v. Pragg (Fla.) 19 L. R. A. 196.

Bowditch v. *Boston*, 101 U. S. 16, 25 L. ed. 980; *Keller* v. *Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 614; 2 Dill. Mun. Corp. § 956; *Dunbar* v. *Augusta*, 90 Ga. 390; *Parham* v. *Decatur County Justices of Inferior Ct.* 9 Ga. 348; Mills, Em. Dom. § 7.

Messrs. **Gignilliat & Stubbs,** for defendant in error:

In the Constitution of the United States the language is, "nor shall private property be taken for public use without just compensation."

In the constitution of Georgia, "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid." It is begging the question to say that the case at bar does not come within these constitutional provisions.

The loss should be made good.

Bishop v. *Macon*, 7 Ga. 200; *Young* v. *McKenzie*, 8 Ga. 31; 1 Bl. Com. 139.

The paraphernalia of a scarlet-fever patient is not a nuisance at common law.

If section 2226 means anything, it means that the property to which it refers should not be considered a nuisance to which the maxim, "*Sic utere tuo ut alienum non ladas*" should apply.

If this was a nuisance, it was a public nuisance.

Bouvier's definition of a public nuisance is, "such an inconvenience or troublesome offense as annoys the whole community in general."

In order to create a legal nuisance, the act of man must have contributed to its existence.

Wood, Nuisances, pp. 118–120.

The subject of contagious and infectious diseases, where treated, is classified under an entirely different head of nuisances.

Ga. Code, Index, p. 1442, pt. 1, title 16, chap. 1.

In the case at bar and all similar cases, the maxim, "*sic utere tuo ut alienum non ladas*" does not apply, because the state of things "exists or arises from purely natural causes."

Wood, Nuisances, p. 118.

Blackstone says "the absolute rights" or "civil liberties" are principally three: viz.: the right of personal security, personal liberty, and private property.

In a case of actual necessity to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity, the private property of an individual may be lawfully taken and used or destroyed for the relief, protection, or safety of the many. In all such cases while agents of the public who officiate are protected from individual liability, the sufferers are nevertheless entitled under the constitution to just compensation from the public for the loss.

Bishop v. *Macon*, 7 Ga. 200.

It is equally evident on the other hand, that if the private property of an individual, the whole or a part of which might otherwise have been saved to the owner, is taken or destroyed for the benefit of the public, or of the inhabitants of a particular county, town, city, or other smaller section of the community, those for whose supposed benefit the sacrifice is

See also 35 L. R. A. 281; 36 L. R. A. 554; 41 L. R. A. 566.

made, ought in equity and justice, to make good the loss which the individual has sustained for the common advantage of all.

Ibid.; *Dawson* v. *Kuttner*, 48 Ga. 133.

In all cases where a statute creates a right of action in individuals or a class of individuals, it is remedial.

Neal v. *Moultrie*, 12 Ga. 104.

Remedial statutes should be liberally construed when enlarging common-law rights and privileges.

Price v. *Bradford*, 5 Ga. 868; *Henderson* v. *Alexander*, 2 Ga. 85.

The term "property" in section 2226 includes both real and personal property.

Code 5, § 5; *Dawson* v. *Kuttner*, *supra*.

Simmons, *Ch. J.*, delivered the opinion of the court:

This was an action against the municipal corporation of the city of Savannah for the value of a feather bed, pillows, and mattress destroyed by a sanitary inspector of that city, under orders of its health officer. On certiorari the superior court ruled that the city was liable to the plaintiff, under section 2226 of the Code; and to this ruling the city excepted. The section referred to is as follows: "Analogous to the right of eminent domain is the power from necessity vested in corporate authorities of cities, towns, and counties, to interfere with and sometimes destroy the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of a conflagration, or the taking possession of buildings to prevent the spreading of contagious diseases. In all such cases, any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such corporation."

We do not think the section above quoted is applicable to this case. Under the ruling of this court in *Dunbar* v. *Augusta*, 90 Ga. 390, a city having the power, under its charter, to abate nuisances endangering the public health and safety, may destroy property without making compensation to the owner, where the property constitutes a nuisance of that kind; and we think the decision in that case controls the present case. There the city authorities destroyed grain which had become wet and damaged by a flood while stored in the plaintiffs' warehouse. The plaintiffs sued the city for the value of the grain, and it was held by this court that, "it not being alleged in the declaration that the damaged grain condemned and destroyed by the municipal authorities was not a nuisance or was not dangerous to the public health (that being the ground on which it was condemned and destroyed), no cause of action against the municipality was set out in the declaration." Bleckley, *Ch. J.*, in delivering the opinion of the court, said: "To destroy property because it is a dangerous nuisance is not to appropriate it to a public use, but to prevent any use of it by the owner, and put an end to its existence because it could not be used consistently with the maxim, '*sic utere tuo ut alienum non lædas.*'" Section 2226 of the Code, though not referred to in the opinion, was cited and relied on by counsel for the plaintiff in error in that case, and was not overlooked by the court in the consideration of the case. An illustration of the class of cases to which this section applies will be found in the case of *Dawson* v. *Kuttner*, 48 Ga. 133, the only case we know of in which the section referred to has been construed. In that case the plaintiff was held entitled to recover from the municipal corporation for property destroyed by the authorities thereof in attempting to prevent the spread of a fire, but the fire did not originate in and had not extended to the property in question at the time of its destruction. In cases of emergency the municipal authorities, if authorized by their charter to abate nuisances, are not bound, before ordering the destruction of property as a nuisance, to wait until the fact that the property is a nuisance is judicially determined. In such cases the destruction may be ordered without a peliminary condemnation. See *Americus* v. *Mitchell*, 79 Ga. 807; *Dunbar* v. *Augusta*, *supra*, and cases cited.

Unless, however, the property is first condemned as a nuisance by appropriate proceedings, its destruction will be at the peril of the municipal authorities; and, when sued for its value, the burden is upon them of showing that it was in fact a nuisance, and that its destruction was really necessary to the public health and safety. In the present case the evidence showed conclusively and beyond question that the property destroyed was in fact a nuisance endangering the public health, having been used as bedding by a person who had scarlet fever, a highly contagious disease; and the mayor and aldermen of the city, under its charter, had ample authority to abate the nuisance. Code, § 4875. Consequently the destruction of the property was lawful, and the owner was not entitled to recover its value from the city.

Judgment reversed.

KENTUCKY COURT OF APPEALS.

SEBREE DEPOSIT BANK, *Appt.*,
v.
J. P. MORELAND *et al.*

(.....Ky.....)

1. **Averments that notice of dishonor was received in due time** by the acceptor and at once delivered to the drawer and indorser by him are mere conclusions of the pleader and do not sufficiently state due diligence.

2. **A subsequent promise to pay** will not bind an indorser who has been released by lack of notice, unless supported by a consideration.

(November 17, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Daviess County in favor of defendants in an action brought to enforce the liability of the maker and indorser upon an accommodation bill of exchange. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Reuben A. Miller** and **Yeaman & Lockett** for appellant.

Mr. **C. S. Walker** for appellees.

Pryor, J., delivered the opinion of the court:

This case went off on the pleadings, the court below sustaining a demurrer to the reply of the plaintiff, and, the latter failing

NOTE.—*Necessity of new consideration to support waiver of failure to give notice of dishonor or subsequent promise by indorser.*

The question of consideration has seldom been discussed in connection with this question but the overwhelming weight of authority is to the effect that an indorser released by the laches of the holder of negotiable paper from liability thereon may again assume such liability by voluntary action on his part; and this has been permitted from the beginning to the present time in case after case without anything to show that there was any new consideration, and without any intimation by the courts that they considered such consideration necessary or that the question of liability was affected by its absence.

Waiver of laches and presumption of diligence.

The indorser's liability has been fixed in two ways: First, when the fact was shown that he recognized his continued liability either by a promise to pay or by payment the presumption was raised that there had been no laches and that he had been duly charged on the paper. This rule obtains even in jurisdictions where a new consideration is required to restore liability when the fact of laches is made to appear. Second, when there was no chance for the operation of the presumption because the fact of laches appeared then it was held that a distinct admission of liability operated as a waiver of the laches.

The whole body of case law was fully examined in 1840, by *Judge* Cowen in Tebbetts v. Dowd, 23 Wend. 379, and he pointed out distinctly the difference which should exist between cases in which it was sought to hold the indorser because of waiver of the laches and those in which his promise was taken as prima facie evidence that due diligence had been observed. In the latter case he held that no proof of knowledge of laches was required, and in the former he said that there were three rules: The first requiring the clearest proof of knowledge of laches, the second going to the opposite extreme, and the third, which *Chancellor* Kent states was supported by the weight of authority, was that the knowledge may be inferred as a fact from the promise under the attending circumstances without requiring clear and affirmative proof of it.

The doctrines of presumption and of waiver rest upon wholly different grounds, although in many of the adjudged cases the distinction between them has not been clearly drawn or adverted to. The former rests upon our common experience, that men will not promise to do what they are under no obligation to perform, and what they receive no consideration for doing, and therefore the promise is held to be presumptive evidence that the indorser knows that all things have been rightly done to hold him. Waiver is the opposite of this. The indorser is held upon the ground that he expressly waives the defense which he might have set up. But no one can waive anything, of the existence of which he has no notice, and therefore he must be conscious, at the time of the new promise, of all the facts which in law are essential to discharge him from liability. If the doctrine of presumption prevails, its only effect is to shift the burden of proof. The plaintiff may rest upon proof of the new promise, and thus throw upon the indorser the double burden of showing laches and his want of knowledge of such laches. Glassford v. Davis, 36 N. J. L. 348.

In McFatridge v. Williston (1894) 25 N. S. 11, the court divided on the question whether or not the promise was made with a knowledge of the facts, but the first opinion states that a promise to pay is only prima facie evidence of notice, and if it is found as a fact that there was a neglect to present and to give notice of dishonor, a waiver must be shown to enable the plaintiff to succeed.

If the proof shows that the demand was not made and notice given the case does not stand on the presumption but upon the waiver, and this cannot avail unless the defendant is shown to have knowledge of the laches at the time he made his promise. Bruce v. Lytle, 13 Barb. 163.

Without knowledge of the facts the promise will not amount to a waiver but only to prima facie evidence that all the necessary acts have been duly performed. Harvey v. Troupe, 23 Miss. 539.

Promise as evidence of notice.

In an action against the drawer of a dishonored bill of exchange in which notice of dishonor to the defendant was not proved but an agreement was proved by the drawer after the bill was dishonored to pay it and several others by installments if suit was not brought on them, the court held that this agreement was evidence that notice of dishonor was given to defendant "for if notice had not been given nothing would become due upon the bill from defendant; the latter would not therefore have agreed to pay (indorsee) whatever was due upon this particular bill but would have insisted upon a discharge." Gunson v. Metz (1823) 1 Barn. & C. 193.

A promise to pay is evidence that due notice of dishonor was given or that it was waived. Cordery v. Colvin (1863) 14 C. B. N. S. 374, 32 L. J. C. P. 210, 9 Jur. N. S. 1200, 8 L. T. N. S. 245. One of the judges states that it amounts to an acceptance of the notice *nunc pro tunc*.

When the bill was payable on December 24, and no notice of dishonor reached defendant until January 7, following, when he promised to pay it, Lord Ellenborough said although the promise

to amend, or plead further, a judgment was rendered for the defendant. The action is based on a negotiable note for $4,000, drawn by the appellee J. P. Moreland on S. P. Walden, in favor of I. H. Hickman (another appellee), and made payable at the Sebree Deposit Bank. The paper was indorsed by Hickman, and discounted by the bank and the proceeds placed to the credit of the acceptor, Walden, the paper having been made, as is alleged, for his benefit. The note was protested for nonpayment, and the defense made by Moreland, the drawer, and Hickman, the indorser, is the failure of the bank (the holder) to give them notice of the paper's dishonor, and other defenses not necessary to be considered. It is insisted by counsel for the bank that the averments of the answer made on information and belief of facts that must, if they exist, be within the personal knowledge of the defendants, is bad pleading, and the demurrer to the reply should have been carried back to the answer, and sustained to that pleading. There was no demurrer to the answer, and the reply of the plaintiff placed directly in issue the fact of the want of notice to the defendants of the dishonor of the paper, and covered the defect, if any existed.

It is alleged in the reply that the notary, in behalf of the holder (the bank), "mailed notices of the nonpayment and protest of the bill to each of the defendants on the 12th of July, 1892, to the acceptor, drawer, and in-

was made to the then holder of the bill and not to plaintiff yet it was evidence that the defendant was conscious of his liability to pay the note which must be because he had had due notice of the dishonor. And Bailey, J., considered the promise of the defendant either as an acknowledgment that he had had due notice of the dishonor or that without such notice he was the proper person to pay the note as the party for whose use it was drawn. Porter v. Rayworth, 13 East, 417.

If a person who has not had due notice of the dishonor of a bill of exchange thinks fit to acknowledge his liability though he does so to a person other than the person who afterwards sues upon the bill, the acknowledgment is sufficient to enable the latter to maintain an action on the bill. Rabey v. Gilbert, 6 Hurlst. & N. 536, 30 L. J. Exch. 171. In that case, however, the admission seems to have been made to plaintiff himself.

Evidence of a promise by the party sought to be charged that the bill will be satisfied either by himself or the acceptor supersedes the necessity of proving the dishonor of the bill and notice. Wood v. Brown (1816) 1 Stark. 217.

In Tobey v. Berly, 26 Ill. 426, the rule is stated that from a subsequent promise to pay with a knowledge of the facts the law will presume that the party making such promise was liable and that the conditions requisite to fix his liability had been complied with.

Part payment or a promise to pay must be taken either as an admission that the notice was sufficient or as a waiver of it. Union Bank v. Grimshaw, 15 La. 321; Oglesby v. Steamboat D. S. Stacy, 10 La. Ann. 117.

In the absence of anything to show that the proper steps to charge the indorser were not taken, his subsequent promise to pay is prima facie evidence that they were and dispenses with other proof. Tebbetts v. Dowd, 23 Wend. 379, reversing Trimble v. Thorne, 16 Johns. 152, 8 Am. Dec. 302, in which it was held that it will not be inferred from the mere fact that a subsequent promise is made that regular notice has been given or was intended to be waived. If the promise is made under a mistaken belief that due notice was given it is not binding.

Evidence of a promise to pay is admissible as tending to show that due notice had actually been received. Myers v. Standart, 11 Ohio St. 29.

After a promise has been made it is equally repugnant to reason and to law that the promisor should claim to be discharged for want of notice and call on the other party to prove that he proceeded in strict conformity with all the necessities of the law-merchant. Pate v. McClure, 4 Hand. (Va.) 164.

A count by indorsee against drawer of a bill of exchange alleging presentment and dishonor and due notice thereof to defendant is sustained by proof of a subsequent promise to pay notwithstanding it is proved or admitted that due notice of dishonor was not given. Killby v. Roehussen (1865) 18 C. B. N. S. 357. In that case Williams, J., said that the promise to pay upon being informed of the nonpayment operates as an acceptance of the notice given as due notice.

In Campbell v. Webster (1845) 2 C. B. 256, 15 L. J. C. P. 4, 9 Jur. 992, one of the judges says, if when payment is demanded the party omits to avail himself of the preliminary objection of want of protest or want of notice, it is a question for the jury, whether he does not thereby admit that all the steps that are essential to create liability in him have been duly taken. In that case certain letters were relied on for such proof, and the court says: "They show that defendant was conscious that there had been a protest and that he had had notice, otherwise he would not have put his nonliability to pay upon the ground he did. He is evidently struggling to avoid payment of the bill. If instead of mentioning that which would have been a good answer he sets up something foreign, the good ground of defense does not exist. The letters are altogether silent as to want of protest or notice. The answer now attempted to be set up is that the letters contained a mere conditional promise to pay. But when we are determining the point by reference to what is supposed to have been passing in the mind of the defendant it is quite immaterial whether the promise is conditional or not."

Where the indorser of a bill when applied to for payment said, if the holder would call again and bring the account with him he would pay it, the court said: "When a man against whom there is a demand promises to pay it for the necessary facilitating of business in transactions between man and man everything must be presumed against him." It was therefore to be presumed prima facie from the promise so made that the bill had been presented for payment in due time and dishonored, and that due notice had been given to the defendant. Lundie v. Robertson, 7 East, 231.

And the above principles have been applied to nearly all the steps which are necessary to bind the indorser.

A promise to pay furnishes presumptive evidence that the proper steps were taken to bind the one making the promise. Brennan v. Lowry, 4 Daly, 253; Stix v. Mathews, 63 Mo. 371; Clayton v. Phippe, 14 Mo. 399; Dorsey v. Watson, 14 Mo. 59; Walker v. Laverty, 6 Munf. 487; Mense v. Osbern, 5 Mo. 544; Croxon v. Worthen, 5 Mees. & W. 5, 2 Horn & H. 12. 3 Jur. 290.

A promise after knowledge of discharge is an admission of notice—an admission of the sufficiency of the notice received. People's Nat. Bank v. Dibrell, 91 Tenn. 301.

dorser of the bill, in an envelope addressed to S. P. Walden, at Owensboro, Kentucky, which was his postoffice, and believes and charges that the said Walden at once duly notified said drawer and indorser, Moreland and Hickman, of the dishonor of the bill, and that the defendants knew before the maturity of the paper it would not be paid, and knew that it had not been paid, and with full knowledge of these facts did repeatedly promise to pay the bill, and relying on these promises forbore to sue for several months."

It appears from this pleading the party not entitled to the notice of dishonor, and without a request even to do so, had been intrusted with the duty of giving this notice to the drawer and indorser, so as to continue their liability; and, with that view, it is alleged in the reply that when notices of the protest were received by the acceptor he at once delivered them to the drawer and indorser. When the notice of protest was received by Walden is not alleged, and while it must be inferred, as a matter of law, that he received the notices in due time, as the notice was placed in the postoffice as soon as it could be done, if it had been necessary to hold him bound, no such inference will be indulged as to the drawer and indorser of the paper. As they were each entitled to notice, the time it was received by the acceptor, as well as the time it was handed them by him, should have been distinctly alleged, and the averments that it was received in due

Notice.

A promise to pay or admission of liability dispenses with proof of notice. Durham v. Price, 5 Yerg. 300, 28 Am. Dec. 267; Dickerson v. Turner, 12 Ind. 228; McPhetres v. Halley, 32 Me. 72; Higgins v. Morrison, 4 Dana, 100; Sherman v. Clark, 3 McLean, 91; Bartholomew v. Hill, 5 L. T. N. S. 756, 10 Week. Rep. 273.

But in Chapman v. Annett, 1 Car. & K. 552, it is stated by the chief baron that a promise to pay after failure to give notice of dishonor does not necessarily admit the notice although it may waive it.

Demand.

The promise amounts to an admission that the bill had been duly presented, dishonored, and due notice thereof given. Martin v. Ewing, 2 Humph. 559.

A promise to pay with knowledge of a lack of notice will raise the presumption that a proper demand had been made. Hall v. Freeman, 2 Nott & McC. 479, 10 Am. Dec. 621.

A promise to pay by a person knowing the bill to be due, and knowing that he was entitled to have it presented when due to the acceptor or maker and to receive notice of its dishonor, furnishes presumptive evidence of the presentment and notice. Taylor v. Jones (1809) 2 Campb. 105; Gibbon v. Coggon, Id. 188; Greenway v. Hindley, 4 Campb. 52; Frost v. Harrison, 8 La. Ann. 123; Walker v. Walker, 7 Ark. 552.

Proof of payment of part of the amount by the indorser will dispense with the proving of a demand upon the maker. Vaughan v. Fuller (1746) 2 Strange, 1246.

The cases are not quite agreed, however, as to how far a demand will be presumed. In one case it was held that, in order to have the new promise effective to charge the indorser, it must be shown that a demand for the amount was made upon the acceptor and that he refused to pay it, since the indorsee's liability only arises in case of the acceptor's default. Brown v. McDermot, 5 Esp. 265.

So it has been held that a promise to pay without knowledge that a demand of payment has not been made upon the maker will not bind the indorser. Good v. Sprigg (1819) 2 Cranch, C. C. 172.

An admission by the indorser of a note, when applied to for payment, that the debt was his, does not admit the right of the holder to resort to him on the note and that he has received no damage from the want of notice unless he was also apprised of the laches of the holder in not making a regular demand of payment of the note by which he was discharged from his responsibility to pay it. That due notice was not given defendant could not fail to know; but a regular demand of a maker of the note would not be inferred from mere admissions of regular notice. Thornton v. Wynn, 25 U. S. 12 Wheat. 183, 6 L. ed. 595.

Knowledge on the part of the indorser that the demand upon the maker has not been made is material, and must be proved notwithstanding the fact that he knew that the note had not been paid and that notice of nonpayment had not been given and was aware that he was discharged from liability. Parks v. Smith, 155 Mass. 26.

A promise to pay without knowledge that the bill had not been presented will not be binding. Kelley v. Brown, 5 Gray, 108.

Nonacceptance.

In regard to notice of nonacceptance there seems to be a strong tendency not to give the promise its usual effect.

In Blesard v. Hirst (1770) 5 Burr. 2670, in which notice of refusal to accept was not given but notice of nonpayment was duly given, upon which the drawer promised to take up the bill, but on learning that notice of nonacceptance was not given refused to do so, the court held that he was discharged.

A promise to pay, made after the bill becomes due, is considered as an admission of regular presentment for payment and of due notice, or at least waives the objection that it has not been done. But if the bill has been presented for acceptance before it falls due, and dishonored, there is no inference that the party who promised to pay after the bill falls due knew of such refusal to accept or of the neglect to give notice of such nonacceptance. Such promise does not furnish presumptive evidence even of the presentment and notice. A promise to pay after a bill becomes due which had been presented for acceptance before it fell due, and dishonored, cannot be relied upon as an independent cause of action in the absence of due notice of such dishonor, there being no consideration to uphold the promise. Landrum v. Trowbridge, 2 Met. (Ky.) 283; Bank of Tennessee v. Smith, 9 B. Mon. 609.

As evidence of waiver.

If an indorser with full knowledge of the facts by which he is released by law unconditionally promises to pay, it is an implied waiver of demand and notice, and a promise by the indorser of a promissory note to pay it after due is at least prima facie evidence of demand and notice. Hazard v. White, 26 Ark. 155.

A promise to pay is evidence of an agreement to waive protest. Cardwell v. Allan, 33 Gratt. 160.

In Woods v. Dean (1862) 3 Best & S. 101, 32 L. J. Q. B. 1, 7 L. T. N. S. 561, 11 Week. Rep. 22, all the judges agreed that admission of liability is evidence of a waiver of a right to notice, and one of them stated that promise to pay when aware that there has been no notice is equivalent to agreeing that he will not take advantage of a want of notice, in other words is a waiver of a right to notice.

time by the acceptor, and at once delivered to the drawer and indorser by him, are mere conclusions of the pleader, and will not authorize the court to say that such diligence had been exercised by the holder of the paper as to continue the liability of the drawer and indorser.

It was a matter of doubt for a long time whether the acceptor of a bill, who had permitted his paper to go to protest, could give a valid notice, but Mr. Daniel, in his treatise on Negotiable Instruments, says it is now "a principle of the law-merchant, however unphilosophical it may seem." 2 Dan. Neg. Inst. § 990. When a notice is delivered by a special messenger, other than through the regular mail, it must distinctly appear when it was delivered, so as to enable the court to say that it was delivered as soon as it could have reached the party sought to be charged by due course of mail. In this case the bank made the acceptor its agent to deliver the notice of protest, and inclosed the notices to the acceptor by mail. They were not sent directly to either the indorser or drawer, and it is therefore manifest the averments of the reply should present a state of facts showing that the appellees received this notice as soon as it could have reached them by the regular mail. That they were sent by due course of mail to the payer, and when received delivered at once to the drawer and indorser, are not such facts as would authorize the inference that due diligence had been exercised

As a waiver.

Excepting the few cases which require a consideration to support a new promise to pay, the cases agree that the laches may be waived.

In Hicks v. Beaufort, 5 Scott, 598, 4 Bing. N. C. 229, 1 Arn. 55, 2 Jur. 255, it is said: "The cases go to this point only that if after the dishonor of a bill the drawer distinctly promises to pay, that is evidence from which it may be inferred he has received notice of the dishonor; because men are not prone to make admissions against themselves, and therefore when the drawer promises to pay it is to be presumed he does so because he knows the acceptor has refused."

But that does not state the law as it became established on the subject of waiver.

If an indorser with full knowledge of the laches of the holder in neglecting to protest the note or bill unequivocally assents to continue his liability or to be responsible as though due protest had been made, he is held to have waived the right to object and will stand in the same position as if he had been regularly charged by presentment, demand, and notice. This assent must be clearly established and will not be inferred from doubtful or equivocal acts or language. A promise made with full notice affords the clearest evidence that the indorser does not intend to take advantage of the laches of the holder, and the law without any new consideration moving between the parties gives effect to the promise. The assent of the indorser to be bound notwithstanding he has not been duly charged, may be established by any transaction between him and the holder which clearly indicates this purpose and intent. Ross v. Hurd, 71 N. Y. 14, 21 Am. Rep. 1.

The right to insist on a discharge may be waived. Curtiss v. Martin, 20 Ill. 557.

After the maturity of the note the indorser may waive proof of demand and notice. Hoadley v. Bliss, 9 Ga. 303.

There may be a waiver of notice. Long v. Crawford, 18 Md. 220.

The waiver is as effectual after as before the maturity of the note. Ringe v. Kimball, 124 Mass. 209.

The indorser can dispense with the conditions for his benefit as well after as before the paper matures. Yeager v. Farwell, 80 U. S. 13 Wall. 6, 20 L. ed. 476.

If when called upon to pay a bill of exchange the indorser says he has not had due notice of dishonor, but at the same time states that since the debt is justly due he will pay it, he thereby waives the defense of want of notice. Lundie v. Robertson, 7 East, 231.

In a case in which the waiver was made before the maturity of the note the court said satisfactory proof of a waiver is in all respects equivalent in law to a compliance with the requirements as to giving notice. Pugh v. McCormick, 81 U. S. 14 Wall. 361, 20 L. ed. 789.

A promise with knowledge of neglect of notice will be a waiver of notice and render the indorser liable. Perry v. Rhodes, 2 Cranch, C. C. 37.

Where the plaintiff's conduct had discharged the indorser but after notice of the laches he promised to pay the note Wilmot, J., said: "By his conduct he has waived the negligence and acquitted the plaintiff." Whitaker v. Morris, 1 Esp. Dig. 58.

A promise by the indorser of a promissory note to pay it with full knowledge of the laches of the holder, waives the laches and renders him liable on the note. Wilkes v. Jacks, Peake, N. P. 202; Patterson v. Becher, 6 J. B. Moore, 319; Strong v. King, 35 Ill. 9, 85 Am. Dec. 336; Davis v. Miller, 88 Iowa, 114; Cheshire v. Taylor, 29 Iowa, 492; Allen v. Harrah, 30 Iowa, 368; Debuys v. Mollere, 3 Mart. N. S. 318, 15 Am. Dec. 159; Bank of United States v. Ellis, 13 La. 368; Byram v. Hunter, 36 Me. 217; Turnbull v. Maddux, 68 Md. 579; Hobbs v. Straine, 149 Mass. 212; Hopkins v. Liswell, 12 Mass. 52; Armstrong v. Chadwick, 127 Mass. 156; Robbins v. Pinckard, 5 Smedes & M. 51; State Bank of St. Louis v. Bartle, 114 Mo. 276; Pratte v. Hanly, 1 Mo. 35; Wilson v. Huston, 13 Mo. 146, 53 Am. Dec. 138; Salsbury v. Renick, 44 Mo. 554; Harness v. Davies County Sav. Asso. 46 Mo. 357; Ladd v. Kenney, 2 N. H. 340, 9 Am. Dec. 77; Workingmen's Bkg. Co. of East St. Louis v. Biell, 57 Mo. App. 410; Faulkner v. Faulkner, 73 Mo. 327; Caldwell v. Porter, 17 N. H. 27; Rogers v. Hackett, 21 N. H. 100; Duryee v. Dennison, 5 Johns. 248; Meyer v. Hibsher, 47 N. Y. 265; De Wolf v. Murray, 2 Sandf. 166; Patterson v. Stettauer, 8 Jones & S. 54; Gardiner v. Jones, 6 N. C. 429; Ashford v. Robinson, 30 N. C. 114; Moore v. Tucker, 26 N. C. 347; Oxnard v. Varnum, 111 Pa. 193, 56 Am. Rep. 255; Smith v. Lownsdale, 6 Or. 78; Johnson v. Arrigoni, 5 Or. 485; Stone v. Smith, 30 Tex. 138, 94 Am. Dec. 299; Blodgett v. Durgin, 32 Vt. 361. And the same is true of the drawer of a bill of exchange. Kupfer v. Bank of Galeno, 84 Ill. 328.

In Borradaile v. Lowe (1811) 4 Taunt. 93, where due notice was not given to an indorser, and the plaintiff relied for recovery on a letter which did not make an express promise, it was argued for defendant that there is a difference between a drawer and indorser of a bill of exchange; the drawer may always look to the acceptor but the indorser after prior indorsers have been discharged must lose the bill if he pays it. There is then no consideration for such promise; it is a *nudum pactum* and will not bind. But Mansfield, *Ch. J.*, said: "I do not find any case in which the indorser after being discharged by the laches of the holder has been held liable upon his indorsement except where an express promise to pay the bill has been proved. In most of the cases where the defendants have been held liable they have either made an

by the holder, or that the drawer and indorser received the notices as soon as they would have received them if the notices had been deposited in the regular mail in due time, addressed to each of the appellees. The envelope in which the notices were inclosed, addressed to the acceptor, might have remained in the postoffice for days before its reception by him, and, while the personal service or delivery of the notice by the acceptor to the appellees would have been good if delivered in due time, it must appear, when the postoffice may be used as a means of giving the notice, that a deposit of the notice in the post office within due time was made, addressed to the party affected by the dishonor of the paper, or that notice was given by the holder, or his agent, to the party sought to be made liable, by delivery made as soon as it could have been received by due course of mail. There is no pretense that any notice was inclosed to the address of those parties, and sent by mail, and no state of fact alleged showing that diligence on the part of the holder, so as to hold these appellees liable on the paper, unless it arises from the promise to pay alleged to have been made after they had known of the protest, and the failure of the acceptor to pay, and his inability, long before the note matured, to make payment.

It is insisted by counsel for the bank that the promises to pay by the drawer and indorser amounted to such an acknowledgment

express promise to pay, or a promise when they have full knowledge at the time that they were discharged; or where there was a real debt binding on their conscience."

A promise to pay will amount to a waiver. Corderv. Colville, 33 L. J. C. P. 210, 9 Jur. N. S. 1200, 8 L. T. N. S. 245, 14 C. B. N. S. 374. If made with knowledge of the law and facts applicable to the case. Woods v. Dean, 32 L. J. Q. B. 1, 3 Best & S. 101, 7 L. T. N. S. 561, 11 Week. Rep. 22.

Where there was evidence that an indorser who was not shown to have received due notice of dishonor, offered to pay down part of the amount and costs, and to secure the residue by a warrant of attorney, the court said that this was not enough to dispense with proof of notice of dishonor, saying that "defendant might, if time had been given him, have been willing to have waived any objection with respect to notice of dishonor." Standage v. Creighton (1839) 5 Car. & P. 406. The ground of this ruling is a little difficult to understand but the implication is that the absence of notice could not be waived. But even if it could not, other cases have admitted the proof of promise to pay for the purpose of dispensing with proof of giving of notice.

Clear and unequivocal evidence of waiver is necessary. Gregory v. Allen, Mart. & Y. 76.

What knowledge necessary to effect waiver.

To effect a waiver it is unanimously agreed that the promisor must have had knowledge of the facts affecting the question of his liability.

In Goodall v. Dolley, 1 T. R. 712, where without knowledge of the fact that notice of nonacceptance had not been given the indorser promised to pay the bill by installments, the court held that having made the promise without notice of the circumstances the promisor was not bound by it.

Where, at a conversation which took place before notice of dishonor could have been received, the indorser made a conditional promise to pay it, and there was no regular notice afterwards, the court said: "Does the admission or promise suffice? I think clearly not; if the conversation took place before the dishonor could be known and the promise was not an express, absolute, and unconditional promise and did not dispense with the want of notice of dishonor." Pickin v. Graham, 1 Cromp. & M. 725, 3 Tyrw. 923.

If the promise to pay is made in ignorance of the fact that protest for nonpayment was not made in proper time, or, if it is made under a mistake of fact, it is of no effect. Fotheringham v. Price, 1 Bay, 291, 1 Am. Dec. 618.

The neglect to demand payment of the maker ought to be disclosed to the indorser at the time he makes his promise in order to make the promise binding. Myers v. Coleman, Anthon, N. P. 150.

Where the notarial certificate was excluded from evidence because it did not have a proper seal, the court says the evidence shows that defendant had no knowledge of the failure of plaintiffs to make a demand but on the contrary thereof the promise was made at a time when he supposed that a proper demand and protest had been made and that a proper notice thereof was being given him. It is clear, therefore, that defendant had not full knowledge of the facts at the time of making the demand and the same was not binding upon him. Richard v. Boller, 51 How. Pr. 371. It may be questioned, however, whether the mistake as to the sufficiency of the certificate in that case was not a mistake of law rather than of fact, and so not available to the one making the promise.

A promise to pay in ignorance of facts material to a full understanding of the indorser's rights and obligations will not constitute a waiver although he then knows that payment was not demanded of the maker. Low v. Howard, 10 Cush. 159.

A promise made in absence of knowledge of the fact that no demand for payment was made will not be binding. Low v. Howard, 11 Cush. 268; Arnold v. Dresser, 8 Allen, 435.

Subsequent acknowledgment and promises made under ignorance of the fact of neglect of due demand of the law arising from such negligence was not obligatory. Thornton v. Stoddert, 1 Cranch, C. C. 584.

To bind the indorser he must either have promised to pay or acknowledged that he was liable with a knowledge of the facts as they really existed. Kennon v. McRea, 7 Port. (Ala.) 175.

Rights will not be waived by a promise made in ignorance of material facts affecting them. Martin v. Winslow, 2 Mason, 241.

A promise to pay in ignorance of the facts which discharge is of no effect. Tickner v. Roberts, 11 La. 14, 30 Am. Dec. 706; Hazelton v. Colburn, 1 Robt. 345; Commercial Bank of Natchez v. Perry, 10 Rob. (La.) 61, 43 Am. Dec. 168; New Orleans Sav. Bank v. Harper, 12 Rob. (La.) 281, 43 Am. Dec 226; Groton v. Dallheim, 6 Me. 476; Hunt v. Wadleigh, 26 Me. 271, 45 Am. Dec. 106; Offit v. Vick, 1 Walk. (Miss.) 99; Baskerville v. Harris, 41 Miss. 595; Norris v. Ward, 59 N. H. 497; Crain v. Colwell, 3 Johns. 384; Griffin v. Goff, 12 Johns. 423; Beekman v. Connelly, cited in 16 Johns. 154; Jones v. Savage, 6 Wend. 658; Hunter v. Hook, 64 Barb. 469; First Nat. Bank of Groton v. Crittenden, 2 Thomp. & C. 119; Richard v. Boller, 6 Daly, 460; Moore v. Coffield, 12 N. C. 247; Lilly v. Petteway, 73 N. C. 358; City Nat. Bank of Dayton v. Clinton County Nat. Bank of Wilmington, 49 Ohio St. 351; Brown v. Lusk, 4 Yerg. 210.

There is not so much unanimity upon the question whether or not a knowledge of the law applicable to the facts is also necessary to effect a waiver. In the cases cited above upon the question of the effect of ignorance of facts it has been assumed that ignorance of law would not excuse.

of continued liability by the drawer and indorser as absolutely fixed their liability; that the promises were made with a full knowledge of all the facts; and the purpose of the notice to the parties to the bill being to prevent any loss by those who are not primarily liable, or liable upon certain conditions, and intended for their protection, they may affirm their liability by a recognition of their obligation to pay, and dispense with the conditions upon which the indorsement was made, the obligation of the indorser being voidable only,—therefore the demurrer to the reply should have been overruled.

This view of the question is sustained by the decided preponderance of authority, both in the text-books and the reported cases. Mr. Daniel says that "the conditions upon which the indorser becomes liable is not a strict and absolute condition precedent, as conditions in contracts construed by the common law; the obligation of the indorser is regarded rather as voidable by nonfulfillment of these conditions, than as actually avoided. If he chooses to affirm rather than disaffirm his liability, it can injure no one to leave him to the exercise of his discretion. Section 1147.

Again, "It makes no difference, when the promise to pay is made with knowledge of the laches, that the party making it did not know of its legal effect as a waiver, or that he had a legal defense to the bill or note, for it is a maxim that ignorance of the law excuses no one," etc. Section 1148. In Yeager v. Farwell, 13 Wall. 6.

And the weight of authority is in favor of that rule although perhaps more cases have actually decided that the law as well as the facts must be known than have decided the contrary.

In Warder v. Tucker, 7 Mass. 449, it is said although defendant when he first received notice of the protest of a bill considered himself as liable by law to pay the amount of it, yet his ignorance of the law will not bind him to fulfill an engagement made through a mistake of the law.

But in later Massachusetts cases it was held that ignorance of the law will not excuse. Matthews v. Allen, 16 Gray, 594, 77 Am. Dec. 430.

Ignorance of the legal effect of the failure to make demand and give notice will not affect the validity of the promise to pay as a waiver. Third Nat. Bank of Boston v. Ashworth, 105 Mass. 503.

Whether the promisor knew that he was discharged by the rules of law is immaterial. Morgan v. Peet, 41 Ill. 347.

It is not required to show that the defendant knew that, as matter of law, he was discharged. It is sufficient to show that he knew the facts and the knowledge may be inferred from a variety of circumstances without requiring clear and affirmative proof. Knowledge may be proved in the same way as knowledge of any other fact can be. Hughes v. Bowen, 15 Iowa, 446.

But in other Iowa cases it has been held that the indorser must have known that he was released from the legal obligation to pay. Ballin v. Betcke, 11 Iowa, 204; Freeman v. O'Brien, 38 Iowa, 407; Abbott v. Striblen, 6 Iowa, 197.

So other cases have held that—

To make the promise binding it must be made with full knowledge that the promisor had been legally discharged. Glenn v. Thistle, 1 Rob. (La.) 572.

A promise to pay, made in ignorance of the legal effect of the laches, will not revive the liability of the indorser discharged by laches. Fleming v. McClure, 1 Brev. 428, 2 Am. Dec. 671.

The defendant must know the law as well as the facts at the time of making his promise in order to be bound by it. Spurlock v. Union Bank, 4 Humph. 336; Williams v. Union Bank of Tennessee, 9 Heisk. 441; Seay v. Ferguson, 1 Tenn. Ch. 296.

Sufficiency of promise.

The character of promise or admission which has been held sufficient to revive or continue the liability is shown by the following:

To amount to a waiver of the defense of want of notice and to entitle the holder to recover, notwithstanding the requisite notice has not been given, the promise to pay must be unequivocal and unconditional, or, if conditional, it must be accepted on the conditions and in terms which it involves. And so with an admission or acknowledgment of continued liability, it must appear that the admission or acknowledgment was without equivocation and unclogged by reservations. A promise to secure one half of the note if certain credits were made on it, or to pay one half if liability for the rest was remitted, at the same time stating that there was no legal liability to pay it but that some moral obligation was recognised, which offer is refused, will not suffice to continue liability thereon. Isbell v. Lewis, 96 Ala. 550.

A promise that when the indorsee comes to town he will "set the matter to rights" is sufficient to hold him liable on the note. Anson v. Bailey, Bull. N. P. 276.

If the drawer of a bill for £200 not having received due notice of dishonor states that he does not intend to insist on the want of notice but that he is only bound to pay £70, the whole statement must be taken together and £70 is all that can be recovered. Fletcher v. Froggatt, 2 Car. & P. 569.

A statement by the drawer of a bill of exchange, upon being told that it had not been paid, that "it must be paid," will charge him on the bill. Rogers v. Stevens, 2 T. R. 713.

The promise of payment need not be express in order to bind the indorser in case he knows at the time it is made that he has been discharged by the laches of the holder. Reynolds v. Douglass, 37 U. S. 12 Pet. 497, 9 L. ed. 1171.

If when called upon for payment the indorser said that in a few days he would arrange it, this amounts to an unconditional promise to pay the note which cannot be repudiated at any subsequent period. Sigerson v. Mathews, 61 U. S. 20 How. 496, 15 L. ed. 989.

A statement by the indorser after the maturity of the note that "I am responsible for that note" dispenses with the necessity of proving demand and notice. Curtis v. Sprague, 51 Cal. 239.

Where the indorser with full knowledge of the fact that there has been no demand for payment or notice of nonpayment enters into negotiations for the settlement of the claims, and finally executes a note for the amount, this will constitute a waiver. Lomax v. Smyth, 50 Iowa, 228.

An express promise is not necessary. It is sufficient if by reasonable intendment the language imports or implies a promise to pay. Zacharie v. Kirk, 14 La. Ann. 496.

If after sufficient opportunity to ascertain the regularity of the notice an indorser promises to pay an indorsee who has taken up the bill, subsequently receives, and proves it against the insolvent estate of the maker, and receives a dividend on it he will be bound by his promise unless he can show that it was made under a mistake of fact. Martin v. Ingersoll, 8 Pick. 1.

A statement by the indorser that he expects to have to pay the note but requests the holder to try to collect it from the maker will be a waiver. Parsons v. Dickinson, 23 Mich. 56.

The Supreme Court of the United States, following the doctrine of the text-books, held the indorsers liable upon their promise to pay where neither protest nor demand of payment had been made. Yeager & Co., of St. Louis, had indorsed the paper of Kerchoff for $15,000, and the paper was held by Farwell & Co., of Boston, who had advanced the money and were the payees. On the 18th of October, 1867, the last day of grace, Yeager & Co. wrote a letter to Farwell & Co. to the effect that Kerchoff would be unable to meet the paper at its maturity but they (Yeager & Co.) would hold themselves "responsible for the payment of the note, and will see that it is done at an early day." This letter was not received in Boston by the payees until after the time for protest had passed, and Yeager & Co., refusing to pay, were sued as indorsers by Farwell & Co., and the court, through *Mr. Justice* Davis, held that Yeager & Co. were estopped from alleging a want of demand and notice of nonpayment.

That case could be distinguished from the one before us in many of its features, but the court in its opinion referred to the case of *Sigerson* v. *Mathews*, 61 U. S. 20 How. 496, 15 L. ed. 989, in which it is said: "If the indorser, with full knowledge of the fact that no demand has been made, or notice given, makes a subsequent promise, he is liable, and cannot, when sued, set up as a defense the want of such demand and notice, and to the same effect are the decisions of the

Actively procuring a third person to purchase the note while concealing the fact of discharge by laches will be a waiver of the laches in favor of the purchaser. Libbey v. Pierce, 47 N. H. 309.

In Keeler v. Bartine, 12 Wend. 110, it is said that this (the New York) court is perhaps more strict in regard to the effect given to the promise to pay the note operating as a waiver of proof of notice of dishonor or laying the foundation for the presumption that notice has been given than many of the cases in England would seem to require. But in that case it was held that where the promise to pay was after judgment after contestation of the suit the jury would be warranted in finding a demand and notice, or that the acknowledgment was made with full knowledge of laches if any existed.

Suffering judgment by default will bind the indorser. Winn v. Levy, 2 How. (Miss.) 902.

Confession of judgment is prima facie evidence that the legal steps were taken to charge the judgment debtor, or that there was a waiver; but this may be explained or rebutted by the circumstances of the case. Richter v. Selin, 8 Serg. & R. 425.

There must be an express promise on the part of indorser to pay or some unequivocal concession of liability from which a promise may be inferred. Baer v. Leppert, 12 Hun, 516.

Giving a note for the amount of the bill with full knowledge of the circumstances which might affect liability will be a waiver of the laches. Bank of Hamburg v. Wray, 4 Strobh. L. 87, 51 Am. Dec. 659.

A promise to furnish a boiler in part payment and to pay every cent binds the indorser, also a promise to give a new note for the amount, although the indorser afterwards refuses to do so. Fell v. Dial, 14 S. C. 247.

A formal acknowledgment of liability need not be added to the promise to pay to constitute a waiver of notice when the proof shows full knowledge of discharge at the time the promise is made. Bogart v. McClung, 11 Heisk. 105, 27 Am. Rep. 737.

Conduct from which notice may be inferred.

Where after the dishonor of a note the indorser requested that the account of it might be kept in a particular way, and subsequently, when a statement of the account was sent him, he made no objection except that a certain credit had not been given, the court held that this was an acknowledgment of liability to pay the note and thereby an admission that notice had been given. Bank of United States v. Lyman, 1 Blatchf. 298, 20 Vt. 666.

Proof of a direct or conditional promise to pay after a bill has become due, or of a partial payment or of an offer of a composition, or of an acknowledgment of liability to pay, has been held to be competent evidence to go to the jury of a regular notice of the dishonor of the bill, and to warrant the jury in presuming that a regular notice had been given. Hyde v. Stone, 61 U. S. 20 How. 170, 15 L. ed. 874.

Where there is no proof that the notice was received the jury may be permitted to infer notice from the fact that a payment was made upon the bill and that in a conversation as to the liability upon it no objection was made that the notice was not sufficient. Horford v. Wilson (1807) 1 Taunt. 12.

Defendant's admission that he has received a notice of dishonor will dispense with the proof of the giving of a regular notice. Norris v. Salomonson, 4 Scott, 257, 3 Hodges, 8, 1 Jur. 55.

Putting a refusal to pay on other grounds than that of failure to give notice may go to the jury as evidence that the notice was sufficient. Curieux v. Corfield, 1 Q. B. 814.

So objection to paying the bill on the ground of fraud will be sufficient to go to the jury as evidence of the giving of due notice. Wilkins v. Jadis, 1 Moody & R. 41, 2 Barn. & Ad. 188.

In Booth v. Jacob (1834) 3 Nev. & M. 351, the court held that a letter containing some ambiguous statements as to the bill was properly submitted to the jury as evidence upon the question whether or not due notice had been given.

If after the declaration was filed the defendant applied for further time to pay the bill the court held that it should have been left to the jury to say whether under all the circumstances of the case defendant had notice, at the time of application for indulgence, that there had been no due presentation. Hopley v. Dufresne, 15 East, 275.

If the acceptor sends the money to the drawer to take up the bill, and the latter after the dishonor of the note says he is going to keep it, that the acceptor owes him more, and directs the holder to insure the acceptor on the bill, this may be evidence of due notice having been given. Jackson v. Collins, 17 L. J. Q. B. 142.

A statement in a letter, "You know I meant to call on you immediately with the money,"—is sufficient evidence from which a presentment and notice of dishonor may be inferred. Mills v. Gibson, 16 L. J. C. P. 249.

A declaration by a person sought to be charged on a bill of exchange to a person not the holder, that he should pay the bill and should not avail himself of the informality of notice, is evidence from which a jury may infer that the defendant had due notice. Brownell v. Bonney (1841) 1 Q. B. 39, 4 Perry & D. 523, 5 Jur. 6.

Insufficient promise or conduct.

A mere admission that the note would have to be paid, not shown to have been made with full knowledge of the discharge, is not sufficient to charge a discharged indorser. Bosson v. Carrol, 12 L. R. A. 727, 90 Tenn. 90.

The promise is not sufficient unless made to the holder or his agent and the one making it knows

courts in this country generally. Applying the principles of these decisions to the admitted facts of this case, there is no difficulty in charging the indorsers."

While this court recognizes the importance of uniformity in judicial utterances affecting the liability of parties to commercial paper, we are not disposed to follow those authorities on the question before us. The tendency of legislation in this state, as well as the decisions of this court, is to relieve parties who stand in the light of mere sureties on written obligations, and are released from continued liability based upon verbal promises subsequently made.

There is no doctrine more firmly established than that negotiable paper, when dishonored, requires actual protest and notice to those who are the mere accommodation indorsers or drawers in order to hold them responsible. This is the rule of the lawmerchant, and applicable to notes discounted in bank and placed on the footing of foreign bills by our statute. And to recognize a doctrine that in effect dispenses with the performance of conditions by the holder upon which the indorser agrees to become bound, and hold him liable upon a subsequent promise to pay, although released, destroys the virtue of commercial paper, and places the indorser at the mercy of those who, in great commercial transactions, are seeking to hold those liable who have been once released, upon the plea that the laches of the holder

that by law he is discharged from all liability. Allwood v. Haseldon, 2 Bail. L. 457.

A mere request not to press the maker of the note will not amount to a waiver of neglect to make the proper demand and give the proper notice. Whittier v. Collins, 15 R. I. 90.

The indorser's consent to the application upon the note of a demand which he has against the holder without notice of the fact of laches is not sufficient to bind him to the payment of the note. Buckley v. Bentley, 42 Barb. 650.

If security is taken after the laches it will not amount to a waiver. Otsego County Bank v. Warren, 18 Barb. 290; Gawtry v. Doane, 48 Barb. 148.

A statement by the indorser to a third person in speaking of the bill, on which he is sought to be held, and others, that he would take care of the bills and see them paid, is not sufficient to charge him as upon a new promise. Miller v. Hackley, 5 Johns. 375, 4 Am. Dec. 372, reversing Anthon, N. P. 68.

A conditional promise not shown to have been made with a full knowledge of the facts is not sufficient to constitute a waiver. Craig v. Brown, 3 Wash. C. C. 506.

An offer to substitute a new note for the dishonored one not shown to have been made with full knowledge of the laches is not sufficient to charge the indorser on the note. Sussex Bank v. Baldwin, 17 N. J. L. 497.

A promise to give collateral security for the promisor's liability as indorser is not sufficient to raise a presumption of due demand and notice. Carter v. Burley, 9 N. H. 558.

A mere statement that the note would be paid is not sufficient to charge the indorser. Creamer v. Perry, 17 Pick. 332, 27 Am. Dec. 297.

That an indorser who, supposing a regular demand and notice to have been made and given, and believing himself chargeable, takes measures for his indemnity against his supposed liability, will not be sufficient to charge him if he had been discharged by failure to make demand and give the notice. Tower v. Durell, 9 Mass. 332.

The mere statement that the indorser had been very unfortunate in indorsing the note, that the estate of the maker owed him money and that he had no means of paying it but that source, will not be considered as a promise to pay which will be binding on him. Vance v. Depass, 2 La. Ann. 16.

A promise to pay, by one partner after the dissolution of the firm, will not bind the other. Hart v. Long, 1 Rob. (La.) 83.

An offer to indorse a note of the maker for the same amount is not a waiver of notice. Laporte v. Landry, 5 Mart. N. S. 359.

Proof of statements by the indorser to the effect that "he had dried fruit with him and would pay the notes when he sold it," and that "he felt himself bound for the payment,"—do not show such an unqualified promise as the law requires to render him liable. Campbell v. Varney, 12 Iowa, 43.

A discharged indorser does not revive his liability by simply advising the holder not to commit the maker to prison. Prentiss v. Danielson, 5 Conn. 175, 13 Am. Dec. 52.

A mere statement of the party sought to be charged, that he would rather pay the note than be sued, will not be sufficient to make him liable in the absence of due demand and notice. Keyes v. Fenstermaker, 24 Cal. 329.

That the indorser said to a third person after the maturity of the note that the fact of notice not having been given at the proper time would make no defense with him, that he would do what was right, is not a sufficient waiver of demand and notice to fix the liability of the indorser. Olendorf v. Swartz, 5 Cal. 480, 63 Am. Dec. 141.

A letter giving an account of the writer's circumstances and containing the statement that under such circumstances he cannot give a bill for the amount, will not amount to a waiver of a want of notice. Sherrod v. Rhodes, 5 Ala. 663.

A statement by an indorser to a third person after suit has been brought that he is ready and willing to pay the debt if he knew the amount of the costs does not dispense with evidence of due demand and notice or of knowledge of dishonor and the want of demand and notice at the time the statement was made. Gassaway v. Jones, 2 Cranch, C. C. 334.

Statements by the indorser that he would see the maker and subsequently that he had seen the maker who said he would pay, accompanied by a request not to crowd him, do not constitute either a promise by the indorser to pay or evidence of waiver of notice or admission that notice had been duly given. Britton v. Milsom (1892) 19 Ont. App. Rep. 96.

Proof that the drawer of a bill of exchange advanced money to the indorser to take up the bill when sued by the second indorsee is not sufficient to charge the drawer with the payment of the note. Holmes v. Staines, 3 Car. & K. 19.

When due notice had not been given but the party sought to be charged was arrested for the debt and while under arrest said to the bailiff that "it was true the note had his name on it" though he wished for time to pay it, *Lord* Kenyon ruled that when a person is arrested and at the time ignorant of his rights, or whether he is by law bound to pay the demand or not, and under such circumstances makes any confession and seemingly admits the demand, such admission should not be allowed to be given in evidence against him. Rouse v. Redwood (1794) 1 Esp. 156.

A mere statement of inability to pay, with the addition, "had circumstances been different you may rest assured that no application would have been needed," is not sufficient to establish a waiver.

redounds at last to his benefit, if he can establish a promise on the part of the indorser, although released from the payment of the dishonored paper.

There is no rule of commercial law more rigidly applied than that requiring notice of protest to those who are the mere indorsers of negotiable paper, and there is but little reason, it seems to us, for dispensing with this rule, or nullifying the conditions upon which the indorser becomes and is to remain bound, for the purpose of releasing the holder from the effect of his own laches. When the question of a want of notice is in issue, it would be competent to show a subsequent promise to pay, as a circumstance showing that the party had received notice, but to make such a promise conclusive, or a waiver of the right to a notice, is a doctrine in which we cannot concur.

In this case the reply alleges the manner in which the notice was given, and, conceding the doctrine to be that the general averment of due demand, protest, and notice is sufficient when the pleader attempts to set forth the mode in which notice was given, and the facts stated are not sufficient to charge the indorser, the pleading should be held bad on demurrer, and the averment of a subsequent promise to pay, being a mere matter of evidence, will be considered only to the extent that it revives the original obligation to pay, and to this doctrine we cannot assent. If the promise had been made upon the considera-

Lecaan v. Kirkman (1859) 6 C. B. N. S. 929, 6 Jur. N. S. 17.

A promise to pay a bill if duly presented is not a promise to pay if afterwards presented. Penn v. Poumeirat, 2 Mart. N. S. 544.

Conditional promise.

There seems to be a distinction as to the effect of a conditional promise between cases of waiver and cases of presumption of presentment and notice of dishonor. To constitute a waiver and hold the promisor liable on his promise the condition must be accepted.

An offer of part of the face of the note which is unaccepted, accompanied with a refusal to state whether or not there is an intention of taking advantage of the discharge, will not operate to bind the indorser. Long v. Dismer, 71 Mo. 452.

An unaccepted offer to take up the old note and give a new one in place of it will not constitute such a promise as to render the indorser liable upon it. Agun v. M'Manus, 11 Johns. 180.

An offer to give a new note is not sufficient unless accepted. Sice v. Cunningham, 1 Cow. 397.

An offer, after arrest, to give a note for the amount, if rejected, will not be sufficient. Cumming v. French, 2 Campb. 106, *note*.

The acceptance of a conditional offer makes it absolute. Holdsworth v. Dimsdale, 24 L. T. N. S. 860, 19 Week. Rep. 798.

An unaccepted offer to pay in confederate money will not be binding on the promisor. Tardy v. Boyd, 26 Gratt. 631.

Payment of part of the claim in depreciated paper is not such an acknowledgment and promise to pay as will waive failure to give the proper notice. Newberry v. Trowbridge, 13 Mich. 279.

In one case it was held that an offer to pay a part of the amount due will amount to a waiver. Shaw v. McNeill, 95 N. C. 535.

And in Margetson v. Aitken, 3 Car. & P. 338, where to dispense with proof of notice of dishonor proof was offered that the indorser offered to pay a certain percentage of the face of the bill, *Lord* Tenterden said that he was of opinion that it was enough to dispense with absence of notice of dishonor.

But in most cases of conditional offers which were not accepted the offer was treated simply as evidence that due demand and notice occurred so that the indorser was not discharged.

In Dixon v. Elliott, 5 Car. & P. 437, where to dispense with proof of notice of dishonor it was proved that the person sought to be charged had said that if the defendants would take ten shillings in the pound upon the bills he would secure them, the court held that this was sufficient.

If the offer to compromise is accepted but afterwards fails because of defendant's failure to carry out his part of it the offer may be evidence of continued liability on the note. Brush v. Hayes, 1 Ir. L. Rep. 327.

Effect of waiver.

If the proof is satisfactory that the defendant under a knowledge of all of the circumstances absolutely promised to pay, he is incontestibly bound by his promise. But if his engagement was of a conditional nature that he would pay when the protest was transmitted; or if any material fact was unknown to him at the time of making the promise,—the verdict should certainly be in his favor. Donaldson v. Means (1791) 4 Dall. 101.

The admission by the indorser of liability to pay after knowing of his discharge will make him liable. Morris v. Gardner, 1 Cranch, C. C. 218.

An express waiver of notice of nonpayment is equivalent to an admission that the note has been presented or need not be presented. Matthey v. Gally, 4 Cal. 62, 60 Am. Dec. 595.

A recovery can be had as upon an account stated where the indorser after discharge, and the holder meet to compute the amount due, after which he promises to pay it on a certain day or give his note for the amount. Smith v. Curlee, 59 Ill. 221.

A promise by the drawer to pay with notice that payment was not demanded of the indorsee at maturity will bind him. Cram v. Sherburne, 14 Me. 48.

A promise to pay a check with knowledge that it was lost and had not been presented at bank for payment will render the maker liable for the amount. Scott v. Meeker, 20 Hun, 161.

A promise with knowledge of discharge is binding. Golladay v. Bank of the Union, 2 Head, 57; Ford v. Dallam, 2 Coldw. 67.

In Hopes v. Alder, 6 East, 16, *note*, where the report of the case shows that notice of the dishonor had been given by the indorsee but had not been given by the holder, the indorsee at a subsequent meeting between the parties, the drawer said he would see the bill paid; counsel argued that the subsequent promise to pay for which there was certainly an equitable consideration put an end to any doubt as to the right to recover and the court ruled that the subsequent promise was decisive and a rule to set aside the verdict for plaintiff must be discharged.

If an indorser has neglected to demand of the drawer in a convenient time a subsequent promise to pay by the indorser will cure these laches. Lord Raymond, *Ch. J.*, in Haddock v. Bury, 7 East, 236, *note*.

Effect of payment or part payment.

Part payment of the note by the indorser will bind him to full liability on the note. Knapp v. Runals, 37 Wis. 135.

Part payment by the indorser, not explained or qualified by any accompanied circumstances, is a sufficient waiver of notice of dishonor, but if it is

tion that no suit would be instituted against the parties to the bill, the promise would be binding, and upon this promise an independent action could be maintained. No such fact is alleged even in the reply, or any facts connected with the promise that would work an estoppel. It is alleged only that, the promise having been made, the plaintiff forbore to sue. No loss or injury is alleged by reason of the promise. There is no allegation that the promise was made on condition that no suit would be brought on the paper. The payor, Walden, was insolvent, and the appellant has a judgment against him for the debt. A promise to pay after the maturity of the paper is presumptive evidence that demand was made and notice duly given, and would support a recovery, if there was no evidence to the contrary, or, rather, the question would go to the jury upon the issue made; but in this case the notice was not duly given, as appears from the reply of the plaintiff.

This court, in the case *Lawrence* v. *Ralston*, reported in 8 Bibb, 104, decided the question involved here. In that case it appeared that Aaron Burr, while on a visit to the present capital of the state, on the 19th of December in the year 1806, drew a bill of exchange on George M. Ogden, a merchant

shown that the payment was made as agent of the maker although it was credited on the note as payment by the indorser there will be no waiver. Whitaker v. Morrison, 1 Fla. 29, 44 Am. Dec. 627.

The payment of the interest in arrear upon the notes by the indorser will revive liability although at the time the person making the payment did so he protested that he was not liable and the payment was made under threats of suits upon other claims against him in case he did not pay. Sigourney v. Wetherell, 6 Met. 555.

Partial payments after maturity will be presumptive proof that proper demand was made and notice given. Bibb v. Peyton, 11 Smedes & M. 275.

Payment of part of the amount by one of two indorsers where the other has received notice is a waiver of want of notice as to himself. Sherer v. Easton Bank, 33 Pa. 134.

In Levy v. Peters, 9 Serg. & R. 125, 11 Am. Dec. 679, in which the suit was against the drawer of a check on which there was a credit of a part of the amount due and demand made only for the balance, the court held that it would not be sufficient for the plaintiff to give credit for part; he should prove the payment. For if the bare giving of credit was sufficient the holder of the bill who had been guilty of laches might always get over it by giving credit for a small payment. In general there cannot be a recovery without proof of a demand and notice to the drawer that payment had been refused, but there are exceptions to this general rule. Whenever the drawer acknowledges himself to be liable to pay, the necessity of proving a demand on the drawee and his refusal to pay and notice to the drawer is dispensed with, because such acknowledgment carries with it internal evidence that the drawer knew that due diligence had been used by the holder; or even if it had not that still the drawer confessed he was under an obligation to pay. And it is immaterial whether there be proof of an express promise to pay or of other circumstances from which it may be inferred that the drawer acknowledged himself liable. And I take it that payment of part is such a circumstance. Citing Reed v. Wilkinson, MSS. Whart. Dig. 87.

Without considering here the general question of the right to recover back money paid under mistake, attention is called to the fact that in Chatfield v. Paxton, 2 East, 471, *note*, it seems to be considered that even payment of the bill in ignorance of the fact of the laches is not sufficient to bind the drawer, but he may recover back the amount paid upon discovering the facts.

And it has been decided that if the note is paid under the mistaken belief that notice had been properly given the payment may be recovered back. Lake v. Artisans Bank, 3 Keyes, 278.

If in ignorance that a demand has not been made and notice given the indorser pays the amount to a bank holding the note for collection, he can upon discovering the fact reclaim the money from it. Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86.

But if the payment of the note is made with a full knowledge of the facts the payment cannot be recovered. Evans v. Gale, 17 N. H. 573, 43 Am. Dec. 614.

Right to contradict presumption of notice.

The presumption of notice may be rebutted. Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190.

The defendant may contradict the fact of notice which is presumed from the admission of liability, but the jury is at liberty to disbelieve him and find that the notice was in fact given. Jones v. O'Brien, 26 Eng. L. & Eq. 283.

A promise to pay or part payment cannot be used as presumptive evidence of regular notice where the evidence distinctly shows that notice was not given. Cayuga County Bank v. Bennett, 5 Hill, 236.

Burden of proof.

There are two distinct theories taken in reference to the burden of proof in cases where a waiver is relied on.

On one side it is held that the burden is on the holder to show that the indorser not only waived notice and promised to pay the note but it is also incumbent on him to prove that the indorser made the promise with full knowledge of the fact that he was released from legal obligation to pay it. Ballin v. Betcke, 11 Iowa, 204; Freeman v. O'Brien, 33 Iowa, 407; Abbott v. Striblen, 6 Iowa, 197.

If the promise is made under the belief that the promisor is liable the plaintiff must show that he had knowledge of the facts. Morgan v. Peet, 33 Ill. 281.

The burden of showing that the new promise was with the knowledge of all the facts is on the party seeking to charge the indorser on the bill. Walker v. Rogers, 40 Ill. 278, 89 Am. Dec. 348.

The plaintiff must show that at the time the promise was made the promisor had notice that he was discharged. Harris v. Allnutt, 12 La. 465.

Plaintiff must show knowledge by the indorser that at the time he made the promise no notice had been given to him in order to establish a waiver. Glassford v. Davis, 46 N. J. L. 348.

If laches appears there must be clear proof that defendant knew of it at the time he made his promise in order to hold him liable. Glaser v. Rounds, 16 R. I. 235.

The burden is on the plaintiffs to show that the promise was made with full knowledge of the laches. Sice v. Cunningham, 1 Cow. 397; Baer v. Leppert, 5 Hun, 453; Edwards v. Tandy, 36 N. H. 540; Otis v. Hussey, 3 N. H. 346; Farrington v. Brown, 7 N. H. 271; Newberry v. Trowbridge, 13 Mich. 279; Vanwickle v. Downing, 19 La. Ann. 83; Butler v. Murison, 18 La. Ann. 363; New Orleans & C. R. Co. v. Mills, 2 La. Ann. 824; Blum v. Bidwell, 20 La Ann. 43; Louisiana State Bank v. Buhler, 22 La. Ann. 83; Mitchell v. Young, 21 La. Ann. 279; James v. Wade, Id. 548; Hunt v. Wadleigh, 26 Me. 271, 45 Am. Dec. 108; Spurlock v. Union Bank, 4 Humph. 336.

of New York, requesting him at 120 days to pay Charles Lynch, or order, $700. That paper was indorsed by Ralston to Sebastian, and by Sebastian to Lawrence, the plaintiff in the action. Ralston, after the bill was drawn, and before maturity, descended the Ohio and Mississippi rivers, and before his return the bill was protested. After Ralston's return he was sought to be made liable as indorser of the paper, and defended on the ground that notice had not been given him of the protest or nonpayment. There being no sufficient evidence of notice, it was then attempted to fasten liability upon him on the ground of his promise to pay. This court, in reference to that issue, said: "We think a promise made under such circumstances, not being founded on any valid consideration, induces no legal obligation, and cannot therefore form a sufficient cause of action. It is not denied but that a promise to pay a bill by an indorser, unless accompanied by circumstances repelling the presumption, is an implied admission of due notice having been given." 3 Bibb, 104. This is the extent to which the authorities in this state go, and we think the correct rule on the subject.

In the cases of *Bank of Tennessee* v. *Smith*, reported in 9 B. Mon. 609, and *Landrum* v.

The person sought to be charged must be shown to have had knowledge that presentment was not made at the time he made his promise. Barkalow v. Johnson, 16 N. J. L. 397; United States Bank v. Southard, 17 N. J. L. 478, 35 Am. Dec. 521.

On the other side it is held that an admission of having received due notice must be shown to have been made under a mistake of fact to relieve from liability. Commercial Bank of Albany v. Clark, 28 Vt. 325.

Defendant must show that he was ignorant at the time he made his promise to relieve himself from liability. Nash v. Harrington, 1 Aik. 39.

A promise to pay throws on defendant the burden of showing that proper demand and notice were not made and given. Schmidt v. Radcliffe, 4 Strobh. L. 296, 53 Am. Dec. 678.

The promise throws on defendant the double burden of showing laches and that he was ignorant of it. Loose v. Loose, 36 Pa. 538; Oxnard v. Varnum, 111 Pa. 193, 56 Am. Rep. 255.

If after an avowal that he is discharged the indorser states that he does not intend to take advantage of the default and will pay the note, the burden is upon him to show that he was acting under a mistake of fact. Leonard v. Gary, 10 Wend. 504.

How far knowledge may be inferred.

Affirmative proof of knowledge need not be made. It may be inferred from circumstances. Williams v. Robinson, 13 La. 419.

In the absence of evidence to the contrary the promise will be presumed to have been made with the knowledge that the note had not been protested for nonpayment. Davis v. Miller, 88 Iowa, 114.

Knowledge of the facts may be inferred from the circumstances. Givens v. Merchants Nat. Bank, 85 Ill. 442; Hughes v. Bowen, 15 Iowa, 446.

The jury may presume knowledge from the circumstances in evidence. Hopkins v. Liswell, 12 Mass. 52.

But knowledge that the promisor was released will not be inferred from the mere fact of promise to pay. Davis v. Gowen, 17 Me. 397.

Is question for court or jury.

The question of the conclusion to be drawn from defendant's conduct is for the jury. Ricketts v. Toulmin, 7 L. J. 108.

The question whether certain transactions amount to a waiver or want of demand and notice is for the jury. Union Bank of Georgetown v. Magruder, 32 U. S. 7 Pet. 287, 8 L. ed. 687.

Whether a conversation amounts to a waiver is a question for the jury. Carmichael v. Bank of Pennsylvania, 4 How. (Miss.) 567, 35 Am. Dec. 408.

It is for the jury to say whether or not the words, "You hold the note two or three days and I will make it all right with the bank," were intended as an absolute promise of payment. Glendening v. Canary, 5 Daly, 489.

On the other hand it was held in Massachusetts that though the questions of waiver were originally questions of fact yet having been reduced to a good degree of certainty by practical usage and a long course of judicial decisions they assume the character of questions of law and it is highly important that they should be so made and applied in order that rules affecting so extensive and important a department in the transactions of the mercantile community may become practical and uniform as well as reasonably equitable and intelligible. Creamer v. Perry, 17 Pick. 332, 27 Am. Dec. 297.

So in Missouri it has been said that the question of what will constitute a waiver is for the court. Wilson v. Huston, 13 Mo. 146, 53 Am. Dec. 138.

Effect of statute.

In 1868 a statute was passed in Maine providing that waiver of demand and notice by the indorser must afterwards be in writing to be binding upon him. Thomas v. Mayo, 56 Me. 40; Parshley v. Heath, 69 Me. 90, 31 Am. Rep. 246.

Writing waiver on note.

If the waiver is in express terms made upon the note it will be given effect without proof of extrinsic facts in respect to knowledge of the absence of previous demand and notice. Lockwood v. Bock, 50 Minn. 142.

Promise secondary evidence of a notice actually given.

The admission of liability may not be available if the plaintiff fails to produce the notice of dishonor which it is within his power to do. Bell v. Frankis, 4 Mann. & G. 446, 11 L. J. C. P. 300, 5 Scott, N. R. 460.

Necessity of consideration or writing.

The question was raised at an early period as to how far the new promise required a new consideration or needed to be in writing under the statute of frauds.

Some few cases have held that both were necessary, but the question has been generally either ignored or decided the other way.

In Connecticut it was decided that a promise to pay, made after release and without consideration, has no legal efficacy. Huntington v. Harvey, 4 Conn. 124.

And that a promise by an indorser discharged by laches to pay the note must, under the statute of frauds, be in writing. Peabody v. Harvey, 4 Conn. 119, 10 Am. Dec. 108.

But in Breed v. Hillhouse, 7 Conn. 523, it is stated that a promise to pay is sufficient evidence that the proper notice was given, and that if a party entitled to notice has knowledge of the want of due diligence on the part of the holder of the note and promises to pay the debt, this is a waiver of the want of notice.

In Kentucky it has been held that a bond for the amount given after the discharge may be impeached for the want of consideration. Ralston v. Bullitts, 3 Bibb, 261.

Trowbridge, reported in 2 Met. (Ky.) 281, a distinction is attempted to be drawn between a promise made after protest for nonacceptance and a protest made for nonpayment after maturity. In the case of *Landrum* v. *Trowbridge*, Id., there was a protest for nonpayment, as well as nonacceptance, and while the distinction between the character of the two cases may exist, in so far as it affects the liability of the indorser, we think, and so adjudge, that the subsequent promise to pay is not binding on the indorsers unless supported by a consideration, but that on the issue as to whether notice of protest had been given it is competent to go to the jury to establish that fact, and to this extent only we are disposed to go; but, as the pleadings in this case show that due notice was not given, the promise, if proven, would not avail the appellant. The obligation of the indorser is known to the holder of the bill. His relation to the bill requires the highest degree of diligence on the part of the holder for the protection of the indorser, and when released from liability, having occupied the position of a mere surety, something more than a verbal promise, so easily established when large commercial interests are involved, should be established before that which is dead is brought to life, and the liability continued without any consideration whatever.

The judgment below must be affirmed.

Rehearing denied.

A promise by the indorsers in ignorance of the fact that they are not liable is without consideration and is not binding. Bank of United States v. Leathers, 10 B. Mon. 64.

But it was also held that a promise to pay the bill by an indorser may be an implied admission that he had received due notice of protest, but where it is evident such notice was not given, a promise by the indorser to pay the bill after he was discharged and without any consideration will not sustain an action against him. Lawrence v. Ralston (1813) 3 Bibb, 102.

In the case of a guarantor discharged by laches in which there was no express promise the court said: "Had he made an express promise, I am inclined to the opinion that the result would have been the same,"—that is that there would have been no binding obligation. A moral obligation will support an express promise but here there is no moral obligation. It is not like a waiver of a forfeiture or laches. Vanderveer v. Wright, 6 Barb. 547.

In New Jersey it was held that a promise to pay the bill after the promisor had been discharged by laches is not binding. Philips v. McCurdy, 1 Harr. & J. 187.

But in Patton v. Wilmot, 1 Harr. & J. 477, the court says that the indorser is not liable where due diligence has not been used unless it appears that he subsequently promised to pay the amount of the note to the indorsee.

And in Beck v. Thompson, 4 Harr. & J. 531, it was held that a promise with knowledge of laches will waive it and that rule was followed in Tate v. Sullivan, 30 Md. 472, 96 Am. Dec. 597; Staylor v. Balls, 24 Md. 201.

So in New Hampshire it has been said that a promise to pay after discharge is not binding unless there is a new consideration or knowledge of the fact of the discharge appears. Merrimack County Bank v. Brown, 12 N. H. 320.

Then there are some decisions which while not directly asserting the necessity of consideration may perhaps be regarded as looking in that direction.

If in consideration of money received from the maker the indorser promises to pay the amount of the bill he will be liable whether the promise was made before or after the bill became due since it is made upon an adequate consideration. Cockrill v. Hobson, 16 Ala. 391.

Certain it is that waiver of protest and notice after the paper has been dishonored will not suffice to bind the indorser, and he will be discharged unless a new valid promise to pay is made by him. White v. Keith, 97 Ala. 668.

It will be observed that even in those states which have held a consideration necessary there is divided opinion, and those which have not repudiated the doctrine after once asserting it generally apply the rule of presumption of notice from the promise. The majority of the cases have, however, decided the other way.

The promise is not void for want of consideration or under the statute of frauds for not being in writing. United States Bank v. Southard, 17 N. J. L. 473, 35 Am. Dec. 531.

In Worden v. Mitchell, 7 Wis. 161, in which the agreement to extend the time for demand and notice was made before the note became due, the court, after stating that the waiver could be made before as well as after maturity, says a waiver of demand and notice made by an indorser is not a new contract which must be in writing under the statute of frauds, or which must be supported by a new consideration, but is only a waiver of a condition precedent to his liability.

In Brooklyn Bank v. Waring, 2 Sandf. Ch. 1, 7 L. ed. 488, it is said, "whether upon the ground of waiver, or of a moral obligation which forms a consideration, the consequence is undeniable" that the new promise will sustain an action on the note.

There is no substantial consideration to support such new promise on the part of an indorser to pay a note for which he is neither legally nor equitably liable. The rule, however, is now so firmly established that it cannot be abrogated, although the contract it enforces is not only without consideration, but it is questionable whether it is not a parol agreement to pay the debt of another, and its enforcement therefore in contravention of the statute of frauds. Glassford v. Davis, 36 N. J. L. 348.

In Porter v. Hodenpuyl, 9 Mich. 11, in which the release was claimed because of time given to the principal debtor, the court says that in every case where with knowledge of the facts a surety recognizes his liability and promises to pay the debt such promise is applied to the original debt and requires no new consideration.

In Harrison v. Bailey, 99 Mass. 620, 97 Am. Dec. 68, the court says that a subsequent promise is a waiver, and since in that case evidence of it was admitted only to show a waiver it was unnecessary to consider what validity it would have as a new promise; or whether it would have been sufficient to sustain the action for want of consideration or under the statute of frauds.

No consideration is necessary in order to make a waiver binding. Matthews v. Allen, 16 Gray, 594, 77 Am. Dec. 430; Morgan v. Peet, 32 Ill. 281; Lockwood v. Bock, 30 Minn. 149; Woodman v. Eastman, 10 N. H. 359; Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1.

The payee indorser does not make a new promise within the statute of frauds when he promises to pay after laches on the part of the holder because the debt is his own as well as that of the maker. Uhler v. Farmers Nat. Bank of Bucks County, 64 Pa. 406. H. P. F.

OHIO SUPREME COURT.

Robert KERNOHAN, *Plf. in Err.*,
v.
John MANSS *et al.*

(52 Ohio St. —)

M. executed to eight persons a mortgage to secure eight promissory notes, made to them respectively. The notes were delivered to the several mortgagees, and the mortgage to McG., one of the mortgagees. It was then duly recorded. After record, without objection by the others, McG. took possession of the mortgage and of three of the notes belonging to other mortgagees, for safe keeping. Afterward, and before maturity of any of the notes, McG., claiming to be the owner of the mortgage and of all the notes, for a valuable consideration, received of K., assigned and delivered to him the mortgage and forged copies of all of the notes, with forged indorsements on each, except that on the note purporting to be made to him the indorsement was genuine. The assignment purported, also, to transfer the notes secured by the mortgage. McG. retained in his own possession the genuine notes. Afterward, but before the maturity of the note made to McG., he, for a valuable consideration, indorsed and delivered the genuine note to M., and M., informing them that the note, with others, was secured by mortgage on certain real estate. Before taking the note, M. and M. had the records examined and found that the statements of McG. respecting the mortgage security were correct. He also stated that he, with the consent of the other mortgagees, was holding the original mortgage for himself, and as custodian for the others. They did not ask to see the original mortgage, and did not see it. K. and M. and M. acted in entire good faith, neither having a suspicion that a fraud was contemplated by McG.

Held: On foreclosure of the mortgage, the debt to M. and M. is entitled to preference over that of K.

(June 11, 1895.)

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas establishing the priority of defendants in error in a mortgage upon the estate of Gano Martin, deceased, in which mortgage the plaintiff in error claimed to be entitled to a prior lien. *Affirmed.*

Statement by **Spear, J.**:

The action below was a proceeding in the probate court of Hamilton county for the sale of lands of Gano Martin, deceased, to pay debts, in which the plaintiff in error and the defendants in erorr were cross-petitioners, each claiming to hold a lien prior to that of the other upon the lands in question. That court found in favor of John and Louis Manss, from which Kernohan appealed. On the trial in the common pleas the following undisputed facts appeared, viz.:

On January 1, 1879, Gano Martin, the then owner of the real estate sold in this action, being in feeble health, and desiring to make some sort of settlement of his estate before he died, providing as well for his children and widow as for certain creditors (amongst whom was one William R. McGill, to whom he was then indebted in the amount of $7,602.72), executed a mortgage deed covering his said real estate; the consideration named was $16,113.69; the grantees were said McGill and seven others. The mortgage was conditioned to secure the payment of eight promissory notes, each dated January 1, 1879, payable five years after date, with 8 per cent interest, payable annually, except one on which no interest was payable until after Gano Martin's death.

The mortgage deed was then delivered to McGill, with the consent of the other mortgagees, he (McGill) stating he would put it in his safe for safe keeping. It was left for record January 20, 1879, with the recorder of Hamilton county, and duly recorded, and thereafter without objection by the other mortgagees, remained in the possession of said McGill until delivered to said Kernohan as hereinafter stated. The note for $7,602.72 was also delivered to McGill at the same time, and the notes to order of three other mortgagees were also delivered, unindorsed, to McGill, at the same time, for safe keeping. Some time afterwards one of the mortgagees (George Martin) sold his note to William R. McGill, and, so far as appears, McGill never owned, or had any interest in, any of the other notes. The note for $7,602.72 remained in the possession of McGill until delivered to John and Louis Manss as hereinafter stated.

On the 8th day of February, 1879, being prior to the maturity of the notes secured by said mortgage, Robert Kernohan made a loan of $11,000 to McGill, who, amongst other collateral, transferred and assigned to Kernohan the said mortgage, and what purported to be all the notes secured thereby. At the time of the transfer McGill was the owner and holder of the genuine note for $7,602.72 secured by said mortgage. This transfer was made in the following manner: before the payment of the $11,000, McGill produced to Kernohan, and his attorney, the original mortgage deed from Gano Martin, and the following assignment was indorsed thereon:

"For value received I hereby assign and transfer to Robert Kernohan, his representatives and assigns, the within mortgage and the notes secured thereby.

"February 8, 1879. William R. McGill."

The assignment was then and there signed by William R. McGill. At the same time eight certain papers answering in form to the eight notes described in the mortgage, including one for $7,602.72, were produced

*Headnote by the COURT.

NOTE.—The general subject of the priority of notes falling due at different times and secured by the same mortgage is treated in a *note* to Horn v. Bennett (Ind.) 24 L. R. A. 800, also in Nashville Trust Co. v. Smythe (Tenn.) 27 L. R. A. 668.

The present case sharply illustrates the relation of negotiable notes to a mortgage securing them, on which see also *note* to Lime Rock Nat. Bank v. Mowry (N. H.) 13 L. R. A. 294.

by said McGill as the original genuine notes secured by said mortgage; the said papers were at the time they were produced, indorsed in blank with the name of the payees thereof, except that for $7,602.72, which was indorsed as hereafter stated. At the same time he signed the said assignment on the back of the mortgage. McGill indorsed each of said papers (including that for $7,602.72 drawn to his own order, which hitherto had been unindorsed), with his own signature, and the words "protest waived," as appears thereon; and thereupon the said papers and mortgage were delivered to Kernohan, with the other collateral, and said sum of $11,000 paid. The mortgage so assigned and delivered was the genuine mortgage deed executed by Gano Martin and wife; but the papers purporting to be the notes secured thereby, and so delivered and indorsed by said McGill, are each and every one of them forgeries (except the indorsements of McGill thereon), though they were delivered to Kernohan by McGill as genuine.

Kernohan received the mortgage, and what purported to be the real notes, as above, duly indorsed and delivered to him, in good faith and for value, supposing said notes to be genuine, and they remained in his possession until after the death of McGill, which took place July 2, 1884, and until this action was begun. Kernohan did not know, or have any cause to know, of such forgery, and that said notes were not genuine, until after the death of McGill.

Interest on said loan of $11,000 was paid by McGill up to his death. The amounts realized from the other collateral, together with any amount that has been, or may be ordered, paid to him in this case, will not discharge said debt of $11,000. The estate of said Gano Martin is insolvent. The assignment on the mortgage was not left for record or entered until April 25, 1884.

On or about April 1, 1879, being after the transaction with Kernohan, but prior to the maturity of said note for $7 602.72, the defendants John and Louis Manss loaned William R. McGill the sum of $4,000, taking his note dated May 8, 1879, for same, McGill at that time transferring to them by indorsement and delivery, as collateral for said loan, the original genuine note for $7,602.72, made by Gano Martin, which, notwithstanding his transaction with Kernohan, he had retained possession of. John and Louis Manss did not learn until a week or ten days after McGill's death of any other note purporting to be of the amount of the note so indorsed and delivered as collateral. At the time of the transaction between McGill and the Manss brothers, McGill stated that the note was secured by a mortgage; that it was given to secure other notes, to other payees, and that he, by and with the consent of all the other mortgagees, was holding the mortgage, for himself and as custodian for the other holders of notes secured by the mortgage, and also told them that he thought the mortgage notes safe. Before loaning the money they had an examination made of the records which showed that the mortgage was as represented, and that there was no other mortgage against the property; they did not ask McGill to let them see the mortgage deed, nor did they at any time see it, but relied upon McGill's statement that he had it.

They, before and after the maturity of the note, made other advances to McGill to the extent of $11,300 additional to said sum of $4,000, and also received other collateral, it being agreed with McGill at the time said other advances were made, that the note for $7,602.72, together with the other collateral, should stand as security for all the advances. Some of the other collateral were known by Manss Bros. to be mortgage notes; but in no instance did they require the production of the mortgage deed securing the same, again relying upon McGill's statements to them. They have not been able to realize upon any of the said other collateral, as in each case the mortgage notes, and other instruments, are claimed to be forgeries.

There is no question as to the good faith of either Kernohan or the brothers Manss.

Upon these facts the court held that John and Louis Manss were the owners and holders of the genuine note for $7,602. 72, given by Martin to McGill, that it was secured by the mortgage, and was the first lien, and decreed accordingly. On error the circuit court affirmed this judgment, and Kernohan now asks that those judgments be reversed.

Messrs. **Drausin Wulsin and Frank O'Suire,** for plaintiff in error:

A mortgage does not secure the note, or other evidence of indebtedness named in it, as such, but secures the debt or promise to repay, of which the mortgage equally with the note is in evidence.

Fisher v. *Mossman*, 11 Ohio St. 42; *Nichols* v. *Briggs*, 18 S. C. 484; *Nesbit* v. *Worts*, 37 Ohio St. 378; *Kuhns* v. *McGeah*, 38 Ohio St. 468; *Choteau* v. *Thompson*, 8 Ohio St. 427; *Patterson* v. *Johnson*, 7 Ohio, pt. 1, p. 287; *Baily* v. *Smith*, 14 Ohio St. 410, 84 Am. Dec. 385; *Richardson* v. *Wright*, 58 Vt. 367; *Kimberly's App.* (Pa.) 5 Cent. Rep. 460; *Trader's Nat. Bank of Charlotte* v. *Lawrence Mfg. Co.* 96 N. C. 298; *Hoffman* v. *Wilhelm*, 68 Iowa, 510; *Raquet* v. *Roll*, 7 Ohio, pt. 2, p. 70; *Williams* v. *Englebrecht*, 37 Ohio St. 333; *Smith* v. *Smith*, 27 S. C. 166; *Plyler* v. *Elliott*, 19 S. C. 257; *McLaurin* v. *Wilson*, 16 S. C. 405; *Childs* v. *Childs*, 10 Ohio St. 339, 75 Am. Dec. 513; *Stewart* v. *Anderson*, 10 Ala. 504; *Stedman* v. *Gassett*, 18 Vt. 346.

Kernohan, by the transaction of February 8, 1879, became the owner of the note, the mortgage debt and the mortgage security.

Kernohan v. *Durham*, 12 L. R. A. 41, 48 Ohio St. 1; Dan. Neg. Inst. §§ 748, 748*a*; Jones, Mortg. §§ 805, 834.

Kernohan, had he discovered the fraud, could have filed a bill in equity to enforce the transfer by indorsement.

1 Chitty, Bills, 10th ed. 167; *Smith* v. *Pickering*, Peake, N. P. 50; *Arden* v. *Watkins*, 3 East, 317; *Ex parte Greening*, 13 Ves. Jr. 206; *Ex parte Mowbray*, 1 Jac. & W. 428; *Ex parte Hall*, 1 Rose, Bankr. Cas. 14, *note a*.

And such indorsement, when made, would have related back to and taken effect as of the time when the actual transfer took place.

Smith v. *Pickering*, Peake, N. P. 50; *Anonymous*, 1 Campb. 492.

Not only by subsequent indorsement does the indorsee take as of the time when the original transfer took place, but he takes free from equities attaching either prior or subsequent to such transfer.

Watkins v. *Maule*, 2 Jac. & W. 237; *Baggarly* v. *Gaither*, 55 N. C. 80; *Bulkley* v. *Chapman*, 9 Conn. 5; *Philips* v. *Bank of Lewistown*, 18 Pa. 403; *Selfridge* v. *Northampton Bank*, 8 Watts & S. 320; *Burrows* v. *Keays*, 37 Mich. 431.

The written assignment of February 8, 1879, transferred to Kernohan the legal title to the land described in the mortgage.

Raquet v. *Roll*, 7 Ohio, pt. 2, p. 78; *Rands* v. *Kendall*, 15 Ohio, 671; *Heighway* v. *Pendleton*, 15 Ohio, 736; *Frische* v. *Kramer*, 16 Ohio, 124; *Nolan* v. *Urmston*, 18 Ohio, 277; *Childs* v. *Childs*, 10 Ohio St. 344, 75 Am. Dec. 512; *Allen* v. *Everly*, 24 Ohio St. 97; *Ely* v. *McGuire*, 2 Ohio, 223; *Williams* v. *Englebrecht*, 37 Ohio St. 386; *McGuffey* v. *Finley*, 20 Ohio St. 474; *Grant* v. *Ludlow*, 8 Ohio St. 1.

Kernohan paid value, had no notice, is not estopped, was honest, and was guilty of no laches.

Holliger v. *Bates*, 43 Ohio St. 437; *Walker* v. *Dement*, 42 Ill. 281.

It cannot be claimed Manss Bros. have any interest at all in the mortgage debt, as distinguished from the note.

Davies v. *Austen*, 1 Ves. Jr. 247; *Kernohan* v. *Durham*, 12 L. R. A. 41, 48 Ohio St. 1.

Nor can it be claimed Manss Bros. got any legal title to the mortgage security, or, what is the same thing, the land covered by the mortgage.

Swarts v. *Leist*, 13 Ohio St. 419.

A mortgage does not, by reason of its securing a negotiable note, partake of the qualities of said note, and become negotiable.

Ranney v. *Hardy*, 43 Ohio St. 157; *Osborn* v. *McClelland*, Id. 284; *Heller* v. *Meiss*, 1 Cin. Sup. Ct. Rep. 477, 2 Cin. Sup. Ct. Rep. 287; *Timberman* v. *Hawley*, 2 Ohio C. Ct. Rep. 27; *Johnson* v. *Carpenter*, 7 Minn. 176; *Hostetter* v. *Alexander*, 22 Minn. 559; *Scott* v. *Austin*, 36 Minn. 460; *Oster* v. *Mickley*, 35 Minn. 245; *Schmidt* v. *Frey*, 8 Rob. (La.) 435; *Bovligny* v. *Fortier*, 17 La. Ann. 121; *Morris* v. *White*, 28 La. Ann. 855; *Butler* v. *Slocomb*, 33 La. Ann. 170, 39 Am. Rep. 265; *Grassly* v. *Reinback*, 4 Ill. App. 341; *Walker* v. *Dement*, 42 Ill. 272; *Kleeman* v. *Frisbie*, 63 Ill. 482; *White* v. *Sutherland*, 64 Ill. 181; *Haskell* v. *Brown*, 65 Ill. 29; *Bryant* v. *Vix*, 83 Ill. 11; *Towner* v. *McClelland*, 110 Ill. 542; *Scott* v. *Magloughlin*, 133 Ill. 33; *Shippen* v. *Whittier*, 117 Ill. 282; *Tabor* v. *Foy*, 56 Iowa, 539; *First Nat. Bank of Nevada* v. *Bryan*, 62 Iowa, 42.

The assignee, though without notice of the defect, takes subject to all equities existing against the assignor.

Pom. Eq. Jur. § 703.

Such defenses can be set up in Ohio.

Osborn v. *McClelland*, 43 Ohio St. 284; *Re European Bank*, L. R. 5 Ch. 359.

As between Kernohan and Manss Bros., whose title or right to the mortgage security is the stronger, admitting Kernohan got nothing but an equity in the mortgage security, whose equity is superior?

Kernohan's equity arose by reason of his being the owner of the real consideration for the mortgage.

Manss Bros.' equity, if any, arose simply and solely from their ownership of one of the evidences of the debt.

Kernohan's rights are prior in point of time. Kernohan was not negligent; Manss Bros. were. Kernohan is not estopped; Manss Bros. should be. Kernohan had no notice; Manss Bros. were so put on their guard that they could have known of Kernohan's rights, had they inquired.

McGill after the transfer had no longer any interest in the note or mortgage, and was at most only a trustee for Kernohan.

Kernohan v. *Durham*, 12 L. R. A. 41, 48 Ohio St. 1.

By not getting the mortgage, Manss Bros. left it in McGill's power to enter a cancellation of it of record, that would undoubtedly bind them, as against subsequent purchasers of the land.

Swarts v. *Leist*, 13 Ohio St. 419; *Anderson* v. *Sharp*, 44 Ohio St. 260; *Walker* v. *Dement*, 42 Ill. 272.

Relying upon McGill's promises they must take the consequences.

Kellogg v. *Smith*, 26 N. Y. 18.

If Gano Martin could have pleaded Kernohan's equity, we see no reason why Kernohan himself could not come in and set it up.

Osborn v. *McClelland*, 43 Ohio St. 284; *Kernohan* v. *Durham*, 12 L. R. A. 41, 48 Ohio St. 1.

Manss Bros. are not bona fide holders without notice, of the note itself.

Strong v. *Jackson*, 123 Mass. 60, 25 Am. Rep. 19; *Taylor* v. *Page*, 6 Allen, 86; *Crane* v. *March*, 4 Pick. 131, 16 Am. Dec. 329; *Abele* v. *McGuigan*, 78 Mich. 415.

Messrs. **William E. Jones** and **J. J. Glidden** for defendants in error, John Manss *et al.*

Messrs. **T. A. Griffiths** and **O. P. Griffiths** for Rachel Martin, admrx., etc.

Spear, *J.*, delivered the opinion of the court:

The question presented by the record is whether, both parties acting in good faith, one who obtains title to a mortgage given to secure several notes to several persons, by assignment for value by one of the mortgagees, with delivery of the same and a forged copy of one of several notes secured thereby, indorsed by the payee who was then the owner of the genuine note, obtains a lien for money thus advanced on the faith of the security, in preference to the bona fide indorsee for value of the genuine note obtained afterwards, both transactions occurring before the maturity of the note?

It seems to us that the question will be solved by the application of simple and well-established principles. The concession that each party acted in entire good faith removes any necessity for considering equities, and leaves the case to be determined on purely legal grounds.

The following propositions we consider are settled in Ohio:

1. Where a promissory note is secured by mortgage, the note, not the mortgage, represents the debt. The mortgage is, therefore, a mere incident, and an assignment of such incident will not, in law, carry with it a transfer of the debt; on the other hand a transfer of the note by the owner so as to vest legal title in the indorsee will carry with it equitable ownership of the mortgage. And so, if the debt be evidenced by several promissory notes the legal transfer of a portion of the notes carries with it such proportional interest in the security as the notes transferred bear to the whole. *Harkrader* v. *Leiby*, 4 Ohio St. 602; *Swarts* v. *Leist*, 13 Ohio St. 419; *Fithian* v. *Corwin*, 17 Ohio St. 118; *Allen* v. *First Nat. Bank of Xenia*, 28 Ohio St. 97; *Holmes* v. *Gardner*, 50 Ohio St. 167, 20 L. R. A. 829.

2. Being but an incident of the debt, the mortgage remains, until foreclosure or possession taken, in the nature of a chose in action. Where given to secure notes it has no determinate value apart from the notes, and, as distinct from them, is not a fit subject of assignment. And where the notes are legally transferred, the mortgagee, and all claiming under him, will hold the mortgaged property in trust for the holder of the notes. *Jordon* v. *Cheney*, 74 Me. 359; Jones, Mortg. 818; Pom. Eq. Jur. § 1210.

3. All notes payable to any person or order are negotiable by indorsement thereon so as absolutely to transfer and vest the property thereof in each and every indorsee or holder successively. Such indorsee, or holder, may, in his own name, institute and maintain an action thereon against the maker. Rev. Stat. §§ 3171, 3172.

4. A holder of negotiable paper who takes it before maturity for a valuable consideration in the usual course of trade, without knowledge of facts which impeach its validity, holds it by a good title. To defeat a recovery it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect, it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. Nor does the note lose its commercial character when secured by mortgage. *Johnson* v. *Way*, 27 Ohio St. 374; *Kitchen* v. *Loudenback*, 48 Ohio St. 177.

Applying these rules to the facts, the following conclusions seem to result, viz.:

Kernohan, by the assignment of the mortgage, took the legal title to it so far as the same was owned by McGill, and an equitable right in the $7,602.72 note. He did not take, nor did McGill intend to transfer to him, any legal title to the note, for McGill kept, and intended to keep, that in his own possession, unindorsed, and subject to his continued control. Such rights as Kernohan took he might assert as against McGill, but John and Louis Manss alone can recover on the note. They, by their purchase and the indorsement to them by McGill, took a full title to it as against the world, together with the equitable title to the mortgage in whosesoever hands it might be. The one has the legal title to the incident, with an equitable right in the debt; the other the legal title to the debt, together with an equitable title to the incident. As both cannot have precedence the weaker must give way to the stronger. The legal title to the incident must be subordinated to that which is superior, viz.: the legal title to the debt, although the holder of the incident acquired his right first. John and Louis Manss were, therefore, entitled to the proceeds of the mortgaged lands.

The case of *Kernohan* v. *Durham*, 48 Ohio St. 1, 12 L. R. A. 41, is relied upon by plaintiff in error. We think it does not support his contention. In that case Coddington took by indorsement the genuine note after due. Kernohan took an assignment of the mortgage, which assignment also purported to transfer the note. This was not only before the transfer of the note to Coddington, but before the note was due. The holding is that, as between Kernohan and McGill (the payee), the former took an equitable title to the genuine note, and hence, as Coddington's title was acquired after the note had been dishonored, he could take no better right than his indorser had. The note being past due he was put upon inquiry, and was chargeable with whatever knowledge due inquiry would have elicited. The vital difference between the position of the holder of the note in that case and in this is, that, while Coddington took his title after due and hence was charged with all infirmities, John and Louis Manss being indorsees and purchasers for value in the ordinary course of trade, before due, took good title as against the world.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Carl SCHROEDER
v.
FLINT & PERE MARQUETTE R. CO., Impleaded, etc., *Plff. in Err.*

(.....Mich.....)

The boss or foreman of a gang of men unloading and leveling dirt on a railroad, who is under the immediate control of a railroad official who is often present, sometimes daily, directing the work, is a fellow servant of a member of the gang who is injured by the foreman's failure to give notice that the train is about to move, whether he had authority to hire and discharge the men under him or not.

(December 22, 1894.)

ERROR to the Circuit Court for St. Clair County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries caused by the negligence of defendant's servants for which it was alleged to be responsible. *Reversed.*

The facts are stated in the opinions.

Messrs. **Hanchett, Stark & Hanchett,** for plaintiff in error:

The plaintiff should have exercised care to avoid getting upon the cars, or attempting to get upon the cars, while they were being moved, or while they were likely to be moved, so as to endanger his safety in getting upon them.

Cousins v. *Lake Shore & M. S. R. Co.* 96 Mich. 386; *Blair* v. *Grand Rapids & I. R. Co.* 60 Mich. 125; *McCaslin* v. *Lake Shore & M. S. R. Co.* 93 Mich. 553; *French* v. *Detroit, G. H. & M. R. Co.* 89 Mich. 537; *Werbowlsky* v. *Fort Wayne & E. R. Co.* 86 Mich. 236; *Lake Shore & M. S. R. Co.* v. *Bangs*, 47 Mich. 470.

It was the plaintiff's duty to exercise care in informing himself of the circumstances, and in doing that he was bound to exercise the care of a reasonable, prudent, and cautious man, and if he neglected to inform himself and to take into account the circumstances as they were, so that by such omission he was negligent or careless, that fact itself would be contributory negligence.

Lake Shore & M. S. R. Co. v. *Bangs, supra; Lake Shore & M. S. R. Co.* v. *Miller*, 25 Mich. 274; *Hasenyer* v. *Michigan Cent. R. Co.* 48 Mich. 205, 42 Am. Rep. 470; *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99.

In the position occupied by Mehalski he is a fellow servant in respect to all acts done by him which do not come within the class of acts which the law imposes upon the railroad company itself to do as the principa

He is a fellow servant unless the act done by him, which caused the plaintiff's injury, was an act which properly belonged to the master to do, and for which the law makes the master personally responsible.

The fact that he was foreman of a crew of men does not change the rule.

McKinney, Fellow Servants, p. 5354; Wood, Mast. & S. § 438; 7 Am. & Eng. Encyclop. Law, p. 884; 24 Am. L. Rev. 157; Criterion of Fellow-Service, by George W. Easley (N. C.) 25 Am. & Eng. R. R. Cas. 513, 520–522; *Flike* v. *Boston & A. R. Co.* 53 N. Y. 550, 13 Am. Rep. 545; *Ross* v. *Boston & A. R. Co.* 58 N. Y. 217; *Booth* v. *Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Fuller* v. *Jewett*, 80 N. Y. 46, 36 Am. Rep. 515; *Crispin* v. *Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Slater* v. *Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Brick* v. *Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; *Loughlin* v. *State*, 105 N. Y. 159; *Hussey* v. *Coger*, 3 L. R. A. 559, 112 N. Y. 614; *Lindvall* v. *Woods*, 4 L. R. A. 793, 41 Minn. 212; *Dwyer* v. *American Exp. Co.* 82 Wis. 307; *Heine* v. *Chicago & N. W. R. Co.* 58 Wis. 525; *Indiana Car Co.* v. *Parker*, 100 Ind. 181; *Capper* v. *Louisville, E. & St. L. R. Co.* 103 Ind. 305; *Ell* v. *Northern Pac. R. Co.* 12 L. R. A. 97, 1 N. Dak. 336; *Lewis* v. *Seifert*, 116 Pa. 628; *Holden* v. *Fitchburg R. Co.* 129 Mass. 278, 37 Am. Rep. 343; *O'Connor* v. *Roberts*, 120 Mass. 227; *Zeigler* v. *Day*, 123 Mass. 152; *Blake* v. *Maine Cent. R. Co.* 70 Me. 60, 35 Am. Rep. 297; *Conley* v. *Portland*, 78 Me. 217; *Doughty* v. *Penobscot Log Driving Co.* 76 Me. 143; *Cassidy* v. *Maine Cent. R. Co.* 76 Me. 488; *Michigan Cent. R. Co.* v. *Leahey*, 10 Mich. 199; *Michigan Cent. R. Co.* v. *Dolan*, 32 Mich. 511; *Michigan Cent. R. Co.* v. *Austin*, 40 Mich. 247; *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34; *Gardner* v. *Michigan Cent. R. Co.* 58 Mich. 584; *Hoar* v. *Merritt*, 62 Mich. 386; *Peterson* v. *Chicago & N. W. R. Co.* 67 Mich. 102; *Van Dusen* v. *Le Tetellier*, 78 Mich. 504; *Hunn* v. *Michigan Cent. R. Co.* 7 L. R. A. 500, 78 Mich. 515; *Adams* v. *Iron Cliffs Co.* 78 Mich. 288; *Harrison* v. *Detroit, L. & N. R. Co.* 7 L. R. A. 623, 79 Mich. 415; *Fox* v. *Spring Lake Iron Co.* 89 Mich. 337; *Morton* v. *Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Roux* v. *Blodgett & Davis Lumber Co.* 13 L. R. A. 728, 85 Mich. 519; *Irvine* v. *Flint & P. M. R. Co.* 89 Mich. 416; *Dewey* v. *Detroit, G. H. & M. R. Co.* 16 L. R. A. 342, 97 Mich. 348.

A true test is, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master.

McKinney, Fellow Servants, p. 54; *Van Dusen* v. *Letellier*, 78 Mich. 492; *Morton* v. *Detroit, B. C. & A. R. Co.*, *Roux* v. *Blodgett & Davis Lumber Co.*, *Irvine* v. *Flint & P. M. R. Co.* and *Dewey* v. *Detroit, G. H. & M. R. Co. supra.*

The fact that an employé represents the master as to certain acts, does not render the master liable for his negligence as to other acts wherein he does not stand in the master's place, but does stand and act in the place of a fellow servant.

NOTE.—The above case adds another important discussion to the vexed fellow-servant question. It is not deemed necessary to collate here the references to the very numerous other cases in this series on the subject. But attention is called to the *notes* to Dixon v. Chicago & A. R. Co. (Mo.) 18 L. R. A. 792; Relyea v. Kansas City, Ft. S. & G. R. Co. (Mo.) 18 L. R. A. 817; Russ v. Wabash Western R. Co. (Mo.) 18 L. R. A. 823; and Schroeder v. Chicago & A. R. Co. (Mo.) 18 L. R. A. 827.

McKinney, Fellow Servants, p. 109; *Crispin* v. *Babbitt*, 81 N. Y. 520, 37 Am. Rep. 521; *Loughlin* v. *State*, 105 N. Y. 159; *Hussey* v. *Coger*, 3 L. R. A. 559, 112 N. Y. 614; *Ell* v. *Northern Pac. R. Co.* 12 L. R. A. 97, 1 N. Dak. 336; *Van Dusen* v. *Letellier*, and *Fox* v. *Spring Lake Iron Co. supra*; *Lindvall* v. *Woods*, 4 L. R. A. 793, 41 Minn. 212.

The act done by Mehalski, of which complaint is made, viz., causing the train to be moved without giving a proper signal, does not come within the class of acts for whose proper performance the master is responsible.

Harrison v. *Detroit, L. & N. R. Co.* 7 L. R. A. 623, 79 Mich. 409; *Greenwald* v. *Marquette, H. & O. R. Co.* 49 Mich. 197; *Adams* v. *Iron Cliffs Co.* 78 Mich. 271; *Michigan Cent. R. Co.* v. *Leahey*, 10 Mich. 193; *Michigan Cent. R. Co.* v. *Dolan*, 32 Mich. 510; *Slater* v. *Jewett*, 85 N. Y. 61, 39 Am. Rep. 627; *Heine* v. *Chicago & N. W. R. Co.* 58 Wis. 525; *Toner* v. *Chicago, M. & St. P. R. Co.* 69 Wis. 188.

The decisions of this court do not recognize an employé as vice-principal or *alter ego* of the principal in any case where he is a simple foreman of a gang of workmen acting under the direction and control of an agent of the principal, as was the case with Mehalski.

Harrison v. *Detroit, L. & N. R. Co.* and *Hunn* v. *Michigan Cent. R. Co. supra*; *Ryan* v. *Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; *Peterson* v. *Chicago & N. W. R. Co.* 67 Mich. 102; *Adams* v. *Iron Cliffs Co.* 78 Mich. 271. See also *Malone* v. *Hathaway*, 64 N. Y. 5, 21 Am. Rep. 573; *Conley* v. *Portland*, 78 Me. 217; *Zeigler* v. *Day*, 123 Mass. 152; *O'Connor* v. *Roberts*, 120 Mass. 227; *Albro* v. *Agawam Canal Co.* 6 Cush. 75; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377, 28 L. ed. 787; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772.

Messrs. **Northup & O'Donnell** and **James A. Muir**, for defendant in error:

Defendant owed plaintiff the duty to warn him of the danger to which he was about to be subject.

Henry v. *Lake Shore & M. S. R. Co.* 49 Mich. 499; *Beauchamp* v. *Saginaw Min. Co.* 50 Mich. 170, 45 Am. Rep. 30; *Town* v. *Michigan Cent. R. Co.* 84 Mich. 214; *Parkhurst* v. *Johnson*, 50 Mich. 70, 45 Am. Rep. 28; *Engel* v. *Smith*, 82 Mich. 1; *Sadowski* v. *Michigan Car Co.* 84 Mich. 100; *James* v. *Emmet Min. Co.* 55 Mich. 346; *Luke* v. *Wheat Min. Co.* 71 Mich. 364.

It was held negligent to throw bales of hay upon the sidewalk from the loft of a barn facing the street, without first looking upon the sidewalk and giving sufficient warning to persons approaching.

Dehring v. *Comstock*, 78 Mich. 156; *Chicago & N. E. R. Co.* v. *Miller*, 46 Mich. 532; *Malmsten* v. *Marquette, H. & O. R. Co.* 49 Mich. 94; *Barnes* v. *Brown*, 95 Mich. 576.

In *Harrison* v. *Detroit, L. & N. R. Co.*, 7 L. R. A. 623, 79 Mich. 409, it was maintained by the court that if the master directs the servant to do some act which is dangerous, but which could be made safe by some special care on the master's part, the servant has the right to assume that such special care will be taken. In all cases where the injury can readily be guarded against the employer is in duty bound to protect the employé at its peril.

Palmer v. *Michigan Cent. R. Co.* 87 Mich. 281.

The failure to warn plaintiff of this intention to move the train was the proximate cause of the plaintiff's injury.

Selleck v. *Lake Shore & M. S. R. Co.* 18 L. R. A. 154, 93 Mich. 375, 58 Mich. 195; *McKeller* v. *Monitor Twp.* 78 Mich. 485; *Sanborn* v. *Detroit, B. C. & A. R. Co.* 16 L. R. A. 119, 91 Mich. 538; *Keating* v. *Michigan Cent. R. Co.* 97 Mich. 154; *Southwestern Teleg. & Teleph. Co.* v. *Robinson*, 16 L. R. A. 545, 50 Fed. Rep. 810; Cooley, Torts, 70, 71; 2 Thomp. Neg. 1084; *Young* v. *Detroit, G. H. & M. R. Co.* 56 Mich. 438; *Rajnowski* v. *Detroit, B. C. & A. R. Co.* 78 Mich. 681.

Plaintiff had no warning nor any reason to apprehend danger. It is a sound rule of law that it is not contributory negligence not to look out for danger when there is no reason to apprehend any.

Engel v. *Smith*, 82 Mich. 1; Beach, Contrib. Neg. 41; *Sadowski* v. *Michigan Car Co.* 84 Mich. 100; *Schlacker* v. *Ashland Iron Min. Co.* 89 Mich. 253.

Defendant cannot so delegate the authority to move and place trains as to free it from the results of negligence of those into whose hands it placed such authority.

Hunn v. *Michigan Cent. R. Co.* 7 L. R. A. 500, 78 Mich. 515; *Town* v. *Michigan Cent. R. Co.* 84 Mich. 214; Bishop, Cont. L. 644–647; 1 Shearm. & Redf. Neg. § 228; *Taylor* v. *Evansville & T. H. R. Co.* 6 L. R. A. 584, 121 Ind. 124.

Mehalski was not a fellow servant with plaintiff.

Ryan v. *Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; Beach, Contrib. Neg. 333; *Hunn* v. *Michigan Cent. R. Co. supra*; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 483, 27 L. ed. 1005; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 387, 28 L. ed. 791; *Hough* v. *Texas & P. R. Co.* 100 U. S. 216, 25 L. ed. 615; *Baltimore & O. R. Co.* v. *Andrews*, 50 Fed. Rep. 728; *Anderson* v. *Bennett*, 16 Or. 515; *Darrigan* v. *New York & N. E. R. Co.* 52 Conn. 285, 52 Am. Rep. 590; *Schroeder* v. *Chicago & A. R. Co.* 108 Mo. 323; *Miller* v. *Missouri Pac. R. Co.* 109 Mo. 350; *Chicago & A. R. Co.* v. *May*, 108 Ill. 288; *Chicago & N. W. R. Co.* v. *Bayfield*, 37 Mich. 212; *Flike* v. *Boston & A. R. Co.* 53 N. Y. 549, 13 Am. Rep. 545; *Booth* v. *Boston & A. R. Co.* 73 N. Y. 38, 29 Am. Rep. 97; *Stevenson* v. *Jewett*, 16 Hun, 210; *Besel* v. *New York Cent. & H. R. R. Co.* 70 N. Y. 171; *Weger* v. *Pennsylvania R. Co.* 55 Pa. 460; Wood, Mast. & S. 356; *Borgman* v. *Omaha & St. L. R. Co.* 41 Fed. Rep. 667; *Shumway* v. *Walworth & N. Mfg. Co.* 98 Mich. 411; *Slater* v. *Chapman*, 67 Mich. 523; *Palmer* v. *Michigan Cent. R. Co.* 17 L. R. A. 636, 93 Mich. 363; *Harrison* v. *Detroit, L. & N. R. Co.* 7 L. R. A. 623, 79 Mich. 409; *Erickson* v. *Milwaukee, L. S. & W. R. Co.* 83 Mich. 281.

Grant, J., delivered the opinion of the court:

The liability of the defendant the Flint & Pere Marquette Railroad Company, under the instructions of the court, depends upon the position occupied by Mehalski, the boss or

foreman of the gang of ten men who were occupied in unloading and leveling the dirt hauled upon its premises by the defendant the Chicago & Grand Trunk Railroad Company. The sole allegation of negligence alleged as ground for recovery against the Flint & Pere Marquette road is that Mehalski failed to give notice to his coemployés that the train was about to move. Before discussing this question, I desire to state that in my judgment this accident could not possibly have happened without the negligence of the plaintiff himself, if the trainmen of the Chicago & Grand Trunk road had performed their duty. It was established beyond controversy, by the testimony of witnesses and by the rules of the company, that it was the duty of the trainmen to give warning of the moving of the train, and to see that both the "track and the train were clear," and that it was the duty of the rear brakeman to be in his place on the rear car when the train moved. The case against the Grand Trunk Company was withdrawn by the plaintiff before it was submitted to the jury, and he was permitted to recover on the ground of the negligence of the Flint & Pere Marquette Company. If Mehalski was not the defendant's *alter ego*, then it is not liable. He occupied the usual position of boss or foreman of a gang of men. His duties were no other, or different, or greater than those of the foreman of the ordinary section gang upon a railroad. In all such cases some one of the men employed must be invested with authority to direct the work. He kept the time, counted the number of cars, directed the men where and how to work, saw that they did their work properly, directed the place where the train should stop for unloading, notified the men when to cease leveling and go to unloading, and then assisted in doing the work. He was under the immediate and direct control of Mr. Cole, a higher official of the defendant, who was often present, sometimes daily, superintending and directing the work. I do not think there was any legitimate evidence tending to show that he was invested with authority to hire and discharge men. He certainly had not done it before the accident, and was not given express authority until long afterwards. But whether he did or not have such authority I consider of little consequence. The power to hire and discharge is not conclusive, and is in many cases of little moment. Too much prominence has often been given to this authority. One may possess it and still not be the *alter ego*, or he may not possess it and still be the *alter ego*. The doctrine of nonliability for the negligence of a fellow servant is so firmly established, and has been so frequently affirmed, in this state, that I deem it unnecessary to cite the authorities. The difficulty has always been in determining whether the servant whose negligence caused the injury was, under the facts of each case, the *alter ego* or a fellow servant. The perplexity and difficulty of the question have been recognized in the decisions of this court, and it is quite possible that there may be some difficulty in harmonizing them all, but the rule recognized in nearly if not all of them is thus stated by McKinney on Fellow Servants: "The true test it is believed, whether an employé occupies the position of a fellow servant to another employé, or is the representative of the master, is to be found, not from the grade or rank of the offending or injured servant, but it is to be determined by the character of the act being performed by the offending servant, by which another employé is injured; or, in other words, whether the person whose status is in question is charged with the performance of a duty which properly belongs to the master." This principle is so exhaustively and carefully discussed by my brother Hooker in *Beesley* v. *F. W. Wheeler & Co.* (Mich.) 27 L. R. A. 266, that further discussion here is unnecessary. The authorities are there cited and commented on. I concur in his reasoning and the conclusions reached.

One of the principal cases relied upon by the plaintiff is *Harrison* v. *Detroit, L. & N. R. Co.*, 79 Mich. 409, 7 L. R. A. 623. In that case my brother Long, speaking for the court, expressly recognized this rule in the following language: "It is not to be determined solely by the grade or rank of the offending or injured servant, but is to be determined by the character of the act being performed by the offending servant. If it is an act that the law imposes the duty upon the part of the master to perform, then the offending employé is not a fellow servant, but a superior or agent, for whose acts the master is held liable. Again, if the master has delegated to a servant or employé the care and management of the entire business, or a distinct department of it, the situation being that the superior servant is charged with the performance of duties towards the inferior servant which the law imposes upon the master, then such superior servant stands in the place of the master, and the rule of *respondeat superior* applies." To hold Mehalski the *alter ego* would result, in my judgment, in the virtual abrogation of the rule. It would establish the doctrine that where a farmer employs a competent ditcher to construct a drain upon his farm, or a foreman to harvest his crops, or a carpenter to build him a barn or other building, he is responsible for their negligent acts notwithstanding that he has employed competent men and furnished proper tools, material, and machinery; and that every foreman in a manufacturing plant, and every boss of a railroad gang, is a vice-principal. It would result in overruling the following cases: *Quincy Min. Co.* v. *Kitts*, 42 Mich. 34; *Hoar* v. *Merritt*, 62 Mich. 386; *Peterson* v. *Chicago & N. W. R. Co.* 67 Mich. 102; *Adams* v. *Iron Cliffs Co.* 78 Mich. 271, —and the many other cases in which this rule has been recognized and affirmed.

Plaintiff relies upon the following authorities to support his right of recovery: *Harrison* v. *Detroit, L. & N. R. Co. supra; Ryan* v. *Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; *Erickson* v. *Milwaukee, L. S. & W. R. Co.* 83 Mich. 281, Id., 93 Mich. 414; *Shumway* v. *Walworth & N. Mfg. Co.* 98 Mich. 411; *Hunn* v. *Michigan Cent. R. Co.* 78 Mich. 513, 7 L. R. A. 500. In *Harrison* v. *Detroit, L. & N. R. Co.*, which, as already shown, ap-

proves the rule as above stated, a division superintendent, who had the entire charge and control of a division of the road 150 miles in length, was held to be the *alter ego*. In *Ryan* v. *Bagaley* the defendant, the owner of the mine, lived in another state, and the entire management, control, and conduct of the mine in its operation was delegated to the mining captain. That case was tried before the writer of this opinion as the circuit judge, and the charge to the jury upon this point was as follows: "It appears from the testimony that he had the entire charge and control of the underground work, and all the work generally, of the mine, and that he employed and discharged men. Now, I charge you that Captain Whitesides, if he had this power delegated to him to manage and control the mine, negligence on his part would be the negligence of the owners or managers of the mine. So, if he directed the hoisting of this pipe, and the act alone of hoisting it was negligence, then the owners of the mine would be liable. If he did not direct how it should be done, but simply instructed Mr. Tyler to hoist the pipe, and Tyler, in his trying it, did it negligently and carelessly, that would not be the act of the defendants or Mr. Whitesides." In *Shumway* v. *Walworth & N. Mfg. Co.* it was conceded by the defendant that the relations of the agent to the defendant were such that he might in law, for some purposes, be regarded as the representative of the master, but it was insisted that in the particular act of starting the machine he was acting as a fellow servant. The officer of the defendant had the entire charge of the factory, as well as the employment and discharge of men. This was evidently a case of the delegation of the entire control to the agent, who was held to be a vice-principal. In *Erickson* v. *Milwaukee, L. S. & W. R. Co.* stress was laid upon the fact that the foreman, Moleski, who had full charge of the gravel train, and complete control over employés working under him, with full power to hire all laborers and to discharge them, and to whom alone complaint could be made, placed the plaintiff in a position of danger, to which he was not accustomed, and for which he was not hired. Both the opinions in that case were also written by *Mr. Justice* Long, and the superior servant was held to be the *alter ego* under peculiar facts which showed an extensive authority conferred by the principal upon his servant. I assented to that opinion without any thought of abrogating or infringing upon the above rule so firmly established by a long line of decisions in this and other courts, and so well grounded in reason. In *Hunn* v. *Michigan Cent. R. Co.* the train dispatcher had absolute control over the running and operating of trains from Rives Junction to Mackinac. This case also recognizes the general rule above stated, and the difficulty inherent in determining whether the facts of any case bring it within the rule. Whatever criticisms may be made upon the soundness of these decisions, it cannot be said that the court intended to abrogate the rule of nonliability for the negligence of a fellow servant in every case of superior authority, nor that they apply to or govern the facts of the case at bar. This rule is well settled, and in every case the question must be, Do the facts shown by the plaintiff bring his case within the rule? See *Peschel* v. *Chicago, M. & St. P. R. Co.* 62 Wis. 349.

I am of the opinion, therefore, that *the judgment should be reversed*, and no new trial ordered.

Ordered accordingly.

Long and **Hooker, JJ.**, concurred with **Grant, J.**

Montgomery, J., concurring:

The plaintiff sues to recover for negligent injury. The defendant railroad company employed the Chicago & Grand Trunk Railway Company to deliver, upon its yard at Port Huron, dirt taken from the tunnel which the Chicago & Grand Trunk road was excavating for, which dirt was to be used by defendant in leveling its own yard. The defendant had nothing to do with the train except to indicate to the conductor of the train where to place the cars for unloading. The plaintiff was engaged with a gang of men in the work of unloading the cars as they were placed in the yard. The gang of men was under the immediate charge of one Mehalski as foreman. Mehalski's authority consisted of directing the manner of unloading, and he also had authority, when given direction by his superior, Mr. Cole, to hire and discharge men. The testimony shows that Mr. Cole was the division road master of the defendant road, and he had general charge and direction of the work of filling the yard. He gave instructions to Mehalski to keep the time and number of cars, and he gave directions in relation to the work. Mehalski, before increasing his force of men, consulted and obtained the consent of Mr. Cole. With this consent, he had authority to keep up the number of the force by hiring men to take the place of those who left. While he did not exercise the power of discharging men at any time prior to the injury to plaintiff, he testifies that he supposed that he had the power to discharge men if they were not doing the work satisfactorily. He testifies that he was under Mr. Cole's direction and charge; that Mr. Cole was there on the spot, sometimes twice a day, and sometimes only twice a week. "If he saw that the work was going on as he wanted it, he would say, 'All right.' If it was something that did not satisfy him, he gave me instructions." The injury was caused, as is claimed by the plaintiff, in the following manner: In the conduct of the business, when the men were leveling dirt in the yard, the signal for them to leave the work, and go at once to the cars and commence the work of unloading, was a call from Mehalski in the words, "Come on, boys." When the train was placed, the engine would be uncoupled and moved away. This custom was known to all the men. They came to unload whenever Mehalski called them, and not before. When he saw the train come, he went on, and placed it where he wanted it to be unloaded, and then called the men. On the day in question, after the train

which caused plaintiff's injury came into the yard, Mehalski, following the usual custom, called to the men by hallooing, "Come on, boys," and waved his hands. The men had previously been assigned in pairs to the cars on the train. Each knew his own car. The plaintiff was at work on the car furthest from the engine,—the fifth car. The men had been working to the south of the train. The engine was on the north end of the train, and plaintiff's car would therefore be the first one reached by the laborers. Each of the men carried a pail of water, in which he dipped his shovel when the wet clay, which was very sticky, adhered to it. The train came. The conductor, under the order of Mehalski, placed it. In coming to the train from the south, plaintiff, who was assigned to the last car, went to the west side, that he might fill his pail with water from the pond. He got his water, and put it upon the car. At the time Mehalski hallooed and motioned to the men, the cars had stopped. Plaintiff saw the engine uncoupled and standing at a distance. When he got to the car, it stood about thirty feet away. It was there when he went for the water. It was standing in the same place when he started to climb up. It appears that Mehalski had been notified that the train was blocking the yard engine of the Flint & Pere Marquette Railroad on another track, and was requested to have the mud train moved. Mehalski was then at the south end of the train, and, in answer to the request to move the train, he went up to the engine. As Mehalski went to the north end of the train to instruct the conductor to pull it ahead, the men were coming up to unload the train. The engine backed down and against the train, and the plaintiff received the injuries complained of. No warning was given by Mehalski. The plaintiff recovered, and the defendant brings the case to this court.

1. The most important question arises upon the instruction of the court upon the subject of whether the plaintiff and Mehalski were fellow servants. Upon that question the circuit judge instructed the jury as follows: "If you find from all the evidence in the case that Jacob Mehalski had full power to hire and discharge men that were engaged in unloading this car, and that he had full control over these men in directing and managing their work in and about the entire business for which they were employed,—that is, in receiving the train into the yard and placing the train, the unloading of the dirt and leveling of it down, and the general direction of the work,—then I instruct you, as a matter of law, that Jacob Mehalski was not a fellow servant of the plaintiff." It has been found difficult to lay down general rules for determining whether one who has some direction of a branch of business of the principal is to be deemed his representative or a fellow servant, and much confusion has arisen from a misapplication of well-understood rules; and it may be said, also, that the confusion has most often arisen in determining the question with reference to the rank of the offending servant. In general, we think the true test is whether the person alleged to be a representative of the master is engaged in the performance of an act which it is the duty of the master to perform for the protection of his employés,—such a duty as that of providing a safe place to work, and safe machinery and appliances; exercising due care in the selection of servants engaged in the same employment; giving proper direction as to use of dangerous machinery by inexperienced employés; and the establishment of proper rules and regulations for the conduct of the business. Where there has been neglect of any of these duties, whether the neglect is the personal neglect of the master or that of one intrusted by him with the performance of the duty, such neglect is attributable to the master; and this is generally true, without reference to the rank of the offending servant. In *Fox* v. *Spring Lake Iron Co.*, 89 Mich. 387, the rule as stated by *Chief Justice* Church in *Flike* v. *Boston & A. R. Co.*, 53 N. Y. 549, 13 Am. Rep. 545, is cited with approval. The rule as cited is as follows: "The true rule, I apprehend, is to hold the corporation liable for negligence or want of proper care in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts, the agent occupies the place of the corporation, and the latter . . . is liable for the manner in which they are performed." See also, *Crispin* v. *Babbitt*, 81 N. Y. 516, 37 Am. Rep. 521; *Van Dusen* v. *Letellier*, 78 Mich. 492; *Morton* v. *Detroit, B. C. & A. R. Co.* 81 Mich. 423; *Roux* v. *Blodgett & Davis Lumber Co.* 85 Mich. 519, 13 L. R. A. 728; *Irvine* v. *Flint & P. M. R. Co.* 89 Mich. 416; *Dewey* v. *Detroit, G. H. & M. R. Co.* 97 Mich. 329, 22 L. R. A. 292. In some jurisdictions, this is the limit of the liability of the master in all cases; and it is held that an employé or servant may occupy a dual position,—that he may represent the master and stand in his place as to certain acts, and in other acts be simply a fellow servant. See McKinney, Fellow Servants, p. 109. And, within certain limits, this rule has been applied in this state. See *Hunn* v. *Michigan Cent. R. Co.* 78 Mich. 513, 7 L. R. A. 500; *Fox* v. *Spring Lake Iron Co. supra.* But it has also been held by this court that where the master places the entire charge of the business in the hands of an agent, exercising no authority therein, he may be liable for the negligence of such agent to a subordinate employé. This rule is recognized in *Harrison* v. *Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623; *Ryan* v. *Bagaley*, 50 Mich. 179, 45 Am. Rep. 35; *Erickson* v. *Milwaukee, L. S. & W. R. Co.* 83 Mich. 281; and *Shumway* v. *Walworth & N. Mfg. Co.* 98 Mich. 411. See also, Bailey, Mast. Liab. 270; Cooley, Torts, 665; *Sell* v. *Rietz & Bros. Lumber Co.* 70 Mich. 479; *Erickson* v. *Milwaukee, L. S. & W. R. Co.* 98 Mich. 414; *Lyttle* v. *Chicago & W. M. R. Co.* 84 Mich. 289.

It remains to be considered, then, whether the negligence of Mehalski in the present case was the neglect of a duty which the master owed to the servant, and could not delegate to a fellow servant, and, if this be answered

in the negative, whether, within the rule established in this state, the entire management of the business, or a particular branch thereof, had been delegated to Mehalski in such sense as to make him the *alter ego*, or vice-principal, of the defendant. We think it very clear that the act which Mehalski was performing was not one which the master owed the duty of performing in such sense that he could not delegate it to a fellow servant of the plaintiff. The act which he performed or neglected—that of giving notice of the intention to move the engine—was such a one as might be, and generally is, intrusted to subordinates, and related to the mere operation of the business in its details. There was no defect in machinery. There was no negligence in the employment of servants. The injury did not result from the failure to properly instruct an inexperienced servant, nor did the injury result from a want of general rules for the management and conduct of the business. It was plainly, therefore, the neglect of a fellow servant, unless it can be said that Mehalski was the vice-principal, or *alter ego*, of the defendant. If the superior servant has complete control of the business of the master, or a disconnected branch thereof, the master is liable for the negligence of the superior servant,—in that case called the "vice-principal;" and this, without regard to whether the negligence is a failure to perform a duty which, upon other grounds, the law casts upon the master. This liability is apparently based upon the ground that the risk of personal negligence of one standing in such relation to the master that he can be called the master's other self is not undertaken by the servant. See cases above cited. Mere superiority in grade does not constitute a foreman the vice-principal, unless his authority is exclusive in his department. Did Mehalski occupy that relation to the defendant's business? In the case of *Harrison* v. *Detroit, L. & N. R. Co.* Light, an assistant road-master, was held to be the vice-principal, on the ground that the entire charge of a distinct branch of the business was, for the time being, in his hands as agent, the master exercising no discretion and no oversight. It was said: "He in fact controlled that entire division absolutely, as far as employing and discharging the men was concerned. Doyle [his superior] was not present at the time of the injury, and the fair inference is that whatever power Doyle would have had, if present, Light had like power, and represented the defendant company as fully as Doyle would have done. He did no manual labor himself, but had the full oversight, care, and management of it." In *Hunn* v. *Michigan Cent. R. Co.* it was said: "The master may not choose to give his personal attention to his business, and may desire to put another in his place, to manage and control it for him as fully as he might do if personally present Such a person is his *alter ego*, and the master is as responsible for his acts of omission and commission, while engaged in the business intrusted to him, as if he did such acts himself. . . . Whenever the business conducted by the person selected by the master is such that the person selected is vested with full control (subject to no one's supervision except the master's) over the action of the employés engaged in carrying on a particular branch of the master's business, and acting upon his own discretion, according to general instructions laid down for his guidance, it is his province to direct, and the duty of the employés to obey, then he stands in the place of the master, and is not a fellow servant with those whom he controls." See also *Lyttle* v. *Chicago & W. M. R. Co.* 84 Mich. 295. In the present case, while Mehalski was acting under the general instructions of Cole, the jury has found that he (Mehalski) had full control of the men employed, and directed and managed the entire work in and about the entire business in which they were engaged, with full power to hire and discharge men engaged in the work. If the facts were so, the plaintiff and Mehalski were not fellow servants. The fact that Mehalski was subject to general directions by another cannot be held conclusive. For the time being, every power and all authority which the master could exercise were vested in Mehalski, including the power of enforcing his authority by a discharge of the men employed. We think, within the rule established in this state, the instructions of the circuit judge, if supported by the evidence, must be upheld.

But it is said that there was no evidence that Mehalski had the power to discharge men. On cross-examination Mehalski testified: "It was my duty to see that the men did their work properly. If they did not, I would discharge them." On redirect he testified: "Mr. Cole had given me authority to discharge men. He said, if the men were no good, to discharge them. That was about two months after we commenced work there." As this date was later than the date of the injury to plaintiff, it is contended that there was no authority at the time of the injury. But the witness further testified on redirect: "I had talked with him many times before that about discharging men, and was acting under his direction about that." On recross-examination he testified: ". . . If any left, I had authority to hire men in their places, but would not have authority to take any greater number than ten without getting authority from Mr. Cole. He told me, if they would not work, to let them go. I considered I had a right to discharge a man if he was not doing good work." We are satisfied that it was properly left to the jury to say whether, at the time of the injury to the plaintiff, Mehalski had authority to hire and discharge men.

2. There was testimony from which the jury would be justified in inferring that the plaintiff attempted to get upon the car after it was in motion. While the testimony upon this point was meager, yet it was such that the jury might have been justified in acting upon it. One Reynolds, a witness for defendant, testified: "Van Patton gave the signal to back up and couple on, and pull the train ahead. There was no jerking of the train. Just as they started, I saw plaintiff step between the cars. He put his pick and shovel and pail onto the car, and then put his hands,

one on each car, and tried to step on the brake beam. There would not be much slack in the train that a person would notice, because they started so slow. I watched the man, and the next I saw of him his foot was run over. I did not see him when he fell." In view of this testimony, defendant asked an instruction as follows: "In order to recover, the plaintiff was required by law to exercise care to avoid getting upon the cars, or to attempt to get upon the cars, while they were being moved, or while they were likely to be moved, so as to endanger his safety in getting upon them; and if, by his own want of care, he contributed to receiving the injury of which he complains, he cannot recover against the defendant." We think this instruction should have been given. It was peculiarly proper in this case, for the reason that the injury is alleged to have occurred through a failure to notify the plaintiff of the fact that the train was about to move. If, then, the plaintiff's attempt to get aboard the car was made after the train was in motion, it cannot be said that the neglect of the duty to notify him that the train was about to move was the proximate cause of the injury; nor are we able to say that the charge of the circuit judge, given on his own motion, cured the error. It is true, the court laid down correctly the general rule that the plaintiff must show that he in no way contributed to the injury complained of; but the instructions did not touch the precise point covered by the request to charge, and the defendant was entitled to an instruction upon this specific point. *Wildey* v. *Crane*, 69 Mich. 17; *Miller* v. *Miller*, 97 Mich. 151; *Babbitt* v. *Bumpus*, 73 Mich. 331.

3. The circuit judge further charged the jury that if they should find that Mehalski, after he had given the order to the men to come on and get upon the cars, and, while the plaintiff was about to climb upon the cars, ordered the engine coupled onto the train to move it, and did not warn the plaintiff, or notify him in some way, that the train was about to be moved, and the engine was backed down and coupled onto the train and moved in obedience to the orders of Mehalski, and in the moving of the train the plaintiff was thrown down and run over, and received the injuries complained of, and if the jury should find that the proximate cause of the injury was the failure of Mehalski to notify the plaintiff that the train was about to be moved, then the plaintiff would be entitled to recover. This instruction implies that the failure of Mehalski to notify plaintiff of the intended movement of the train was negligence as matter of law. While it was clearly a fact from which the jury might have inferred negligence, yet we think it should have been left to the jury to determine whether, in view of the custom of giving notice by Mehalski, and the custom of ringing a bell and blowing a whistle by those in charge of the train, the failure of Mehalski to give notice on the occasion in question was or was not negligence. There are no other questions presented which are likely to arise upon another trial. The judgment should be reversed, with costs, and a new trial ordered.

McGrath, *Ch. J.*, concurred with **Montgomery**, *J.*

Rehearing denied.

CALIFORNIA SUPREME COURT.

City of SAN BERNARDINO, *Appt.*,
v.
SOUTHERN PACIFIC CO., *Respt.*

(.....Cal.....)

A license tax on the right to operate a branch railroad in a city cannot be imposed by the city where this branch is part of an interstate line of railroad.

(June 27, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for San Bernardino County in favor of defendant in an action brought to enforce payment of a license tax for the privilege of engaging in the business of carrier within the city. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **Rolfe & Rolfe**, for appellant:

A city may impose a license tax on a railroad company having a depot or operating its railroad therein.

Los Angeles v. *Southern Pac. R. Co.* 61 Cal. 59; *San José* v. *San José & S. C. R. Co.* 58 Cal. 476.

A common carrier is not an entirety so as to exonerate it from paying a license on each of its branch offices in the different counties of the state.

People v. *Wells, Fargo & Co.* 19 Cal. 293; *Sacramento* v. *California Stage Co.* 12 Cal. 134.

A state or municipality may, by imposing a license or other tax on internal business, indirectly affect commerce or business carried on between different states.

Ficklen v. *Shelby County Taxing Dist.* 145 U. S. 1, 36 L. ed. 601, 4 Inters. Com. Rep. 79.

A state may tax its own internal commerce.

Robbins v. *Shelby County Taxing Dist.* 120 U. S. 499, 30 L. ed. 698; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 27 L. ed. 419; *Maine* v. *Grand Trunk R. Co. of Canada*, 142 U. S. 217, 35 L. ed. 994; *Ficklen* v. *Shelby County Taxing Dist.* 145 U. S. 23, 36 L. ed. 607, 4 Inters. Com. Rep. 79.

Any doubt as to a restriction of a state to tax is to be decided in favor of the right.

Bank of Commerce v. *Tennessee*, 104 U. S. 495, 26 L. ed. 811.

NOTE.—For a collection of authorities upon the question of the right of a state to impose a license tax which affects interstate commerce, see *note* to Rothermel v. Meyerle (Pa.) 9 L. R. A. 366.

As to power to impose local license tax upon vessels licensed by the United States, see Frere v. Von Schoeler (La.) 27 L. R. A. 414, and *note*.

The taxing power is an incident of sovereignty and co-extensive with it.

Burroughs, Taxn. § 6.

Messrs. **W. J. Hunsaker** and **William F. Herrin**, with *Messrs.* **Bicknell & Trask**, for respondent:

By the Constitution of the United States the power of regulating interstate commerce is vested in congress.

See U. S. Const. art. 1, § 8, pt. 3.

Of course the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business.

Leloup v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719; *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Harmon* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216.

All railroads and parts of railroads which are now or may hereafter be in operation are post-roads.

U. S. Rev. Stat. § 3964.

A railroad which is a link in a through line of railroad by which passengers and freight are transported into a state from other states, and from that state into other states, is engaged in the business of interstate commerce.

Norfolk & W. R. Co. v. *Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178; *California* v. *Central Pac. R. Co.* 127 U. S. 1, 32 L. ed. 150.

The fact that local business is done between the city of San Bernardino and other points within the state is wholly immaterial, there being no discrimination in the tax as between local business and interstate business.

Osborne v. *Mobile*, 83 U. S. 16 Wall. 479, 21 L. ed. 470; *Leloup* v. *Port of Mobile*, 127 U. S. 647, 32 L. ed. 314, 2 Inters. Com. Rep. 134; *Cook* v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Webber* v. *Virginia*, 103 U. S. 344, 26 L. ed. 565; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653; *Walling* v. *Michigan*, 116 U. S. 455, 29 L. ed. 694; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Corson* v. *Maryland*, 120 U. S. 502, 30 L. ed. 699; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244.

A state tax upon the business of carrying freight or passengers into and out of the state is void, as being a tax upon commerce.

Fargo v. *Stevens*, 121 U. S. 230, 30 L. ed. 888; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308; *California* v. *Central Pac. R. Co.* 127 U. S. 1, 32 L. ed. 150; *Lyng* v. *Michigan*, *supra*; *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649; *United States Express Co.* v. *Hemmingway*, 39 Fed. Rep. 60; *Com.* v. *Smith*, 92 Ky. 38.

A license tax which is a tax on the privilege of doing business involving interstate commerce is void, and cannot be enforced.

San Benito County v. *Southern Pac. R. Co.* 77 Cal. 518; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 211, 2 Inters. Com. Rep. 134; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181; *Norfolk & W. R. Co.* v. *Pennsylvania*, and *Crutcher* v. *Kentucky*, *supra*; *Harmon* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216; *Brennan* v. *Titusville*, 153 U. S. 299, 38 L. ed. 719; *Ex parte Thomas*, 71 Cal. 204; *Re White*, 11 L. R. A. 234, 3 Inters. Com. Rep. 531, 43 Fed. Rep. 913; *Re Nichols*, 48 Fed. Rep. 164; *McClellan* v. *Pettigrew*, 44 La. Ann. 356; *Re Spain*, 14 L. R. A. 97, 47 Fed. Rep. 208; *Com.* v. *Smith*, *supra*; *McLaughlin* v. *South Bend*, 10 L. R. A. 357, 126 Ind. 471; *Ex parte Murray*, 3 Inters. Com. Rep. 574, 93 Ala. 78; *State* v. *Agee*, 2 Inters. Com. Rep. 21, 83 Ala. 110; *Wrought Iron Range Co.* v. *Johnson*, 8 L. R. A. 273, 3 Inters. Com. Rep. 146, 84 Ga. 754; *Fort Scott* v. *Pelton*, 39 Kan. 764; *Re Flinn*, 57 Fed. Rep. 496; *Re Rozelle*, 57 Fed. Rep. 155; *Clements* v. *Casper*, (Wyo.) 35 Pac. Rep. 472; *Georgia Pkg. Co.* v. *Macon*, 22 L. R. A. 775, 4 Inters. Com. Rep. 508, 60 Fed. Rep. 774; *Farris* v. *Henderson*, 1 Okla. 384; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297.

Garoutte, J., delivered the opinion of the court:

This is an action by the city of San Bernardino, a municipal corporation of the fifth class, to recover of the Southern Pacific Company, a corporation organized under the laws of the state of Kentucky, the sum of $100 as license tax for carrying on the business of common carrier, under the provisions of a city ordinance imposing a license tax of $5 a month on any person or company carrying on such business in said city. The answer alleges that the defendant is engaged in interstate commerce in operating a railroad for the carriage of freight and passengers and United States mail from New Orleans, in the state of Louisiana, through the state of California, to Portland, in Oregon, and as part of said system operates a line of railroad to said city of San Bernardino, and that the sum sought to be recovered from defendant is a license tax for the privilege of engaging in interstate commerce, and its assessment and attempted enforcement, and collection is a violation of article 1, section 8, parts 3 and 7, of the Constitution of the United States. The case was tried on an agreed statement of facts, and judgment went for defendant in the court below, and plaintiff appeals.

In the agreed statement of facts we find the following: "That the defendant is now, and at all the times stated in plaintiff's complaint herein was, a railroad corporation organized under the laws of the state of Kentucky, and

engaged in operating, as lessee of the Southern Pacific Company, a continuous line of steam railroad, for the carriage of freight, passengers, and United States mails, for hire as common carriers, from the city of New Orleans, in the state of Louisiana, through the states of Louisiana and Texas, the territories of New Mexico and Arizona, and the states of California and Oregon, to the city of Portland, in the state of Oregon, and that as a part of its said transcontinental line of railroad, and connecting with its main line thereof, near Colton, in the county of San Bernardino, state of California, it operates a line of steam railroad to and into the city of San Bernardino, in said county and state, for the carriage of freight, passengers, and United States mails to and from points on its said main line of railroad outside the state of California; also between points in the state of California; and that it does now and at all times mentioned in said complaint did, under contracts with the government of the United States, regularly carry over its said line of railroad the mails of the United States to and from said city of San Bernardino, and to and from points outside of the state of California, and has at all times mentioned in the complaint herein maintained an office at said city of San Bernardino for the carrying on of its said business."

A license tax, which is a tax on the privilege of doing business involving interstate commerce, is void, and cannot be enforced. This doctrine cannot be questioned. In *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, the court said: "We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by the way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it, which solely belongs to congress." See also *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649.

It would appear from appellant's brief that this proposition of law is not controverted, but its application to the facts of this case is denied, upon the ground, as it is claimed, that the line of railroad operated by the defendant in the city of San Bernardino is not its main trunk line, but is only a branch thereof. In other words, it is conceded that a similar license tax to the one here involved would not be a valid tax, and could not be collected, in any city located upon the main trunk line of road between New Orleans and Portland, Or., not even in the city of Colton, which is situated at the point of junction of the main and branch lines, and in the same county as the plaintiff itself. Under the agreed statement of facts, there is no sound foundation upon which to rest the application of a different principle of law in these two classes of cities. It is stipulated that this branch line is "a part of its said transcontinental line of railroad," and in the face of existence of such fact we do not perceive any force in plaintiff's contention that this particular part of the railroad is no part of its main trunk line. But the stipulation of facts even goes beyond this broad statement and declares that the line of road operating in the city of San Bernardino carries passengers, freight, and United States mails to and from points on its said main line of railroad, outside of the state of California; also between points in the state of California, and likewise conveys the United States mails to and from such points. Carrying passengers and freight from San Bernardino to a thousand places on the line of the road in other states, and likewise from those points to San Bernardino, is conducting an interstate commerce business pure and simple, and by the stipulation this is the business the defendant is carrying on in the city of San Bernardino. The question of power in the city to create such an ordinance is not to be tested by the fact as to whether or not the city is located upon any particular line of railroad, be it trunk or branch line, but rather by the character of the business in which the defendant is engaged in the city passing the ordinance.

In dealing with this question, we do not concern ourselves as to the character of the franchise under which either the trunk line or the branch line of defendant is doing business. The character of defendant's business, and not the character of its franchise, points the judgment. Again, as far as plaintiff is concerned, it is the terminus of the transcontinental line; but we think the question of direct line and terminal wholly immaterial.

If this question is to be determined by the character of the business done, and we are clear that by such rule the rights of defendant are to be measured, then plaintiff stands upon common ground with every other city situated in the state of California upon the main line proper, for in those cities the defendant conducts and carries on the same kind and character of business as is conducted and carried on in the city of San Bernardino. While defendant does business in the city of San Bernardino in carrying freight and passengers to and from other points in the state of California upon the trunk line, the same conditions are present as to every other city located upon the trunk line, and such circumstance, if controlling, would give them all power to levy the tax here assailed.

There is no attempt by the ordinance here under discussion to levy this tax upon the local business of the defendant, even if the power to take such course existed, but by its terms it includes both local and interstate business. The ordinance covers its entire business as common carriers, regardless of its nature, and therefore, of necessity, operates as a burden upon interstate commerce, if its business is of that character. As a condition attached to the conduct of its business in the city of San Bernardino, it is required by this ordinance to pay a tax to the city. In that city its business is not confined within the state lines of California. it is therefore engaged in interstate commerce, and, being so engaged, no statute or municipal law can burden or handicap its business, for the regulation thereof rests solely in the hands of congress. For the foregoing reasons *the judgment is affirmed.*

We concur: **Van Fleet, J., Harrison, J.**

MICHIGAN SUPREME COURT.

Albert M. TODD
v.
Board of ELECTION COMMISSIONERS of Kalamazoo, Calhoun, Branch, Eaton, and Hillsdale Counties.

(.....Mich.....)

1. **A statute requiring a person nominated for the same office by different parties** at the same election to notify the election commissioners within a limited time upon the column of which party his name shall appear and forbidding its appearance in more than one place will not apply to cases in which the specified time has elapsed before the act takes effect.
2. **A ballot law which permits the name of a candidate to appear on the official ballot but once,** although he may be nominated by different parties, is not unconstitutional although some voters may be unable to vote as voters of other parties can for all the candidates of their party without marking the ballot more than once, or to have all the candidates of their party appear on the party ballot.

(March 25, 1895.)

APPLICATION for a writ of mandamus to compel defendants to put relator's name in the columns belonging to three different parties on the ballot of an approaching election as candidate for representative in congress. *Allowed.*

The facts are stated in the opinion.

Mr. **Myron H. Walker,** for relator:

The law is unconstitutional:

(1) Because it is destructive of rights inherent in every qualified elector and fundamental in a representative government, the preservation of which is essential to a free people and a republican form of government.

(2) Because it requires a test for an office or public trust expressly forbidden by the Constitution.

Const. art. 18, § 1.

(3) Because it is retrospective in operation, and renders illegal that which was legal and valid when done, and affords no opportunity to conform to its requirements in the pending election to which it is made applicable.

Constitutions measure the powers of the rulers, but they do not measure the rights of the governed.

Cooley, Const. Lim. 47; *People* v. *Hurlbut*, 24 Mich. 107, 9 Am. Rep. 103; Story, Miscellaneous Writings, 620.

From the foundation of our national as well as our state government, it has been a guaranteed and assured right of the qualified elector, freely and without coercion, to vote for the person of his choice for every elective office, providing only that such person possessed the legal qualifications for that office.

The act in effect is an attempt to prevent the free choice by the people of their candidates for office; and in this manner their free choice of the officers themselves.

It is no answer to say that such candidate will appear upon the official ballot upon some other party ticket, for to vote for him, they must make no nomination or antagonize the one they do make, and thus endanger and abandon their party nomination and organization, when to them its success is of great importance and the voters are necessarily discriminated against.

The Constitution, art. 7, § 2, provides that "all votes shall be given by ballot."

The system of ballot voting rests upon the idea that every elector is to be entirely at liberty to vote for whom he pleases, and with what party he pleases, and that no one is to have the right or be in the position to question his independent action, either then or at any subsequent time.

Cooley, Const. Lim. 762; 6 Am. & Eng. Encyclop. Law, p. 343.

All regulations of the elective franchise must be reasonable, uniform, and impartial; they must not have for their purpose directly or indirectly to deny or to abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do they must be declared void.

Cooley, Const. Lim. 758; *Capen* v. *Foster*, 12 Pick. 485, 23 Am. Dec. 632; *Atty-Gen.* v. *Detroit*, 7 L. R. A. 99, 78 Mich. 558.

It cannot be for a moment contended that by section 6 of article 7, the framers of the constitution intended to give the legislature the power to arbitrarily disfranchise any elector who is such under section 1 of the same article, or to make any difference between the rights of any of the classes of electors therein specified, or to put obstacles in the way of the ballot box for one class while the road is left open to another.

Atty-Gen. v. *Detroit, supra; Page* v. *Allen*, 58 Pa. 338, 98 Am. Dec. 272; *Dells* v. *Kennedy*, 49 Wis. 555, 35 Am. Rep. 786; *Edmonds* v. *Banbury*, 28 Iowa, 267, 4 Am. Rep. 177; *Monroe* v. *Collins*, 17 Ohio St. 685; *Daggett* v. *Hudson*, 43 Ohio St. 561, 54 Am. Rep. 832; *State* v. *Baker*, 38 Wis. 71; *State* v. *Butts*, 31 Kan. 554.

This act is not uniform. It is aimed at minority parties. It is not impartial. "It put obstacles in the way of the ballot box for one class or party while the road is left open to another." It is partisan legislation. It might well be entitled "An act to perpetuate the supremacy of the party in power."

NOTE.—The above case adds to the rapidly growing list of valuable cases construing the Australian Ballot Law as adopted in the different states of the Union with various modifications.

For marks on ballots, see Rutledge v. Crawford (Cal.) 13 L. R. A. 761, and *note*, also later cases cited in *footnote* with Sego v. Stoddard (Ind.) 22 L. R. A. 468, and the cases of Ellis v. May (Mich.) 25 L. R. A. 325, and Taylor v. Bleakley (Kan.) 26 L. R. A. 633.

For irregularities in taking such ballots, see Bowers v. Smith (Mo.) 16 L. R. A. 754, and *note*. See also Re Contested Election of School Directors (Pa.) 27 L. R. A. 234, and cases cited in *footnote*.

As to nominations, see also Stackpole v. Hallahan (Mont.) 28 L. R. A. 502; Manston v. McIntosh (Minn.) 28 L. R. A. 605.

See also 34 L. R. A. 498, 845; 42 L. R. A. 239.

Where the constitution has prescribed the qualification of electors it is not in the power of the legislature to take from or add to such qualifications, or to injuriously, unreasonably, or unnecessarily restrain, impair, or impede the right of suffrage thus guaranteed by the constitution.

State v. *Dillon*, 22 L. R. A. 124, 32 Fla. 545.

If the time shall come when party headings are given up and the Australian system is adopted in its entirety, so that the names of the candidates for the same office appear together under the title of that office, without any party designation or heading, so far as the official ballot is concerned, there can be no discrimination between the candidates and voters of different parties.

Wigmore's Australian Ballot, p. 56, and *note*.

But in any event and under any circumstances, under our present system, the right to make free and untrammeled nominations of candidates for office is of vital and fundamental importance.

Maynard v. *First Dist. of Kent County Board of Canvassers*, 111 L. R. A. 332, 84 Mich. 242; *Atty-Gen.* v. *Detroit*, 58 Mich. 216, 55 Am. Rep. 675; McCrary, Elections, § 8; Cooley, Const. Lim. 483, 484; *People* v. *Hurlbut*, 24 Mich. 92, 9 Am. Rep. 103.

The act in question is unconstitutional, because in effect it establishes a political test as a qualification for office or public trust contrary to article 18, § 1, of the Constitution.

People v. *Hurlbut*, *supra*; *Atty-Gen.* v. *Detroit*, 58 Mich. 214, 55 Am. Rep. 675.

This act is invalid as applied to the pending election.

Yick Wo. v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220.

Messrs. **Howard & Roos** and **E. M. Irish**, also for relator:

Laws passed to preserve the purity of elections, and to guard the elective franchise, must be impartial, and calculated to facilitate and secure rather than to subvert and impede the right to vote.

Capen v. *Foster*, 12 Pick. 488, 23 Am. Dec. 632; *Atty-Gen.* v. *Detroit*, 7 L. R. A. 99, 78 Mich. 560, 58 Mich. 213, 55 Am. Rep. 675; *People* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

The question raised by this relator involves the right to vote for a representative in congress. Article 2 of the 14th Amendment to the Constitution of the United States provides: "But when the right to vote at any elections for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

This statute of Michigan, while it does not deny the right to vote, abridges it, and raises a question not only for the federal court to settle finally, but one which might be taken to the house of representatives on a contested election.

The Constitution of the United States prohibits a state from passing any *ex post facto* law.

The amendment to section 10 in question is an *ex post facto* law.

Cummings v. *Missouri*, 71 U. S. 4 Wall. 277, 18 L. ed. 356.

Mr. **Fred. A. Maynard**, *Atty-Gen.*, for respondents:

The act in question is not only constitutional and therefore legal, but it is one of the wisest laws that could be placed upon the statute books, a law which must do much to prevent fraud at elections in this state, and to preserve the sacredness of the ballot box, upon which the welfare of this country depends.

The method which has prevailed in this state, of placing the name of a man in two or more columns on the official ballot, is now illegal, and if not unconstitutional, should be so; it is designed to accomplish by fraud and deception what could not be accomplished by legitimate methods.

If a man has a right to be voted for, and also an opportunity to be voted for, it must follow that every nominee shall have an equal chance upon the ballot, so far as its official arrangement is concerned. No candidate shall have an advantage over another, but each candidate must stand on a perfectly equal footing with the other.

How can this constitutional principle be carried out when it is permitted that one man shall have his name printed on two or more columns of the official ballot.

This act requires a little thoughtful consideration and care, and it requires evidence of the voter's desire to vote for the candidate by taking his pencil and making a cross opposite his name. The act does not prevent the man receiving the votes; but the act does prevent the name of the nominee of one party appearing in another column and thereby receiving votes of those who would never vote for him except from the fact of his name appearing in the column set aside for their party, whose principles they indorse and who they think the nominee stands for.

A court will not declare the statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural social or political rights of the citizen.

Cooley, Const. Lim. 6th ed. p. 197.

Mr. **Moses Taggart**, also for respondents:

Article 7, section 6, of the Constitution reads:

"Laws may be passed to preserve the purity of elections and guard against abuses of the elective franchise." That the laws which may be passed for such purpose, and the methods adopted by the legislature to accomplish it, are entirely a matter of discretion in the lawmaking power, under the decisions of this court, is too plain for argument. The limit is only drawn when the act is destructive of the right of franchise.

People v. *Kopplekom*, 16 Mich. 342; *Detroit* v. *Rush*, 10 L. R. A. 171, 82 Mich. 532; *People* v. *Blodgett*, 13 Mich. 127; *Atty-Gen.* v. *Detroit*, 58 Mich. 213, 55 Am. Rep. 675; *Atty-*

Gen. v. *May*, 25 L. R. A. 325, 99 Mich. 538; *Atty-Gen.* v. *Detroit*, 7 L. R. A. 99, 78 Mich. 545; *Shields* v. *Jacob*, 13 L. R. A. 760, 88 Mich. 164; *Chateau* v. *Jacob*, 88 Mich. 170; *Atty-Gen.* v. *Glaser*, 102 Mich. 396 and 407; Cooley, Const. Lim. p. 753; Paine, Elections, § 301; *Zeiler* v. *Chapman*, 54 Mo. 502; *Nefzger* v. *Detroit & St. P. R. Co.* 36 Iowa, 642; *State* v. *Hilmantel*, 21 Wis. 567; *Capen* v. *Foster*, 12 Pick. 485, 23 Am. Dec. 632.

Whether such regulation be reasonable or unreasonable is for the determination of the legislature, and not for the courts, so long as such legislation does not become destructive.

Atty-Gen. v. *McQuade*, 94 Mich. 439; *Atty-Gen.* v. *May*, and *Atty-Gen.* v. *Detroit*, *supra*; *State* v. *Black*, 16 L. R. A. 769, 54 N. J. L. 446; *Bowers* v. *Smith*, 16 L. R. A. 754, 111 Mo. 45; *De Walt* v. *Bartley*, 15 L. R. A. 771, 146 Pa. 529.

The law itself may be regarded in the light of an attempt on the part of the people to secure a pure, free, and unintimidated ballot; every presumption is in favor of the law.

Detroit v. *Rush*, 10 L. R. A. 171, 82 Mich. 532; *Shields* v. *Jacob*, and *Chateau* v. *Jacob*, *supra*.

The discretionary power extends to the form of ballot as well as to the manner in which it shall be deposited, and the registration of voters.

Paine, Elections, § 454.

No inclination appears in the opinions of courts of other states, tending to restrict legislative power in the exercise of legislative discretion in the enactment of such laws.

Miner v. *Olin*, 159 Mass. 487; *Atkeson* v. *Lay*, 115 Mo. 539; *Zeiler* v. *Chapman*, *supra*; *Simpson* v. *Osborn*, 52 Kan. 328; *Nefzger* v. *Detroit & St. P. R. Co. supra*; *Re Ballot Marks*, 18 R. I. —; *Page* v. *Allen*, 58 Pa. 347, 98 Am. Dec. 272; *Patterson* v. *Barlow*, 60 Pa. 54; *De Walt* v. *Bartley*, 15 L. R. A. 771, 146 Pa. 529.

It is possible under present methods to find a Prohibitionist voting for men utterly opposed to taxation or prohibition of the liquor traffic, and the Democrat for prohibition, and so with the members of other parties professing directly opposing theories of government or policy.

State v. *Barden*, 10 L. R. A. 155, 77 Wis. 601; *Coffey* v. *Edmonds*, 58 Cal. 526; *State* v. *Adams*, 65 Ind. 393; *State* v. *Wolf*, 17 Or. 119; *Kellogg* v. *Hickman*, 12 Colo. 556; *Druliner* v. *State*, 29 Ind. 308; *Stanley* v. *Manly*, 35 Ind. 275; *Millholland* v. *Bryant*, 39 Ind. 363; *People* v. *Kilduff*, 15 Ill. 493, 60 Am. Dec. 769; *Kirk* v. *Rhoads*, 46 Cal. 398; *Parvin* v. *Wimberg*, 15 L. R. A. 775, 130 Ind. 561.

The law was given immediate effect by its terms, and apparently applies to all the actions of boards of election commissioners in the performance of their specific duties.

Bay City & E. S. R. Co. v. *Austin*, 21 Mich. 390; *Van Fleet* v. *Van Fleet*, 49 Mich. 610; Cooley, Const. Lim. pp. 334, 335, 470, 471; *People* v. *Ingham County Suprs.* 20 Mich. 95; Endlich, Interpretation of Statutes, 478.

The giving of the law in question immediate effect after the governor had called the election, and too late for the twenty days' election by relator, as to which column he desired to have his name placed upon, would not require the full twenty days. Statutory notice is held dispensed with where an office is to be filled at a regular election under a law passed so late that the full statutory notice could not be given.

Powell v. *Jackson*, 51 Mich. 129; *Atty-Gen.* v. *Iron County Board of Canvassers*, 64 Mich. 609; *People* v. *Witherell*, 14 Mich. 48; *People* v. *Hartwell*, 12 Mich. 508, 86 Am. Dec. 70.

Long, J., delivered the opinion of the court:

The relator was nominated on February 28, 1895, as a candidate for representative in congress by the Prohibition party for the third congressional district of Michigan, and on March 7 he was nominated for the same office by the Free Silver party. On February 27 the People's party nominated one Robert McDougall for the same office. On March 8 Robert McDougall withdrew as a candidate upon the People's party ticket, and the relator was substituted in his stead by the congressional committee of the People's party, such committee certifying that they were authorized by the convention to fill any vacancy upon such ticket. Certificates were filed with the election commissioners, March 7, 8, and 9. The relator claims that he has the right, under Act No. 190 of the Public Acts of 1891 to have his name printed upon each of these three tickets. On March 14, 1895, an amendatory act was passed by the legislature to the election law, and given immediate effect, and respondents claim that under the terms of this amendatory act the relator is not entitled to have his name appear upon the official ballot more than once. This amendatory act provides that "it shall be unlawful for the said board of election commissioners to cause to be printed in more than one column on the ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office." The act contains further provisions, relating to the manner in which a choice is to be made by the candidate as to the place which his name shall have on the ballot as follows: "Any person so receiving the nomination for the same office by two or more parties or political organizations shall, within five days after his name has been certified to said election commission as having been nominated by two or more political parties for the same office, give notice to the board of election commissioners of each county in the state, if said nomination be for a state office, and to the board of election commissioners of each county in the district, if said nomination be for a congressional, judicial, or legislative office, and to the board of election commissioners of the county, if such nomination be for a county office, specifying in such notice the column of which party or political organization on the ballot he wishes his name to be printed, and said board of election commissioners shall print the name of such candidate in such column on the ballot so specified by him, and in no other column. Such notice shall be given to said election commissioners by delivering the same either in person or by depositing the same in the post-office, in a sealed envelope, with post-

age prepaid, directed to the chairman of such board of election commissioners at the county seats of the respective counties: provided further, that in case any such candidate so nominated by two or more parties or political organizations for the same office, and whose names shall have been certified by the chairman and secretary of the committees of such parties or political organizations to said board of election commissioners, within the time and as above provided shall refuse or neglect to give notice to said board of election commissioners as above provided, and within the time above named, specifying in which column on the ballot he wishes his name to be printed, then in such case said board of election commissioners shall cause his name to be printed in the column of the party or political organization, from the chairman and secretary of whose committee said board of election commissioners shall have first received notice of such person's nomination for said office, and said board of election commissioners shall not cause the name of such person to be printed on the ballot as a candidate for the same office in any other column." The relator contends: (1) That this amended law is wholly unconstitutional, for the reason that it discriminates between political parties, and imposes a political test as a condition to one becoming a candidate for office. (2) That if the statute be upheld as constitutional as applied to future elections, in which the opportunity is given to parties and candidates to act under the law, it cannot be so far given retroactive effect as to make it applicable to a case like the present, where the nominations of the parties had been made, and the time within which, under the terms of the act, the candidate is required to make his election as to the place which his name is to have on the ballot has expired before the act took effect.

1. The constitutional question is one of unusual importance, and as the exigencies of the present case demand a prompt decision, in order that the rights of the relator may be protected, and as we have reached the conclusion that the act is valid, and within the power of the legislature, acting under the provisions of article 7, section 6, of the Constitution, which provides that "laws may be passed to preserve the purity of elections, and guard against abuses of the elective franchise," and as the relator in the present case is entitled to his remedy without delay, we have thought it best to direct the entry of the order, and withhold a written opinion upon the main point until we shall have the opportunity to formulate our views upon that question, and an opinion upon the full case covering that question will be handed down later.

2. We are of the opinion that the Amendatory Act of March 14 cannot be held applicable to the present case. The time within which the candidate is authorized by law to exercise his choice of tickets had in the present case expired before the law took effect. He, therefore, under the law, had no opportunity to exercise the right conferred. If it be attempted to apply the terms of this act to the present case, the election commissioners would be bound under the other provisions of the act to print the name of the candidate on the ticket first certified, thus excluding wholly the right of choice plainly intended to be conferred by the statute. The general rule is well settled in this state and elsewhere that all statutes are prospective in their operation, except when a contrary intent is clearly evidenced by the context. *Heineman* v. *Schloss*, 88 Mich. 153; *Stitt* v. *Casterline*, 89 Mich. 239; *Smith* v. *Pinch*, 80 Mich. 332; *Finn* v. *Haynes*, 37 Mich. 68; *Maxwell* v. *Bay City Bridge Co.* 46 Mich. 278; *Danville Stove & Mfg. Co.* v. *Adsit*, 88 Mich. 244. The rule to be derived from a comparison of a vast number of judicial utterances upon this subject seems to be that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by a clear and positive command, or to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute, taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention. Endlich, Interpretation of Statutes, § 271. *Judge* Cooley, in his work on Constitutional Limitations (2d ed., p. 370), referring to this subject, says: "Legislation of this character is exceedingly liable to abuse; and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should act retrospectively; and some of the states have deemed it just and wise to forbid such laws altogether by their constitutions." As is said in Potter's Dwarris on Statutes and Constitutions, in a note on page 163: "Although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein." The act grants the right of choice of tickets, but compels the choice within a time which had already expired in the present case when the act took effect, and then in express terms provides that if the choice is not made by the candidate within that time the election commissioner shall print his name in the ticket first certified. There is no other alternative under the act but that, if the choice is not made by the candidate within the time, his name must be printed upon the ticket first certified, and if we hold that the relator may have further time beyond the time fixed by the act we must interpolate something into the statute. If this be done, what time shall be fixed when the relator must make his choice? What is to guide us in fixing that time? Certainly not the act itself, but an arbitrary rule which we must adopt, and which is not contained in the act. It cannot be presumed from the language of the statute that the legislature intended such a result as that one who could not conform to the provisions of the act, for the reason that the proceedings in his case had so far progressed as to render compliance

by him with the terms of the act impossible, should be held within the act.

The writ must issue to the election boards of the counties named, directing such boards to print the relator's name upon all three tickets mentioned.

McGrath, *Ch. J.*, did not sit. **Grant** and **Hooker**, *JJ.*, concurred with **Long**, *J.*

Montgomery, *J.*: I concur in the foregoing opinion, so far as it holds that the right of the present relator cannot be affected by the provisions of the Act of March 14. As this holding disposes of the case, I do not deem it necessary to set forth my views upon the question of the constitutionality of the act.

Grant, *J.*, delivered the following opinion on October 1, 1895:

A brief opinion was filed in this case upon the hearing and is found on page 332, *ante*. The provision of the constitution empowering the legislature to enact laws to preserve the purity of elections and the provisions of the statute are sufficiently stated in that opinion. For want of time a written opinion upon the constitutional question was then withheld.

If the effect of this act, as is strenuously argued by the learned counsel for the relator, is to "subvert or impede the right to vote," it is clearly unconstitutional. If, on the contrary, it neither subverts nor impedes, but only regulates that right it is constitutional. As experience has disclosed corruption, fraud, venality and assaults upon the purity of the ballot, the legislatures of the several states have enacted laws to prevent them. Few if any of these enactments have escaped attack in the courts and the charge against them has usually been that they are unconstitutional and infringe upon the sacred and constitutional rights of the citizen. The registry law of this state was attacked. So also were the laws providing for the present system, the quasi-Australian ballot. The effect of those laws has been to render voting more inconvenient, to require greater care on the part of the elector and to sometimes deprive him of his vote. The elector who has failed, through forgetfulness or other reason, to register on the days provided by the law, must lose his vote, unless he was sick or absent from the township on business and without intent to avoid registration. The elector may not desire to vote for any man upon the ballot and in that case he must erase the name of the objectionable candidate and write another name or mark some name for the same office upon another ticket, or lose his vote for that office. He may innocently make certain marks prohibited by law or he may innocently show his ticket, either of which will cause the loss of his vote.

These and other similar provisions designed to secure an honest election and to preserve "this most precious right to those who are entitled to enjoy it," have been sustained by the courts. The constitution does not guarantee that each voter shall have the same facilities with every other voter in expressing his will at the ballot box, or, to apply the rule to the present cases, it does not guarantee to each voter the right to express his will by a single mark. The constitutionality of the law is not to be tested by the fact that that one voter can cast his ballot by making one mark while another may be required to make two or more to express his will. When each has been afforded the opportunity and been provided with reasonable facilities to vote, the constitution has been complied with. All else is regulation and lies in the sound discretion of the legislature, to whom alone such regulation is committed. Courts cannot hold them unconstitutional because in their judgment they are harsh or unwise or have their originin partisan purposes. Constitutional laws often have their origin in such purposes and unconstitutional laws are often based upon pure motives and honest intentions. Courts have nothing to do with the motives of legislators nor the reasons they have for passing the law. The polar star of interpretation to guide them is the language of the constitution itself, and the sole question always is. Does the law destroy or abridge the right?

It is well, perhaps, to refer to some of the decisions of this court as to the power of the legislature to pass acts to maintain the purity of elections, which is expressly conferred upon them by the Constitution. Article 7, section 6.

In *Chateau* v. *Jacob*, 88 Mich. 170, a candidate for alderman claimed the right to have his name appear upon the official ballot as a candidate on the citizens' committee independent ticket. He had the right to be a candidate, but it was held he had no right to have his name printed upon the official ballot because it did not appear that he was selected by any assemblage of electors of his ward, and that anybody could vote for him by writing his name upon the ballot.

In *Detroit* v. *Rush*, 82 Mich. 532, 10 L. R. A. 171, it was held that parties might place a county ticket upon the official ballot as the law then stood, and if they desired to vote for any state ticket they could erase the county ticket and place their own in its stead. In that case one voter would be put to more trouble in preparing his ballot than another.

In *Atty-Gen.* v. *May*, 99 Mich. 538, 25 L. R. A. 325, we said that every presumption is in favor of the constitutionality of the law, citing the authorities.

In *Atty-Gen.* v. *Detroit*, 78 Mich. 545, 7 L. R. A. 99, it was said: "In order to prevent fraud at the ballot box, it is proper and legal that all needful rules and regulations be made to that end; but it is not necessary that such rules and regulations shall be so unreasonable and restrictive as to exclude a large number of legal voters from exercising their franchise. . . . The power of the legislature in such cases is limited to laws regulating the enjoyment of the right, by facilitating its lawful exercise and by preventing its abuse. The right to vote must not be impaired by the regulation. It must be regulation, not destruction."

In *Detroit* v. *Rush*, *supra*, we held that it was "the exclusive province of the legisla-

ture to enact laws providing for the registration of voters, and the time, place, and manner of conducting elections. It may regulate, but cannot destroy, the enjoyment of the elective franchise. Whether such regulation be reasonable or unreasonable is for the determination of the legislature, and not for the courts, so long as such regulation does not become destructive. . . . When power is conferred upon the legislature to provide instrumentalities by which certain objects are to be accomplished, the sole right to choose the means accompanies the power, in the absence of any constitutional provisions prescribing the means. The finding by this court that the law impeded, hampered, or restricted the right to vote, and is therefore void, would be a clear assumption of, and encroachment upon, legislative power,—a substitution of our judgment for that of the legislature. It can only be declared void when it destroys the right. Its unconstitutionality can be determined by no other rule."

See also *Atty-Gen.* v. *McQuade*, 94 Mich. 439. Other decisions by this and other courts might be cited and quoted from, but the above are sufficient to establish the rule by which courts must be governed in determining the constitutionality of acts passed by the legislature for the purity of elections.

The rule is thus stated by *Justice* Cooley: "All such reasonable regulations of the constitutional right which seem to the legislature important to the preservation of order in elections, and guard against fraud, undue influence, and oppression, and to preserve the purity of the ballot box, are not only within the constitutional power of the legislature, but are commendable, and at least some of them absolutely essential. Cooley, Const. Lim. 753; Paine, Elections, § 301.

In the light of this well-established rule let us examine the official ballot to ascertain what the voter is required to do, in order to cast his vote under this law. When he enters the booth with his ballot he seeks that portion of it representing his political affiliations. We will assume that the law was in force at the election in question, that relator was first nominated by the Free Silver party, that he was also the nominee of all the other parties except the Republican, and that he elected to have his name appear upon the ballot on the Free Silver ticket. The ballot, aside from the vignettes and instructions, would be as shown in next column.

The voter, if he belonged to any other party than the Free Silver or Republican party, would see at a glance that there was no candidate for congress upon his ticket, and that there were only two candidates for that office upon the ballot. After having made the cross in the space at the head of his party ticket, if he desire to vote for either of the candidates appearing on the ballot he would then make another cross in the square opposite the name. If he desired to vote for neither of these, but for some other man, he would write the name in the blank space on his party ticket. Any voter able to read could in a few seconds prepare his ballot. Is this destructive of the elective franchise? Does

KALAMAZOO COUNTY OFFICIAL BALLOT.

NAME OF OFFICE VOTED FOR.	REPUBLICAN TICKET.	DEMOCRATIC TICKET.	PROHIBITION TICKET.	PEOPLE'S PARTY.	FREE SILVER PARTY-16 to 1.
STATE. Justice of the Supreme Court	JOSEPH B. MOORE.	JOHN W. McGRATH.	MYRON H. WALKER.	ROBBINS B. TAYLOR.	
Regents of the University	ROGER W. BUTTERFIELD.	CHARLES T. PAILTHORP.	NOAH W. CHEEVER.	GEORGE B. SMITH.	
CONGRESSIONAL. Representative in Congress (3d Congressional District. (To Fill Vacancy.)	CHARLES H. HACKLEY.	STRATTON D. BROOKS.	DELAVAN B. REED.	VARNUM J. BOWERS.	
COUNTY. County Commissioner of Schools	ALFRED MILNES.				ALBERT M. TODD.
	ASHLEY CLAPP.	RUSSELL G. SMITH.	SAMUEL McKEE.	SAMUEL McKEE.	

it destroy the full, free, and intelligent exercise of that precious right which is essential to the perpetuity of our government? To so hold would be absurd, and further argument cannot make it clearer. To what extent is the voter impeded? If he belongs to the Democratic or Prohibition or People's party, and desires to vote for a congressional candidate, he is required to make two crosses or marks instead of one. If he cannot read, he is certainly not impeded, because the parties sworn to assist him in preparing his ballot will readily inform him upon the subject, and mark it according to his wishes. It would be much more difficult to prepare a ballot under the pure Australian system, where each name must be marked. It would be a serious reflection upon the intelligence of the voters of Michigan to hold that they could be deceived by such a ballot or impeded in the right to vote. Especially is this true in view of the means of disseminating intelligence through the newspapers, upon the hustings, by printed posters, and the importunities of candidates and their friends.

It is, however, said that the voter has the right to suppose that all his party nominees will be on his party ticket. The constitution neither expressly not impliedly confers any such right. If he be possessed of any intelligence whatever, he cannot fail to see at once the vacant space upon the ticket, and to know that, if he desires to vote for a congressman, he must check one of the two candidates, or write a name in the blank space. Both the opportunity and the facility to vote are afforded. If it be said that the voter who does not examine his ticket may by this means be deprived of his vote for an office, it may also be said with equal certainty that, if another candidate than the one nominated by the convention is upon it, he will probably vote for the man who he had no reason to suppose was on his ticket, and for whom he never intended to vote. The ballot prepared under the present law challenges the voter's attention by the vacant space upon his party ticket to the fact that, if he desires to vote for a candidate for that office, he must seek his name upon other tickets, or write a name upon his own ticket. It is apparent that this law will tend to secure a more intelligent vote than if the name of the candidate was upon all three tickets. It is alleged in the answer that the convention of one of the political parties did not expressly authorize its committee to fill any vacancy, and that its congressional candidate withdrew, and such committee placed the name of the relator upon its ticket. It is alleged by the respondents that corrupt bargains have been made, between unscrupulous managers of different political parties, by which one candidate has been bought off and another substituted, and that new political parties have been organized by unscrupulous men for the sole purpose of bargain and sale, and that the purpose of this law is to prevent these corrupt deals between corrupt politicians. No fraud is charged in the present case, but it affords an illustration of the opportunities for such trades which every good citizen condemns, and which should, if possible, be prevented by law.

It is also insisted that the candidate has the constitutional right to have his name appear upon the ticket of every party which indorses him. It gives every candidate the right to have his name appear upon the ticket once. Naturally, it belongs in the column of that party with which he is openly affiliated; but if he chooses to have his name attached to the ticket of some other party, and that party does not object, he possesses that right. But I know of no reason or authority for saying that any candidate possesses the constitutional and inalienable right to have his name appear more than once upon the official ballot containing the tickets of two or more political parties. The Australian ballot contemplates that his name shall be there but once. It follows, then, that every voter has a reasonable opportunity to vote for him. This is the sole constitutional right guaranteed him. He has no occasion to find fault so long as he is permitted to have his name upon the ballot upon such ticket as he chooses, with the constitutional right following of an opportunity given to every voter to vote for him, which he can do by simply making two crosses instead of one. The law is general, and aims at no political party. One party may be affected at one election, and another at another, or all parties may be affected at one election, some in one locality and others in another. It does not prevent coalition between different political parties, which is often very commendable and patriotic. It does not deprive the members of those political parties of the means to put their coalition into effect by their votes, but furnishes all reasonable facilities for so doing. It only requires some degree of intelligence and care on the part of the voters.

We hold the law to be constitutional.

McGrath, *Ch. J.*, did not sit. **Long** and **Hooker, JJ.,** concurred with **Grant, J.**

OHIO SUPREME COURT.

OHIO GAS FUEL CO., *Plff. in Err.*,
v.
Louisa ANDREWS.

(50 Ohio St. 666.)

***The provisions of section 3561a, Rev. Stat.,** imposes on plaintiff in error the duty of keeping under its control natural gas while it is transporting the same, and if damages should result to others, without their fault, by its explosion, while being thus transported, the plaintiff in error will be held liable therefor, although not negligent in regard thereto.

(December 19, 1893.)

ERROR to the Circuit Court for Mahoning County, to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for injuries to plaintiff's building by reason of defendant's negligence in permitting gas to escape into it. *Affirmed.*

Statement by **Bradbury,** *Ch. J:*

The defendant in error recovered against the plaintiff in error, in the court of common pleas of Mahoning county, a judgment for damages caused to her property by an explosion of natural gas while the same was being conducted by plaintiff in error along one of the streets of the city of Youngstown. The judgment was affirmed by the circuit court. The facts necessary to understand the decision will be stated in the opinion.

Messrs. **Hine & Clarke** and **George P. Arrel,** for plaintiff in error:

Section 3824 of Revised Statutes provides that a company having control or management of a railroad shall construct or cause to be constructed and maintained in good repair on each side of such road along the line of the lands of the company a fence sufficient to turn stock, and further provides that such company shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such fence.

In construing section 3824, this court determined that there is no liability on the part of the company for damage which results from defects in an otherwise sufficient fence if the company is free from fault or neglect.

Baltimore & O. R. Co. v. *Schultz,* 43 Ohio St. 270. See also *Small* v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 338; *Slosson* v. *Burlington,*

*Headnote by the COURT.

NOTE.—*Liability for negligence in the escape and explosion of gas.*

I. *General doctrine governing such actions.*
II. *Legislative and municipal control.*
III. *Evidence.*
 a. *In general.*
 b. *Burden of proof.*
 c. *Expert testimony.*
 d. *Sufficient to establish negligence.*
 e. *Insufficient to establish negligence.*
IV. *Contributory negligence.*
V. *Questions for and instructions to the jury.*
VI. *Effect of contributing causes.*
VII. *Effect of negligence of third person.*
VIII. *Act of fellow servant.*
IX. *The question of notice.*
X. *As between landlord and tenant.*
XI. *Rights of the owner of the reversion.*
XII. *Effect of, upon insurance.*
XIII. *Gas generated by accident.*
XIV. *Right of action over.*

This note is strictly confined to the question of negligence in allowing an escape of gas and for explosions occasioned thereby, and does not include cases wherein gas companies' actions have been held to create a nuisance, neither does it include cases wherein the companies' actions have been held remedial by way of injunction.

As to natural gas, see *note* to People's Gas Co. v. Tyner (1892) (Ind.) 16 L. R. A. 443.

As to the transportation and supplying of natural gas as a public business, and the municipal control thereof, see *note* to Saltsburg Gas Co. v. Saltsburg (1890) (Pa.) 10 L. R. A. 198.

The question of explosions caused by the manufacture of gun-powder, nitro-glycerine, and other explosives will form the subject of another *note;* and the question of liability for the escape and explosion of gas in mines will also be treated later.

I. General doctrine governing such actions.

The common law declares that he who puts in action anything which he cannot control must answer for all the consequences, leading to the affirmative rule that where an agent so introduced is controllable by care, attention, or science, he who receives the emolument must take the responsibility. Holding v. Liverpool Gas Co. (1846) 3 C. B. 1, 5 N. Y. Legal Obs. 77, Anthon, N. P. 356, *note.*

Negligence in cases of this description as in others may be either in omitting to do something which, in the exercise of ordinary care and skill, ought to have been done, or in the doing an act dangerous in itself under circumstances in which it cannot consistently with ordinary care and prudence be said that it should be done. Blenkiron v. Great Central Gas Consumers Co. (1860) 2 Post. & F. 437.

Before a gas company can be liable for negligence it must have been guilty of it, and it will not be charged for the negligence of another over whose movements it has no control or ordinary authority and whose negligence it has no reason to anticipate, and though the doctrine may in some cases expose it as a defendant to an action where, if the action were brought by another person for damages resulting from the same cause, he would not be liable, yet it works no injustice as it never allows a party to recover unless his adversary has been guilty of negligence and he himself is free from it. Lannen v. Albany Gas Light Co. (1865) 43 Barb. 264, affirmed 44 N. Y. 459.

There is a great difference between bringing upon one's premises a dangerous substance or element for private profit, and the introduction of that substance or element for public convenience by authority of law; in the former case a person may well be held responsible for results which naturally arise out of the dangerous character of the thing itself, as he may be said to assume the risk of all the consequences just as a man assumes the risks of all accidents happening from keeping upon his premises animals which are *ferœ naturæ,* without regard to any question of negligence in the keeping, while on the other hand no man can be held responsible for doing that which he is expressly authorized by law to do unless he is guilty of some

See also 30 L. R. A. 651, 653; 31 L. R. A. 785; 32 L. R. A. 146, 524; 33 L. R. A. 366; 36 L. R. A. 683, 689; 42 L. R. A. 569; 44 L. R. A. 92; 47 L. R. A. 790.

C. R. & N. R. Co. 51 Iowa, 294; *Libby* v. *Chicago, R. I. & P. R. Co.* 52 Iowa, 92; *Anderson* v. *Wasatch & J. V. R. Co.* 2 Utah, 518; *Little Rock & Ft. S. R. Co.* v. *Payne*, 33 Ark. 818, 34 Am. Rep. 55; *Tilley* v. *St. Louis & S. F. R. Co.* 49 Ark. 535; *Missouri, K. & T. Railway* v. *Davidson*, 14 Kan. 349.

Mr. **Myron A. Norris,** for defendant in error:

A person who for his own purposes brings upon his land and collects and keeps there anything likely to do mischief if it escapes is, prima facie, answerable for all damage which is the natural consequence of its escape, although he may not be guilty of any negligence.

Addison, Torts, § 95; *Rylands* v. *Fletcher*, L. R. 3 H. L. 330, 37 L. J. Exch. 161, 19 L. T. N. S. 220, affirming *Fletcher* v. *Rylands*, L. R. 1 Exch. 265, 12 Jur. N. S. 603, 35 L. J. Exch. 154, 14 Week. Rep. 799, 4 Hurlst. & C. 263, 14 L. T. N. S. 523; *May* v. *Burdett*, 9 Q. B. 101, 16 L. J. Q. B. 64, 10 Jur. 692; Bigelow, Lead. Cas. on Law of Torts, 478, and *note*, pp. 487–505; *Smith* v. *Fletcher*, L. R. 7 Exch. 305; *Cahill* v. *Eastman*, 18 Minn. 324, 10 Am. Rep. 184; *Hay* v. *Cohoes Co.* 2 N. Y. 159, 51 Am. Dec. 279; *Tremain* v. *Cohoes Co.* 2 N. Y. 163, 51 Am. Dec. 284; *Pixley* v. *Clark*, 35 N. Y. 520, 91 Am. Dec. 72; *Gillhan* v. *Madison County R. Co.* 49 Ill. 484; *Livingston* v. *McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Shipley* v. *Fifty Associates*, 106 Mass. 194, 8 Am. Rep. 318; *Wilson* v. *New Bedford*, 108 Mass. 261, 11 Am. Rep. 352; *Towle* v. *Clifton*, 22 Ohio St. 247, 10 Am. Rep. 732; *Carman* v. *Steubenville & I. R. Co.* 4 Ohio St. 399; *Tiffin* v. *McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408; *Valley R. Co.* v. *Franz*, 43 Ohio St. 623; *Winslow* v. *Fuhrman*, 25 Ohio St. 650.

The sanction of the legislature to occupy the streets, squares, alleys, etc., probably carried with it this consequence that if damage resulted from the use of the streets for such transportation, independently of negligence, the plaintiff in error would not have been liable unless the legislature had so provided.

Vaughan v. *Taff Vale R. Co.* 5 Hurlst. & N. 679, 29 L. J. Exch. 247, 6 Jur. N. S. 899, 2 L. T. N. S. 394, 8 Week. Rep. 594; *Mazetti* v. *New York & H. R. Co.* 3 E. D. Smith, 98.

The legislature added these words: "But said company shall be liable for any damage that may result from the transportation of the same."

Rev. Stat. § 3561*a*.

A statute enacted by a legislature, like the utterances of an individual, or any other body of individuals, in the use of words, does so to convey some certain meaning.

Potter's Dwarr. Stat. 47.

It is not permitted to interpret what has no need of interpretation.

Potter's Dwarr. Stat. 143; *Jackson* v. *Lewis*,

negligence or misconduct. Strawbridge v. Philadelphia (1879) 13 Phila. 173, 36 Phila. Leg. Int. 276.

Unless there is negligence no action will lie against a municipality authorized by law to manufacture and furnish gas. *Ibid.*

A violation of the contract of a gas company, or any unauthorized intrusion, must be redressed as all ordinary wrongs are redressed, by the usual legal remedies, the injured party having a remedy for any grievance. People v. Mutual Gas-Light Co. of Detroit (1878) 38 Mich. 154, 156.

Such a company is, as every one else should be, held responsible for its unlawful acts or their consequences, when by the exercise of ordinary judgment it could have foreseen the danger. Louisville Gas Co. v. Gutenkuntz (1884) 82 Ky. 462.

As a defendant it is bound for the consequences of its own negligence, though those consequences were not and could not by any ordinary prudence have been anticipated; while a plaintiff is bound only to a knowledge of the probable consequences of the facts of which he was cognizant, and to that ordinary prudence which the circumstances required, exercising reasonable care for his own safety. Oil City Gas Co. v. Robinson (1881) 99 Pa. 1, 5.

In such actions, as in others, no exact legal definition can, however, be given of the words, "with ordinary prudence and care," which will embrace all their meaning and be precisely applicable to every possible case, there being no such thing as an absolute standard of ordinary care and prudence to which the conduct of individuals in each particular instance can be brought, and by which it can be compared and tested. Holly v. Boston Gas-Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 233. See Smith v. Boston Gas-Light Co. (1880) 129 Mass. 318, *infra*, head, III. a.

Yet care and diligence should always vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted. Holly v. Boston Gas Light Co. *supra*.

The vigilance and attention required of the company must in such cases conform to the nature of the emergency and the danger to which others may be exposed, and must always be judged of according to the subject-matter; the danger and force of the material under the defendant's charge. Hutchinson v. Boston Gas Light Co. (1877) 122 Mass. 219.

In determining what care of property is reasonable, its situation and the object of its use should be consideeed. Fuchs v. St. Louis (1895) (Mo.) 31 S. W. Rep. 115.

A municipal corporation owning and occupying property for public purposes, such as the manufacture of gas, is as much subject as a private citizen to the usual rule, *sic utere tuo ut alienum non laedas*. Shuter v. Philadelphia (1858) 3 Phila. 228.

A gas company is bound to exercise reasonable care, and the degree of care depends upon the degree of danger, the duty increasing with the degree of danger where parties have a dangerous element under their control. Butcher v. Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 628.

A higher degree of care and vigilance being required in dealing with a dangerous agency such as gas than in the ordinary affairs of life or business involving little or no risk of injury. Koelsch v. Philadelphia Co. (1893) 18 L. R. A. 759, 152 Pa. 358.

There must, as in other cases of negligence, be an omission to do something which a reasonable man acting upon considerations which ordinarily regulate the conduct of human affairs would do, or the doing something which such a man would not do. Hutchinson v. Boston Gas Light Co. (1877) 122 Mass. 219.

One for which there is no reasonable excuse, and especially one that could have been prevented by the reasonable efforts of the company with such servants and agents as could have been employed. *Ibid.*

17 Johns. 475; *People* v. *New York Cent. R. Co.* 13 N. Y. 78; *United States* v. *Fisher*, 6 U. S. 2 Cranch. 358, 2 L. ed. 304; Vattel, bk. 2, chap. 17, § 263.

Statutes should be interpreted according to the most natural and obvious import of their language.

Potter's Dwarr. Stat. 144; *Waller* v. *Harris*, 20 Wend. 560, 32 Am. Dec. 590; *McCluskey* v. *Cromwell*, 11 N. Y. 593; *Newell* v. *People*, 7 N. Y. 97; American Rules, Potter's Dwarr. Stat. 144, 145; *Maillard* v. *Lawrence*, 57 U. S. 16 How. 255, 14 L. ed. 928.

The construction given to section 3561*a* by the courts below is in line with the decisions of this court, whenever such question has been before the court.

Gries v. *Zeck*, 24 Ohio St. 329; *Pittsburgh, C. & L. R. Co.* v. *Smith*, 38 Ohio St. 410; *Cleveland, C. C. & I. R. Co.* v. *Scudder*, 40 Ohio St. 173. See also *Pratt* v. *Atlantic & St. L. R. Co.* 42 Me. 579; *Stearns* v. *Atlantic & St. L. R. Co.* 46 Me. 95; *Simmonds* v. *New York & N. E. R. Co.* 53 Conn. 264; *Adden* v. *White Mountains N. H. Railroad*, 55 N. H. 413, 20 Am. Rep. 220; *Rowell* v. *Railroad*, 57 N. H. 132, 24 Am. Rep. 59; *Hart* v. *Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Lyman* v. *Boston & W. R. Corp.* 4 Cush. 288; *Ross* v. *Boston & W. R. Co.* 6 Allen, 87; *Perley* v. *Eastern R. Co.* 98 Mass. 414, 96 Am. Dec. 645; *Small* v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 338; *Missouri, K. & T. Railway* v. *Davidson*, 14 Kan. 349; *Little Rock & Ft. S. R. Co.* v. *Payne*, 33 Ark. 816, 34 Am. Rep. 55; *Tilley* v. *St. Louis & S. F. R. Co.* 49 Ark. 535.

Bradbury, *Ch. J.*, delivered the opinion of the court:

The record discloses that the plaintiff in error, a body corporate, was engaged in transporting, in pipes, natural gas to the city of Youngstown, and underground, along its streets, to supply its inhabitants with fuel; that the defendant in error owned valuable improved real estate in said city, the improvements of which were substantially destroyed by an explosion of the gas while in course of transportation along a street of said city adjacent thereto.

Upon the trial of the action in the court of common pleas, the evidence tending to show that the explosion occurred without negligence of the plaintiff in error; and in contending that it was not liable for the results of such explosion, in the absence of proof of its negligence contributing thereto,—it requested the following separate propositions to be given in charge to the jury by the court: "(1) If you shall find from the evidence that the gate or valve which defendant placed in its line of pipe broke by reason of some latent defect in the metal of which it was composed, which defect defendant did not dis-

The liabilities must grow out of the subject-matter and must be peculiar to it, and it is the duty of those who introduce such a dangerous agent and derive emolument from it, to understand it and provide all the safe-guards which science may from time to time develop. Holding v. Liverpool Gas Co. (1846) 3 C. B. 1, 5 N. Y. Legal Obs. 77, Anthon, N. P. 235, *note*.

One who owes a duty to the community, as such a company does, owes it as a general rule to every member of the community, and if any member suffers a special injury from a breach of that duty, an action lies. Mississinewa Min. Co. v. Patton (1891) 129 Ind. 472.

The proximate cause must be one without which the accident would not have occurred, and therefore where the existence of a gunny sack led to the experiment which caused the accident, it was held not to be the proximate cause of such accident. Taylor v. Baldwin (1889) 78 Cal. 517.

Thus if through the negligence of the defendants a current of their gas is set in motion, and in its course through the sewer and drain takes up other gases which are noxious and carries them into the house of the plaintiff, who is made sick thereby, the defendant's negligence is as much a proximate cause of the injury as if their own gas had caused it. Hunt v. Lowell Gas Light Co. (1864) 8 Allen, 169, 85 Am. Dec. 697.

Whether the act of permitting gas to escape, which in itself was not the cause of the explosion, can be said to have contributed to it in such direct or proximate manner as to justify the imputation of such negligence as would defeat a recovery for damages consequent upon the explosion, was said to be a question of some difficulty. Lannen v. Albany Gas Light Co. (1865) 46 Barb. 264, affirmed 44 N. Y. 459.

If a gas company has or ought to have knowledge of the construction of a sewer near to its own gas mains, it is its duty to guard against the damage likely to be sustained thereby if the injury to such mains is a natural and probable consequence of the construction of the sewer. Koelsch v. Philadelphia Co. (1893) 18 L. R. A. 759, 152 Pa. 355.

The company is responsible for what may in the nature of things occur from its neglect, and its responsibility is not limited by what its officers may have thought to be improbable or even impossible. Oil City Gas Co. v. Robinson (1881) 99 Pa. 1, 5.

It is the duty of the company's agent to exercise such care as one of ordinary prudence and judgment in the discharge of a duty would be required to exercise for the safety of the premises from an explosive substance such as gas. Louisville Gas Co. v. Gutenkuntz (1884) 82 Ky. 432.

A defendant gas company, in managing a dangerous element, is bound not only to due care on the part of itself and its servants, but also to due care in preventing injury from the careless or wrongful meddling with its works on the part of others. Butcher v. Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 626.

The handling of a key used by the agent of the company for turning off the gas in a street main, by a third person, is the ordinary and natural result of the negligent act of such agent in leaving it there for which the company is liable. Louisville Gas Co. v. Gutenkuntz (1884) 82 Ky. 432, 438.

It is the duty of a gas-light company, as of all incorporated companies invested, for their profit and advantage, with the privilege of supplying the community with light for private habitations and for other places devoted to public or private use, to exercise due care and diligence in keeping it constantly under their control, and preventing it from escaping into a dwelling-house or other place of business, where the inmates or occupants are in such cases involuntarily subjected to its effects, whether they are positively injurious, or merely disgusting or offensive. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

So it is bound to exercise such care in the proper location, structure, and repair of pipes, as will pre-

cover, or by the exercise of reasonable care could not have discovered, and that the escape of gas was due to such break, then the plaintiff cannot recover, and your verdict should be for the defendant. (2) The court says to you that, in and about the laying and constructing of the line of pipe which the defendant laid in and along Boardman street, the defendant was not required by the law to use the best possible mode and appliances for laying and constructing such line; but it was only required to lay and construct its pipe line in such manner, and to employ such means and appliances to guard against the escape of gas, as were at that time in common use by persons of ordinary care and prudence, who were at that time engaged in the same, similar business, in similar locations. (3) The court says to you that, in and about the laying and constructing its line of pipe in and along Boardman street, the defendant was required to use only such care and precautions to guard against the escape of gas as prudent persons, who at the time when said line of pipe was laid and constructed, and who were then engaged in the same kind of business, were accustomed to use, under the same or similar circumstances. (4) If you shall find from the evidence that the fire by which plaintiff's property is alleged to have been destroyed was caused by the gas escaping from the break which is alleged to have occurred in the gate or valve forming a part of defendant's line, but if you shall, nevertheless, find, from all the evidence in the case, that such break did not occur through any negligence on the part of the defendant, in any of the particulars set forth in the plaintiff's petition, but, on the other hand, occurred by reason of some casualty, over which the defendant had no control, and of which it had no knowledge in time to prevent the injury which may have resulted therefrom, then the defendant would not be liable, and your verdict should be in favor of the defendant. . . . (7) The burden of proving negligence is on the plaintiff, and, before there can be any recovery in this case, you must be satisfied, by a fair preponderance of the evidence, that the defendant was, in the manner averred in the petition, guilty of the negligence which directly resulted in the damage to the plaintiff by reason of the destruction of her property described in the petition, or some part thereof. (8) Before the plaintiff can recover in this action, she must satisfy you, by a fair preponderance of all the evidence, that the defendant was guilty of negligence in and about some of the particulars set forth in her petition; and, if you are not so satisfied that the defendant was guilty of negligence, your verdict should be in favor of the defendant."

The court declined to give either proposition to the jury, and, instead, instructed them as follows: "But if, on the other hand, you find that the defendant was engaged in the transportation of natural gas for the purposes mentioned; that the same escaped from the pipe line of the defendant, at the gate or

vent an escape of gas dangerous to life and health, Smith v. Boston Gas Light Co. (1880) 129 Mass. 318.

To furnish pipes sufficiently strong to stand all ordinary uses which may be made of public streets through which they pass, but if broken by any unlawful or improper use of the streets they will not be responsible. Brown v. New York Gas Light Co. (1850) Anthon, N. P. 351, 355.

And to use reasonable and ordinary care in so planting its pipes and mains as to prevent escape of gas therefrom in such quantities as to become dangerous to life and property. Mississinewa Min. Co. v. Patton (1891) 129 Ind. 472.

Whether by inhalation or explosions. Schmeer v. Gas-Light Co. of Syracuse (1892) 65 Hun, 378.

Being authorized to lay down their pipes and convey gas through them under the surface of the public streets, they must conduct their business in all its branches and in every particular with ordinary prudence and care. Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 233.

The construction and care of the works being exclusively in the company's hands; and where no cause independent of some negligence on the company's part is shown to have produced the effect, the company is liable. Smith v. Boston Gas Light Co. (1880) 129 Mass. 318.

The contract is not to supply a pipe which might perhaps be defective until tested, but to supply a pipe reasonably sufficient for the purposes for which it is to be used, and therefore if the pipe supplied is defective and the consequence (the natural and necessary consequence) is that the gas escaped, and having so escaped a further natural consequence is that an accident might be expected to result, the company is liable. Burrows v. March Gas & Coke Co. (1872) L. R. 7 Exch. 96, 41 L. J. Exch. 46, 26 L. T. N. S. 318, 20 Week. Rep. 493.

As that which is authorized must be done in a careful manner. Strawbridge v. Philadelphia (1879) 13 Phila. 173, 36 Phila. Leg. Int. 276.

Having reference to the delicate and dangerous character of the material in its charge. Smith v. Boston Gas Light Co. *supra*.

It owes it in virtue of its occupancy of the public streets which belong to the community, for its own special and extraordinary use in conducting an article which is known to be in a high degree inflammable and explosive. Mississinewa Min. Co. v. Patton (1891) 129 Ind. 472.

And if its effect is noxious as well as disagreeable, it is a reason why the diligence required to take care of and control it should be still more active and unremitting. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

There ought to be some system of supervision, and men should be always ready to repair any leakage that may be discovered, and anything short of this precaution against accidents amounts to negligence for which the company will be liable. Mose v. Hastings & St. Leonards Gas Co. (1864) 4 Fost. & F. 324.

A system sufficient to insure reasonable promptness in the detection of all leaks that may occur from deterioration of the material in the pipes, or from any other cause within the circumspection by men of ordinary skill in the business. Koelsch v. Philadelphia Co. (1893) 18 L. R. A. 759, 152 Pa. 355.

Affording ample facilities to all parties interested, to make communications to them, having a sufficient force ready to be put in action and fully competent to supply and furnish a prompt remedy for all such accidents, defects, and interruptions in the conduct of their affairs, as from experience and the character and peculiarity of their works there is reasonable ground to anticipate may occur. Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 233.

valve therein, while the same was being so transported, at the time and place and in the manner claimed by the plaintiff in her petition, and that the buildings were in fact destroyed by reason thereof, and that the same was the proximate and direct cause of the destruction of the buildings mentioned; and that the plaintiff's own acts and conduct did not contribute to the injury of which she complains,—then your verdict should be for the plaintiff, in such sum as the evidence shows you she has actually been damaged."

The effect of the instructions thus refused and given was to render the plaintiff in error liable, if the explosion was the proximate cause of the injury, although the jury should entirely exonerate it from negligence in connection therewith.

The question of how strictly one who undertakes to transport through or along the highways of populous districts, or to store adjacent thereto, subtle and dangerous substances, like natural gas, should be held to the duty of absolutely controlling it, is both interesting and important; but we are relieved from the duty of discussing it, in the case before us, by the provisions of the statute under which the plaintiff in error was authorized to transport natural gas through the streets of Youngstown at all. That statute reads as follows: ". . . But said company shall be liable for any damages that may result from the transportation of the same." This language is explicit and unambiguous. This court is asked to add to the language chosen by the legislature the word "negligent," so that the statute may read, "But said company shall be liable for any damages that may result from the negligent transportation of the same."

Upon principles of universal application, the company would be held liable for any damages that might result from its negligence in transporting natural gas through the streets of a city. Therefore, to construe the statute as the plaintiff in error contends would deny it any operation or effect whatever. We think that when the subtle and dangerous properties of this fluid are considered, together with the long existing, and perhaps still unsettled, controversy that has claimed the attention of courts and text-writers, both in England and in this country, respecting the extent of the liability of those who deal in dangerous substances, for damages caused by them, the absence of the word "negligent," in the act declaring the liability of the plaintiff in error has great significance, and can only be reconciled with a legislative purpose to impose upon the company the duty of absolutely controlling this substance when it should introduce it into places where, if it escaped control, it would menace the lives and property of others, who had no control over it, and who were without fault themselves contributing to injury.

Judgment affirmed.

It is, however, manifestly impossible for a gas company to have at its service at every moment and every point of exposure an adequate force to overcome a sudden fracture of its pipes, or any other casual or unexpected obstacle in the conduct of its affairs in the shortest possible time. *Ibid.*

If the system is all right and all due preparation has been made in advance, and the force which can be commanded is applied in a proper manner to the reparation of the brake in the pipes or correction of any disturbance in the regular operation of its business, it cannot be held to have failed in the exercise of ordinary care, even though it happens that owing to the occurrence of several interruptions or leaks at the same moment of time, through an extraordinary state of the weather, or other unforeseen causes, a particular defect should not be overcome with the same promptitude and dispatch that it might be under other and more favorable circumstances. *Ibid.*

Admitting that the main pipes were in all respects properly constructed and secured, yet if the city officials knew or ought to have known, previously to the time of the explosion, that such pipes were in a defective condition, and failed to have them properly repaired, such default would fix the liability for the explosion on the city. Kibele v. Philadelphia (1884) 105 Pa. 41, 44.

In order, however, to ascertain whether due diligence has been exerted on the part of a gas company in any particular instance, it is necessary to know what is its general system and what are the means of relief at its command and within its control. Holly v. Boston Gas Light Co. *supra.*

Probability of danger is to be taken into account but not that which arises when the elements with unprecedented power overcome all ordinary restraints. Hutchinson v. Boston Gas Light Co. (1877) 122 Mass. 219.

A city as a manufacturer of gas is bound to know about its character, and to take care that through the default of its officers or servants the article manufactured and sold occasions no harm to any one. Kibele v. Philadelphia (1884) 105 Pa. 41, 44.

Although gas companies having the right or use of the streets for laying the gas pipes, cannot interfere with or prevent the building of a sewer, yet they have a right to and are bound to see that in restoring the earth to its place, their own pipes are properly supported, and, if injured, to see that the injury is repaired within a reasonable time, any negligence on their part rendering them liable. Butcher v. Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 626.

Where the loss and injury sustained were the result of the negligence of a gas fitter, and of the gas company, the former being the proximate and the latter the main cause of the explosion, the court held the plaintiff was entitled to hold both responsible for what occurred, the former's negligence co-operating with that of the latter, the act of sending for a gas fitter to ascertain the escape of gas not being a negligent but a prudent act. Schermerhorn v. Metropolitan Gas Light Co. (1874) 5 Daly, 144. Burrows v. March Gas & Coke Co. (1870) L. R. 5 Exch. 69, 39 L. J. Exch. 33, 22 L. T. N. S. 24, followed.

In Holding v. Liverpool Gas. Co. (1846) 3 C. B. 1, 5 N. Y. Legal Obs. 77, Anthon. N. P. 356, *note*, it was attempted to make the company liable by reason of there being no stop-cock on the outside of the meter so that it could turn off the gas entirely from the interior of the house when required, other companies having entire command of the gas by means of such appliance, the facts showing that the injury to the plaintiff's house by the explosion which proceeded from some unlawful destruction of the interior pipes by a burglar, could not have occurred had the company turned off the gas effectually by such a contrivance. The court below nonsuited the plaintiff, holding there was no duty cast by law up-

INDIANA SUPREME COURT.

LEBANON LIGHT, HEAT & POWER CO. *et al.*, *Appts.*, *v.* Amos LEAP.

(.....Ind.....)

(November 27, 1894.)

1. **Pipes for natural gas** cannot be lawfully laid on the surface of a highway.
2. **Conducting natural gas at high pressure through poorly jointed pipes** with numerous leaks, lying loose upon the ground where the public, including children and other inexperienced persons, daily pass, especially when it is laid on a public highway in violation of law, constitutes actionable negligence.
3. **A company actually using natural gas** which flows through a pipe over a highway crossing cannot escape liability for the dangerous condition of poorly jointed and leaking pipes because the contractor who laid them has not yet formally turned over the plant to the company or fully completed his contract.
4. **The acts on previous occasions of a person injured by an explosion of natural gas** in defective pipes may be taken into account in determining his contributory negligence by showing his experience and knowledge of the danger, especially when previous disturbances of the pipes are charged to have been the occasion of the explosion.

APPEAL by defendants from a judgment of the Circuit Court for Hamilton County, in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendants' negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **E. P. Schlater** and **T. J. Terhune,** with *Messrs.* **Shirts & Kilbourne,** for appellants:

A party can never be liable for injury arising from a work over which it has neither possession nor control.

If the company let the contract for the completion of such work to Doxey, and if Doxey sub-let such work to said Snow, as another independent contractor, then the Lebanon company cannot be liable for negligence.

Ryan v. *Curran*, 64 Ind. 355, 31 Am. Rep. 123; *Wabash, St. L. & P. R. Co.* v. *Farver*, 111 Ind. 195, 60 Am. Rep. 696; *New Albany Forge & Rolling Mill* v. *Cooper*, 131 Ind. 363.

If Doxey had "possession," it must have been, in the opinion and mind of the jury, a bare, naked, legal possession wherein Doxey was unable to give directions or exercise controlling influence. Under the circumstances,

on the defendant, and upon an application for a new trial, the court stated that the act under which the company was formed gave no directions as to the use of an outer stop-cock, and as the legislature was silent upon the point, the common law imposed no precise duty on the defendant, or any other duty than that expressed in the general doctrine of using proper and sufficient care in the supply of gas.

Where the plaintiff, who carried on business as a livery-stable keeper contrary to the Massachusetts statute, which requires a license, sought to recover damages for an escape of gas, the court held the case would not lie although he might sustain the action for nuisance to real estate. Sherman v. Fall River Iron Works Co. (1862) 5 Allen, 213.

II. *Legislative and municipal control.*

Although the public by reason of the gas company being authorized by the legislature may be barred from recovering damages, yet private persons may maintain an action for damages against such company. People v. New York Gas Light Co. (1872) 64 Barb. 55, 6 Lans. 467.

Even for consequential damages it is not exempt as a corporation by reason of its being so authorized by statute. Pottstown Gas Co. v. Murphy (1861) 39 Pa. 257.

Yet, in the absence of negligence, no such action for damages can be maintained for acts which are within the scope of an express authority conferred by law. Strawbridge v. Philadelphia (1879) 13 Phila. 173, 36 Phila. Leg. Int. 276.

See also, Gas Fuel Co. v. Andrews (1896) 50 Ohio St. 695, 701, head III. subdiv. a. *infra*, pages 344, 345.

III. *Evidence.*

a. *In general.*

In actions of this description the plaintiff must show that he is free from fault. Bartlett v. Boston Gas Light Co. (1877) 122 Mass. 209.

The question being whether, under all the circumstances of the case, the action of the plaintiff is that of a man of ordinary prudence and discretion, and if not and injury results from such action, the company will not be liable. Lanigan v. New York Gas Light Co. (1877) 71 N. Y. 29.

Each separate and individual case must stand upon and be decided by the evidence particularly applicable to it. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

As the fact that the agent of the defendant company was negligent as to the block on the other side of the street, does not of itself tend to prove that he or any one else was negligent in respect to plaintiff's premises. Emerson v. Lowell Gas Light Co. (1863) 6 Allen, 146, 83 Am. Dec. 621.

The mere fact that gas escaped into a certain block, not of itself tending to prove that it also escaped into the plaintiff's premises, and therefore not relevant. *Ibid.*

It is a proper subject of inquiry, in cases where it is insisted that gas infused into the air of a dwelling house is noxious to the health of its occupants, to inquire whether such is its usual, necessary, or probable effect. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

The evidence should, however, be limited to the effect of the gas upon those who have in common and under similar circumstances inhaled it. Hunt v. Lowell Gas Light Co. (1864) 8 Allen, 169, 85 Am. Dec. 697.

As the case cannot be allowed to branch out into several collateral issues on such a point. *Ibid.*

Evidence that the inmates of another house were made sick, in consequence of inhaling the gas that escaped into their house from the same defect in the defendant's pipes, is inadmissible. *Ibid.*; Emerson v. Lowell Gas-Light Co. *supra.*

The reason being that the gas company's action could not in any degree have been, or have been required to be, influenced by facts of the existence of which it had received no information and of which it was entirely ignorant. Emerson v. Lowell Gas Light Co. *supra.*

So if the evidence falls short of proving that the

under the doctrine of *Ryan* v. *Curran*, *Wabash St. L. & P. R. Co.* v. *Farver* and *New Albany Forge & Rolling Mill* v. *Cooper*, *supra*, Doxey was not liable.

The appellee, being a person in full possession of his faculties, was bound to know that he was standing within the presence of one of the most dangerous agencies known to modern times.

Jamieson v. *Indiana Natural Gas & Oil Co.* 12 L. R. A. 652, 3 Inters. Com. Rep. 618, 128 Ind. 555.

The act which is characterized by negligence shall be stated.

Jeffersonville, M. & I. R. Co. v. *Dunlap*, 29 Ind. 430; *Hawley* v. *Williams*, 90 Ind. 160; *Cincinnati, H. & D. R. Co.* v. *Chester*, 57 Ind. 297.

The specific statement of facts controls the construction of a pleading, and not of its general averments.

Pennsylvania Co. v. *Marion*, 104 Ind. 239; *Louisville, E. & St. L. R. Co.* v. *Payne*, 103 Ind. 187; *Ivens* v. *Cincinnati, W. & M. R. Co.* 103 Ind. 27; *Louisville, N. A. & C. R. Co.* v. *Schmidt*, 106 Ind. 74.

The appellee was so clearly guilty of contributory negligence that he had no standing in court. The question is not only, what caused the injury, but, Did the plaintiff contribute?

Brand v. *Schenectady & T. R. Co.* 8 Barb. 377; *Hartfield* v. *Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Rathbun* v. *Payne*, 19 Wend. 399; *Carolus* v. *New York*, 6 Bosw. 15; *Dietrich* v. *Baltimore & H. S. R. Co.* 58 Md. 354; *Union Pac. R. Co.* v. *Adams*, 33 Kan. 427; *Gibson* v. *Wyandotte*, 20 Kan. 158; *Lane* v. *Atlantic Works*, 107 Mass. 107.

If a party thinks proper to make an experiment, under circumstances of peril open and known to him, and which he could have reasonably avoided, it is no injustice that he is required to bear the consequences of his own act.

Dietrich v. *Baltimore & H. S. R. Co. supra*; *Baltimore & P. R. Co.* v. *Jones*, 95 U. S. 439, 24 L. ed. 506; *Simpson* v. *Keokuk*, 34 Iowa, 568; *Colegrove* v. *New York, & N. H. R. Co.* 20 N. Y. 492, 75 Am. Dec. 418.

A person may contribute to his injury by exposing himself to the risk of injury quite as effectively as by committing the very act which injures him.

Shearm. & Redf. Neg. § 34; *Grippen* v. *New York Cent. R. Co.* 40 N. Y. 47; *Indianapolis* v. *Cook*, 99 Ind. 10; Beach, Contrib. Neg. § 162; 4 Am. & Eng. Encyclop. Law, p. 94, and cases cited in *note 2*; *Nagle* v. *Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *Hoag* v. *Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 659.

gas caused the sickness of the other persons, it amounts to nothing. Hunt v. Lowell Gas Light Co. *supra*.

The attending circumstances may be so different that the occurrence of sickness in one house would have no tendency to show the cause of illness in the occupants of another. Emerson v. Lowell Gas Light Co. *supra*.

If the plaintiff have other relevant evidence, it is within the discretion of the court to reject this until the other is put in, the order in which evidence should be offered, being subject to the control of the judge. Emerson v. Lowell Gas Light Co. (1863) 3 Allen, 146, 83 Am. Dec. 621.

As the plaintiff cannot establish or strengthen the evidence in his own case by any proof concerning the condition of, or the injury sustained by, another. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

Yet it is competent to show that gas has escaped from the defendant's pipe through the fracture into the sewers and into other houses in the neighborhood, the company being notified that it so penetrated and entered. *Ibid.*

Such evidence being confined to prove that certain gas was pervading the streets under which the company's pipes were laid, was in relation to a fact of which the defendants, after notice that the gas in consequence of a defect in their works was escaping in that vicinity, must be presumed to have had knowledge, or reasonable means of knowledge. *Ibid.*

So evidence as to the presence of gas in other adjoining premises has been held properly admissible. Butcher v. Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 626.

And evidence of the particulars of the sickness of any one of the persons in the house with which the plaintiff was visiting, is a collateral fact, admissible merely for the purpose of showing the nature of the gas which came into the house, to the influence of which all the inmates were subjected alike. Hunt v. Lowell Gas Light Co. (1864) 8 Allen, 169, 85 Am. Dec. 697.

For if it be a fact that the inhalation of gas will produce sickness or generate disease, such fact being determinable by the jury upon evidence submitted to them, the defendants are bound to exercise that care and diligence in its control and management which is reasonably sufficient to guard the public against its deleterious effects whether their agents are aware of its bad influences or not. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

How far the plaintiff should be permitted to go into particulars in offering such evidence should depend somewhat on the circumstances of the case, and must, within reasonable limits, be left to the discretion of the presiding judge. Hunt v. Lowell Gas Light Co. *supra*.

It may be shown by evidence which excludes fault; and in a case where there was nothing which excluded the inference that both mother and child went to sleep in the usual manner, with nothing to indicate that there was any unusual exposure to injury, and they were suffocated in their sleep by the gas which escaped from the defendant's pipes, they were held to be in the exercise of such care as prudent people ordinarily use under circumstances of similar exposure to injury from hidden and unsuspected causes. Smith v. Boston Gas Light Co. (1880) 129 Mass. 318.

In an action against a gas company to recover injuries for an escape of gas, it is competent for the defendants after first obtaining from a witness testimony as to what was actually done by them or by persons in their employ, after the fact of the leak came to the company's knowledge, to show due diligence on their part by proving the system of the company in regard to complaints of leaks, how they were usually treated, and what was the established course of proceeding in applying remedies and making needful repairs. Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 233.

The evidence of a witness that it was possible for gas to escape in the manner plaintiff claimed, was held properly admitted in rebuttal. Butcher v.

The whole case proceeds upon the theory that this boy was, for the purposes of this case, a man.

See *Dietrich* v. *Baltimore & H. S. R. Co.* 58 Md. 354.

If while in the act of experimenting with this dangerous agency this explosive, inflammable material, he was injured, it must be held, as matter of law, that he was guilty of contributory negligence.

It is averred in this complaint that at the time of this injury the appellee was in full possession of all his faculties, which relieves this case from one view which has been taken by the courts in some cases.

Missouri Pac. R. Co. v. *Kincaid*, 29 Kan. 654; *Johnson* v. *Chicago & N. W. R. Co.* 49 Wis. 529; *Chicago, B. & Q. R. Co.* v. *Payne*, 59 Ill. 534; *Kansas Pac. R. Co.* v. *Brady*, 17 Kan. 380; *Illinois Cent. R. Co.* v. *Nunn*, 51 Ill. 78; *Scoville* v. *Hannibal & St. J. R. Co.* 81 Mo. 434; *McGovern* v. *New York Cent. & H. R. R. Co.* 67 N. Y. 421; *Barry* v. *New York Cent. & H. R. R. Co.* 92 N. Y. 294, 44 Am. Rep. 377; *Atlas Engine Works* v. *Randall*, 100 Ind. 300, 50 Am. Rep. 798.

In cases of this kind, where the appellants owe no duty to the appellee except that of humanity, no presumption of negligence would arise from the mere fact of an explosion.

Citizen's Street R. Co. of Fort Wayne v. *Carey*, 56 Ind. 396; *Wabash, St. L. & P. R. Co.* v. *Locke*, 112 Ind. 404; *Huff* v. *Austin*, 46 Ohio St. 386; *Cosulich* v. *Standard Oil Co.* 122 N. Y. 118.

It is neither averred nor proven that the appellants or either of them had any knowledge of such defect.

Holly v. *Boston Gas Light Co.* 8 Gray, 123, 69 Am. Dec. 233; *Mahoney* v. *Libbey*, 123 Mass. 20, 25 Am. Rep. 6; Ray, Negligence of Imposed Duties, 44; *Edwards* v. *New York & H. R. Co.* 98 N. Y. 245, 50 Am. Rep. 659; *Wolf* v. *Kilpatrick*, 101 N. Y. 146, 54 Am. Rep. 672.

There was no presumption that boys would trespass upon this line, nor that children would congregate on a country highway.

Hartfield v. *Roper*, 21 Wend. 615, 34 Am. Dec. 273; *Mangan* v. *Atherton*, 4 Hurlst. & C. 388, L. R. 1 Exch. 239.

Extra precautions are not required in anticipation of trespassing children.

Biddle v. *Hestonville, M. & F. Pass. R. Co.* 112 Pa. 551.

Messrs. **Kane & Davis** for appellee.

Howard, J., delivered the opinion of the court:

The Lebanon Light, Heat & Power Com-

Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 626.

The mere fact that an explosion of gas, caused by the negligence of the company, was effectuated by the lighting of a match, will not relieve the company from liability. Koelsch v. Philadelphia Co. (1898) 18 L. R. A. 759, 182 Pa. 355.

But the simple fact that gas accumulated in a pit, though unusual and not according to the ordinary occurrence of events, will not give rise to a prima facie presumption that it was there by the negligence of the defendant, it being a mere circumstance to be considered in connection with the full facts of the case. Washington Gas Light Co. v. Eckloff (1894) 22 Wash. L. Rep. 656.

So evidence showing that a business was not specially dangerous when prosecuted with reasonable care, that there were suitable regulations, arrangements, and equipments, and reasonable care exercised, and that there was no neglect by the defendants to enforce such regulations, is sufficient to rebut the prima facie presumption of negligence in an action to recover damages caused by an explosion. Warn v. Davis Oil Co. (1894) 61 Fed. Rep. 631, in which case it was not sufficiently proved whether the explosion was caused by an escape of gas or by the nature of the articles manufactured upon the premises.

In Butcher v. Providence Gas Co., *supra*, plaintiff recovered damages for injuries to his plants in a green house caused by the defendant's negligence in allowing illuminating gas to escape from their pipes in the city sewers and drains, and thence into the plaintiff's green house.

The evidence of witnesses who passed along the highway and lived in the neighborhood of the house into which the gas escaped owing to a fracture in the main, entering plaintiff's house through the drains and sewers, as to what extent the gas escaped into the street, has been held admissible, being material as tending to show how rapidly and in what quantities the gas was escaping, thereby affording some means of judging as to the amount of force and labor to be applied in arresting its escape, and the alacrity with which it should be applied and as indicating the place where the leak occurred, and for that reason in connection with other evidence is available upon the question whether the defendants had been negligent and careless in not having discovered the leak earlier than they did. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

If the company seeks to prove by a witness that the gas from its pipes was not escaping in great or dangerous quantities into houses in the vicinity of the plaintiff's, it is competent for the plaintiff to produce testimony tending directly to contradict it and to disparage the credibility of such party as a witness, the contradiction being only in relation to a collateral matter, and although such evidence may tend directly to contradict such a witness in relation to the answer which he may give to the inquiry, yet being in conflict with his testimony in chief, must be considered to have been material and therefore subject to be refuted by showing that he elsewhere made different statements on the subject in controversy, or to be disproved by any competent countervailing evidence. Hunt v. Lowell Gas Light Co. (1862) 3 Allen, 418.

In Hunt v. Lowell Gas Light Co. (1864) 8 Allen, 169, 85 Am. Dec. 697, the plaintiff alleged that the gas escaped from the main pipe into one of the large sewers, and thence passed through a drain and up the sink spout into the kitchen of the house of a family with which the plaintiffs were at the time visiting. Plaintiff's evidence showing that the family they were visiting had been in perfect health up to the time the gas escaped, and that immediately or soon after, every member of the family became seriously sick, was held admissible.

So where the facts, as in the principal case, showed that the plaintiff's property was destroyed by an explosion of natural gas, in transportation along a street in the city, without negligence; and it was contended that defendants were not liable for the results of such explosion in the absence of proof of negligence,—the court held (under the Ohio revised statutes relating to the transportation of natural gas through the

pany entered into a contract with its coappellant Charles T. Doxey, according to which the said Doxey was to construct a natural gas plant for the appellant company. The terms of this contract do not appear from the record. The appellant Doxey also entered into a contract with his coappellant John E. Snow, according to the terms of which the said Snow was to drill four gas wells in Hamilton county to supply gas for said gas plant. The wells were to be drilled at such points as Doxey should direct. Snow was to receive $625 for each well, and was himself to do all the work and furnish all labor; also fuel for the first well. He was to have the privilege of using gas from the first well or wells for drilling purposes. He was to pipe such gas at his own expense, except that Doxey was to furnish him the necessary pipes and fittings.

The four wells were located near the crossing of two highways. The first well was situated near the east and west highway, and about half a mile west of the crossing. Doxey located well No. 2 near the north and south highway, and about three quarters of a mile north of the crossing. In like manner, well No. 3 was located by Doxey near the east and west highway, and about half a mile east of the crossing. Well No. 4 was not near the highway, but was located about a mile north of well No. 1. After drilling well No. 1, and when well No. 2 was located, Snow laid a two-inch supply pipe on top of the ground, along the north side of the highway, from well No. 1 east to the crossing, where he put in a T, and thence continued the pipe along the west side of the highway, north to well No. 2. After well No. 2 was drilled, and well No. 3 located, Snow continued the pipe line from the T at the crossing, east along the north side of the highway, to well No. 3. At the time of the accident, wells Nos. 1, 2, and 3 had been drilled.

The accident occurred September 20, 1890, about two weeks after the completion of well No. 3. Snow was then engaged at No. 4, away from either highway. Soon after well No. 3 had been completed, Doxey's men took up the pipe on the north and south highway, from the T at the crossing, north to well No. 2. There was then no gas in the pipe at the crossing. Snow was getting his gas from wells 1 and 2 for use in drilling No. 4, and it does not appear that he had anything further to do with well No. 3 or with the pipe on the highway.

Doxey's assistant testifies that he began taking up the pipe north from the crossing by cutting the second joint north of the T. He then took two pairs of tongs,—one to hold

streets of a city, which provides, "but said company shall be liable for any damages that may result from the transportation of the same") that the language was specific and unambiguous, and could only be reconciled with a legislative purpose to impose upon the company the duty of absolutely controlling the substance whenever it should introduce it into places where, if it escaped control, it would menace the life and property of others who had no control over it and who were without fault themselves contributing to the injury.

b. *Burden of proof.*

As in other cases of negligence a party charging negligence as a ground of action must prove it; he must show that the defendant by his own act or by his omission has violated some duty incumbent upon him which has caused the injury complained of. Washington Gas Light Co. v. Eckloff (1894) 22 Wash. L. Rep. 656; Nitro-Glycerine Case (1873) 82 U. S. 15 Wall. 524, 537, 21 L. ed. 206, 211; Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 233; Adams v. Carlisle (1838) 21 Pick. 146; White v. Winnisimmet Co. (1851) 7 Cush. 155.

He must allege facts showing that the injury was due to the defendant's negligence. McGahan v. Indianapolis Natural Gas Co. (1894) (Ind.) *post*, 253.

Showing some specific act or acts of negligence directly contributing to the result, there being no rule of law requiring individuals or corporations to provide against an overwhelming calamity which in the exercise of ordinary prudence could not have been foreseen. Hutchinson v. Boston Gas Light Co. (1877) 122 Mass. 219.

And it has been held that such a plaintiff must prove the use of ordinary care for his own protection against the noxious influences of gases. Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 233.

It being for him to establish that his own negligence did not cause or contribute to the injury. Lee v. Troy Citizens Gas-Light Co. (1885) 98 N. Y. 115, 118.

One having no right to expose oneself carelessly and willfully to the injurious effects of gas, and thereby make the defendant responsible for the mischievous consequences resulting from such exposure. Holly v. Boston Gas Light Co. *supra*.

Although the burden of proof in these cases is upon the plaintiff to show the exercise of due care in respect to the occurrence from which the injury arises, yet it has been held that this, although in form a proposition to be established affirmatively, need not be proved by affirmative testimony addressed directly to its support. Smith v. Boston Gas Light Co. (1880) 129 Mass. 318.

Injuries which do not ordinarily happen when reasonable and proper care is taken to avoid them, afford a presumption of negligence and place upon the defendant the burden of proof that ordinary and reasonable care was taken to avoid the accident, the principle of evidence being that he who has peculiarly within his power the means of producing evidence of reasonable care shall be required to produce it. Warner v. Davis Oil Co. (1894) 61 Fed. Rep. 681.

A plaintiff charging the omission of the defendants to discharge their duties in keeping their pipes in a sound and safe condition for the transmission and distribution of gas, must, in order to maintain his action, show that they failed in that respect to exercise due and ordinary care. Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 233; Adams v. Carlisle (1838) 21 Pick. 146; White v. Winnisimmet Co. (1851) 7 Cush. 155.

c. *Expert testimony.*

The evidence of expert witnesses has been held admissible in cases of this description and it has been held that it is for the presiding judge to decide whether a witness so offered has been proved an expert, the evidence on the point being addressed to him and not to the jury; and if it has been excluded, no part of his testimony tending to prove him such, can go to the jury. Emerson v. Lowell Gas Light Co. (1863) 6 Allen, 146, 83 Am. Dec. 621.

The testimony of a doctor as to his experience relative to the breathing of burning gas has no

the first joint in place, and keep it from turning into the T, while the other tongs were used to unscrew the piece of the second joint which had been cut off. They then plugged up the end of the first joint with a two-inch wooden plug, and went on and took up the rest of the pipe north to well No. 2. When cutting the second joint, and unscrewing the piece from the first joint, and plugging the end of the latter, they did not examine the T to see if the joint of pipe was tight in it, but it seemed tight. There was no gas on that line at the time. The T was cast iron, and of heavier make than the pipe. It would weigh about 25 pounds. The joint of pipe left attached to it was about 19 feet long. It was about 12 feet from the nearest fence.

It does not appear how soon after the taking up of the pipe north of the T that the gas was again turned on, nor does it appear who turned it on, nor for what purpose or use it was turned on. Snow, as we have seen, had not used gas through this line since his completion of well No. 3, which was about two weeks previous to the accident. It does appear, however, from the testimony of Frank K. Pierce, an employé of the appellant Doxey, and superintendent of construction of the permanent line to Lebanon that that line was completed into the city of Lebanon, and gas furnished to the city, in the month of August, 1890, the month previous to the dates of the accident. But, for whatever purpose the gas was turned into the pipe between wells 1 and 3 after the taking up of the pipe north of the T, it is certain that between that time and the time of the accident the leak of gas at the T was observed frequently. It also seems very probable that the leak was noticed before the taking up of the pipe; but of this the evidence is not so marked, while it is clear that the leak grew worse from time to time up to the date of the accident.

The appellee was at the time about eighteen years of age, and lived with his father about 40 rods south of the crossing. Several persons testified that they saw gas on fire at the leak in the T on the day of the accident and at other times previous. John Griffin, who lived near the crossing, and who was the father of Warren Griffin, another boy who was hurt at the accident, testified that there had been a leak at the T, to some extent, ever since the pipe had been laid, and that the leak had been quite bad for some length of time previous to the accident. Others who had passed there frequently had never no-

relevancy, except as it tends to prove him an expert. *Ibid.*

As the mere fact that he is in practice as a physician does not of necessity give him any knowledge as to gas. *Ibid.*

Where the doctor's evidence was that he was a physician, and as such had witnessed the effects of the gas which escaped from the defendant's pipes at the time when the plaintiff alleged they were injurious, and the persons whom he saw lived in another house in the neighborhood, the mere fact that he was a physician would not prove that he had any knowledge of the gas without further proof as to his experience, as a physician may have professional learning without being acquainted with the properties of gas or its effect on health. *Ibid.*

Yet it is competent for the plaintiffs to show all the facts and circumstances attending their sickness, and to add proof of the opinions of persons of skill and experience as to the cause which produced such sickness and particularly whether it might have been or probably was produced by the gas to which they were exposed in their house. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

Upon the question as to whether or not due diligence had been used by the defendant company in making the excavations in the street necessary to enable them to find the place and cause of the leak in their pipe, the testimony of a witness offered as an expert should be received and submitted to the jury. *Ibid.*

Such evidence being intended to show with what dispatch, in the judgment of persons experienced in such work and competent to give a reliable opinion concerning it, that which was done by the defendants might have been accomplished in order to aid the jury in coming to a conclusion on the question whether, under all the circumstances of the particular case, the defendants were not guilty of negligence by failing to employ a sufficient number of men of vigor and activity, and of experience in that kind of labor. *Ibid.*

d. *Sufficient to establish negligence.*

In Washington Gas Light Co. v. Eckloff (1894) 22 Wash. L. Rep. 656, the defendants were negligent in failing to prevent the accumulation of inflammable gas in a pit on premises under their control, which the plaintiff in the discharge of his duty to his employer, a water company, was required to visit for inspecting and taking the register of the water meter fixed in the pit, over which the defendants had placed a shed which was dark and required the use of a light, which the plaintiff took for such inspection, when, gas having accumulated in the pit through percolation from a leak in the main pipes some thirty feet from the pit, an explosion occurred. The defendants contended that they owed no duty to the plaintiff, and that in order to maintain an action for a negligent injury it must appear that there was a legal duty owing from the person inflicting the injury to the person on whom it was inflicted, and that such duty had been violated by the want of ordinary care on their part. The court held that although such proposition might generally be conceded, yet it did not apply, defendant being under a contract duty to the municipal government to maintain the water meter upon its premises in good condition, and in such position that it could be approached and examined with reasonable safety by the agents of the municipal government, the defendant's duty being created by contract; the right of the plaintiff to go upon the premises of the defendant being derived from the municipal government, it was therefore a duty imposed upon the defendant to the plaintiff, even though there was no privity of contract between them, there being a right created by contract with the government that afforded protection to the plaintiff against the negligence or want of reasonable care on the defendant's part.

In Chisholm v. Atlanta Gas Light Co. (1876) 57 Ga. 28, the question was whether there was sufficient evidence to make out a prima facie case of negligence for the jury; the facts showing that the property damaged had been vacant; that on the evening of the explosion the plaintiff rented it for an evening, but no gas was used although gas fixtures were there; that defendant was notified of the house being vacant, that gas was not needed and must be cut off, which was done by means of a meter cock in the cellar; further, that there were two ways of cutting off the gas, one by the

ticed the leak before that day. Some had smelled gas for a few days previously, but saw no fire. John Leap, father of the appellee, had seen it on fire about two weeks before, and had put out the fire with a bucket of water, but had not seen it burning on any other occasion.

The appellee himself testified that he had noticed the leak on fire about two months before the accident, and at different times all along up to the time of the accident. The last time previous he had seen it on fire was on the preceding Monday night. The accident happened on Saturday. On that Monday night, he says, there was a charivari party out, and they stopped for a while near the leak, and some one set it afire. It burned for five minutes or less, when they put it out, and went home. He did not touch the pipe or set the gas afire himself. He saw two of the party lift up the end of the link of pipe about four feet, and then let it down again. Appellee next saw the leak afire on the Saturday of the accident, about 10 o'clock in the morning. The blaze was then three or four feet high when he came up to it. The pipe at the T and across the traveled part of the road was covered with about an inch or two of earth. It had been so covered when first laid. He again saw the leak between 1 and 2 o'clock that afternoon. He was on his way afoot to Sheridan, a town about a mile north of the crossing. When he came up to the fire, he saw Warren Griffin, a boy about twelve years of age, standing there. He began talking to Warren about the nice time they had at the charivari. He noticed Warren with a small stick scraping along the dirt where the fire was burning. While they were standing there, a neighbor came along in a team going to Sheridan, and asked appellee to go along but he said he was not quite ready. Another neighbor, Mr. Raridan, passed along a minute or two later, and made some remark about the fire. The two boys were standing without talking during this time, when appellee testifies he said to Warren, "'If that plug was taken out of that pipe, it would make a nice fire.' He asked, 'What plug?' and I went around and pointed to the plug, . . . the plug in the north end of the pipe. . . . He walked around to the end of the pipe, and raised the end of the pipe up somewhere about three inches, and that was the last I knew." The explosion followed, the joint of pipe being thrown out, and the two boys thrown violently back and burned by the gas.

meter cock, the property of the plaintiff, but used by the defendant also; the other by the service cock under the curb stone, the property of the defendant and under its exclusive control: that if the gas had been cut off by the latter method the explosion would not have occurred; that defendants sometimes used the one and sometimes the other method, the service cock under the curb stone being the safer as it was under the exclusive control of the defendant; that the meter examined after the explosion, had been tampered with, a nail being found in the hole of the meter cock used to turn it, though the gas was turned off when examined, the gas getting into the building in that manner. The court held that the plaintiff having no reason to suppose that any of defendant's gas was on the premises, was not bound to take any precautionary action in relation to the escape, neither for himself nor tenants, and that the principle, that in conducting its business as a gas producer and furnisher, the company was bound to use such ordinary skill and diligence as was proportioned to the delicacy, difficulty, and nature of that particular business, applied, and further that the evidence being sufficient to be submitted to the jury for them to say whether the explosion was caused by the defendant's negligence or not, the granting of a nonsuit was error.

When the evidence showed that deceased employed by the company as a laborer, subject to the orders and directions of the superintendent of the works, while following the instructions of such superintendent was suffocated by the negligent escape of gas into a room not properly arranged so as to allow of its passing out, the company having knowledge thereof and of the danger of inhaling the same, the deceased going to the room as instructed by such superintendent, without knowledge of the danger or fault or negligence on his part, defendants were held liable. Citizens Gas Light & Heating Co. v. O'Brien (1886) 118 Ill. 174.

So where the defendant was engaged to supply natural gas to certain premises through its service pipe extending from its main to the property line connecting there with a valve in the pipes on the premises; and the tenant discovered gas escaping from the pipes after passing through the valve and employed an experienced plumber to locate and remedy the defect, the valve used for that purpose and the only means of cutting off the supply of gas from the main, being shut, the said premises being under the exclusive control of the company; and to repair a defect it was necessary to cut off the supply of gas and for that purpose the defendant was notified, but through the negligence of the company and its incompetent servants the valve was not turned off and, the gas escaped and, in searching for the escape, exploded causing the injuries complained of, without contributory negligence on plaintiff's part,—it was contended that the company knew of the dangerous character of the gas, but there was no allegation as to the cause of such explosion, nor that the gas would have exploded without some intervening agency. It was held that there was no sufficient allegation to show that the injury was the proximate result of the defendant's negligence, and that the injury complained of must appear from the facts to have been the proximate result of the defendant's negligence. McGahan v. Indianapolis Natural Gas Co. (1894) (Ind.) *post*, 355.

Again where the facts showed that an employé of the company was directed by the defendants to turn off the gas from the house, that afterwards the plaintiff's wife, finding the smell of gas strong in the house and thinking it was gas escaping from the pipes in the cellar after the removal of the meter, took a lighted candle to the cellar door with a view to opening and ventilating the cellar, when the explosion occurred, there being no contributory negligence on the part of the wife, the company was held liable, the act of its servant being the proximate cause of the injury. Louisville Gas Co. v. Gutenkuntz (1884) 82 Ky. 422.

And again, where the facts showed the plaintiff was too young to testify, and there was no other person who could be called upon to give an account of the accident, but it was in evidence that upon a door of the room in which the parties were sleeping being broken open plaintiff was found insensible, by the side of the dead body of his mother, the escape coming from a crack in the pipe laid by the defendant corporation through a street, no gas fixtures being in the room; and there was no evidence that

On cross-examination the appellee testified that he had seen the wells put down, and saw the gas burning at the wells, and knew that it had been turned into the pipe. He had stopped at the crossing a great many times since the pipe was put down. Quite a crowd of boys and girls used to assemble there Sunday evenings. He never lit the gas or interfered with the pipe himself. He saw the link of pipe lifted up by boys several times, sometimes when the leak was afire. They just raised it up, and then let it down. On the night of the charivari, when the gas was lit, and two persons lifted up the joint of pipe, he heard his father say, "Boys, I would not do that," and they laid it down. At the time of the accident he told Warren, "If the plug was took out, and it was lifted up, it would make a nice fire." The dirt which Warren was scratching with a stick was burned red, like tile. Warren turned to look at the fire just as he raised the pipe. Appellee did not touch the pipe.

Warren Griffin testified that he was at the crossing with his brother before noon on the day of the accident, for about five minutes. The blaze at the leak was then about six feet high. He went down again alone after dinner. Just after he got there, the appellee came along, going to town. He had not seen the appellee since the Sunday before, and did not expect him then. They had been there about five minutes before the explosion. They were standing near the end of the link. Appellee said, " 'If the plug was out of the end of the pipe, and the pipe was raised up, it would make a nice fire.' I said, 'What plug?' and he showed me; and I lifted the pipe up a little, . . . about three inches." Appellee did not have hold of it. Thomas W. Raridan, one of the neighbors who passed while the boys were standing near the pipe, testified that after he passed them, going north, he looked back and saw the smaller boy stoop, as if he were about to lift something up. The other boy was standing near by, but not in a stooping position. Just then the explosion took place.

We think that no other evidence given substantially changes the facts as we have set them out from the record. The question for decision is as to the negligence of the appellants and the contributory negligence of the appellee. The material parts of the complaint, as presenting the issues on the question of negligence, are the following: That the appellee was, on and prior to September 20, 1890, "a strong, active, intelligent, and

plaintiff or his mother had notice of escaping gas, or that they were conscious of its presence in the room in time to leave or to take precautions to prevent the consequences by opening windows or doors; but there was evidence that on the day before the accident there was no smell of gas in the street, and that the mother was a sober and prudent woman,—the court held the jury justified in finding that the crack in the pipe and the escape of gas first occurred during the night of the accident, and that neither the plaintiff nor the mother were chargeable with any want of ordinary care in preventing or escaping the result, and in finding a verdict for plaintiff. Smith v. Boston Gas Light Co. (1880) 129 Mass. 318.

The court distinguished the action of Smith v. Boston Gas Light Co., *supra*, from that of Hutchinson v. Boston Gas Light Co. (1877) 122 Mass. 219, upon the ground that in the latter case the injury to the pipes and the leakage of gas were produced by other causes, excessive heat, and the fall of heavy buildings, and other destructive agencies of the great fire, while in the former case there was evidence that the pipes were not laid with sufficient care, or made of proper material, with reference to the action of frost, and therefore more liable to break in winter.

Where the evidence of the plaintiff tended to show that his intestate was killed by inhaling gas while engaged in the cellar of a building, pursuant to his duty as an employé for the purpose of reading a gas meter, but there was no evidence as to how the gas got into the cellar, nor of the defendant's negligence, beyond the fact that the gas was there and that the ventilators of the cellar were stopped up, it was shown that the defendant, by taking the meter, voluntarily entered into a relation the result of which was to require some one to enter its premises in order to read its meter. The court held it was bound to use reasonable care to prevent the place necessarily entered by the deceased from becoming a death trap, and that the jury might have found that it knew or ought to have known of the presence of gas in the cellar in quantities sufficient to be dangerous and that it might have prevented the accumulation by ventilators, or might have put the meter in a different place, and therefore might have found the defendant guilty of negligence. Finnegan v. Fall River Gas Works Co. (1893) 159 Mass. 311.

In Sherman v. Fall River Iron Works Co. (1861) 2 Allen, 524, 79 Am. Dec. 799, the action was for injuries caused by laying imperfect gas pipes in the streets near to plaintiff's premises, by reason of which the gas escaped through the ground into the plaintiff's well and thereby injured him, the court holding the defendant liable even though such state of things existed at the time the plaintiffs hired the premises.

So where the defendants were notified that gas was escaping, and directed one of its servants, a common laborer in its employ, to ascertain where the leak was, and the evidence showed that such servant found the smell of gas so strong as to be dangerous, and in the absence of the person who gave the notice to the company, and whom the company had directed to prevent any one from going into the cellar with a light, struck a match which ignited the gas and caused an explosion, the court held that the evidence of negligence on the part of the company was clear and decisive, being the direct and immediate consequence of the explosion which was caused by the negligent act of their agent in lighting the match, and that such negligence was established by such fact, whether he was wholly or only in part their agent. Lannen v. Albany Gas Light Co. (1865) 46 Barb. 264, affirmed 44 N. Y. 459.

In the above case where the instructions given by a gas light company to its servants sent by it were to examine and find out the locality of the leak in the gas pipe, and extended to the finding out of such leakage wherever it might be, the injury being sustained through the improper manner adopted by such agent in finding out the leakage, the company was held liable, no matter whether the leak was in the brass head of the pipe or in the service pipe.

In Kimmel v. Burfeind (1866) 2 Daly, 155, the plaintiff hired from the defendant the second floor of premises, the basement of which was occupied by another tenant. In the former's apartments was a gas pipe or fixture neither covered nor stopped. Gas was introduced into the basement by

energetic young man, eighteen years of age, in good health, and in full possession of all his faculties, and with good prospects for a long, successful, and profitable life." That "said defendants, a short time prior to the date hereinbefore stated, negligently constructed a gas-pipe line along and in the highway for the purpose of conveying and transporting natural gas through said line, and that said line so constructed as aforesaid was in use and operation by said defendants on said date." "That said line was made of pipe three inches in diameter, screwed together, and negligently laid on top of the ground in said highway. . . . Said defendants negligently and imperfectly and partially screwed one end of the joint of pipe, perhaps twenty feet in length, into said pipe running east and west." "That said joint of pipe was negligently, loosely, and imperfectly inserted and screwed into said pipe line, as aforesaid, in such an insecure and imperfect manner that it was liable at any moment to become disconnected from said line. That the north end of said joint of pipe was plugged, and the south end was, as before stated, imperfectly and carelessly inserted into the pipe line as aforesaid." "That natural gas was, at the time herein mentioned, being negligently conducted by said defendants through said pipe line at the high and dangerous pressure of more than three hundred pounds to the square inch." "That at the place of intersection of said joint of pipe with said line the gas was, on account of said deficiencies and imperfections, constantly escaping, and was frequently on fire; and that the said line and the said joint of pipe aforesaid were unprotected and unguarded." "That on the said 20th day of September, 1890, the plaintiff, who was a young man eighteen years of age, as aforesaid, and who was passing by said public road crossing and said pipe line, as aforesaid, and who stopped to look at said escaping and burning gas, and had but little knowledge and comprehension of the dangers of handling, using, and transporting natural gas, was in said highway at or near the point where this joint of pipe intersected with said line, and was at or near the north end of said pipe, and was standing there looking at said escaping and burning gas; and that without fault or want of care on his part, and on account of said negligence and carelessness of said defendants, the said joint of pipe was blown out of said line, and the fire and escaping gas from said line, through said

defendant's tenant's permission in the absence of the plaintiff, who, subsequently discovering the escape, notified the defendant who tested the pipe and found the escape in one part of the premises, but did not make a thorough search. Upon an explosion occurring the court held the defendant liable for negligence there being no contributory negligence on the plaintiff's part, the defendant being guilty of a violation of the obligation which enjoins care and caution and of a duty which he owed to his tenant.

Where the gas company contended that the cause of the accident was the contributing negligence of a plumber called in by the plaintiff to ascertain and stop the escape of gas, who, examining the fixtures in the basement and finding the smell not strong enough to do harm with the light, and therefore not dangerous, used a light, as accustomed to do when examining for a leakage of gas, it being his custom to judge by the smell whether it was safe to light a candle, relying upon his nose when he went where gas was escaping, which he did on that occasion, and finding no leak in the basement, took a candle to go into the cellar to examine the meter, when opening the cellar door an explosion occurred,—the court stated that to hold that such gas fitter did not exercise ordinary care and prudence would be equivalent to holding that he was bound to know that it might be dangerous to open the cellar door with a lighted candle in his hand. Schermerhorn v. Metropolitan Gas Light Co. (1874) 5 Daly, 144.

In the above case plaintiff's evidence showed that the breakage in the pipe was occasioned by the frost, and that the pipe was not laid at a proper depth, but the defendant contended that the pipe was laid at a sufficient depth, that the breakage was not occasioned by the frost but from other circumstances for which it was not liable, the gas escaping through the break in the pipe into the plaintiff's house. The court held the main, though not the proximate, cause of the accident was the escape of gas in consequence of the breakage in the pipes in the street, and that there was evidence sufficient to go to the jury thereon. *Ibid.*

In Lanigan v. New York Gas-Light Co. (1877) 71 N. Y. 29, damages were claimed for negligence in discontinuing the supply of gas and removing the meter the service pipe not being properly closed. The court held the defendant guilty of an omission of duty in neglecting effectually to cap and close the service pipe so as effectually to exclude the gas from the cellar of the store. Lannen v. Albany Gas-Light Co. (1871) 44 N. Y. 459; Holding v. Liverpool Gas Co. (1846) 8 C. B. 1, 5 N. Y. Legal Obs. 77, Anthon, N. P. 356, *note*.

The court, in Holding v. Liverpool Gas Co. (1846) 8 C. B. 1, 5 N. Y. Legal Obs. 77, Anthon, N. P. 356, *note*, held that the outer stop-cock was in that case so obvious a protection and being in addition in actual use, there was no apology for its omission and the mischief being traced to that cause the liability of the defendants admitted of no doubt.

Where it was admitted that the death of the plaintiff's minor son resulted from asphyxia caused by inhaling illuminating gas, which escaped from a broken gas pipe in the street, the court held that even without reference in detail to the uncontradicted evidence tending to prove that the proper city authorities had been duly notified of the fact of the escape of gas, and that they neglected for several days to locate the leak and replace the broken pipe, the plaintiff's evidence, if believed by the jury, presented a case of inexcusable and protracted neglect of duty on the defendant's part resulting in the death of the plaintiff's son, the duty of promptly locating and stopping the leak being one that devolved solely upon the proper authorities of the city. Ottersbach v. Philadelphia (1894) 161 Pa. 111, 114.

So where the pipe and sewer were in the immediate vicinity of each other and there was a defect in the former from which through negligence gas escaped, not merely by absorption or by gravity, but also by pressure, finding its way into the sewer, the fact that the city contractor in building the sewer disturbed the pipe was held not to affect or shift the cause of action, the facts still remaining that gas was escaping, and that the company knowing of the defect neglected to make the necessary repairs, and that even if the plaintiff by his own negligence occasioned the defect, that fact would not make the cause less direct so as to defeat his action on the ground of contributory neg-

opening, instantly caused a terrible explosion, the flames of said escaping and burning gas, on account thereof, extending to and beyond the plaintiff, who at the time was at or near the north end of said joint of pipe, completely enveloping him; and that on account of said explosion and burning gas, the said plaintiff was violently thrown a distance of many feet, and his clothing was burned, and he was so deeply, seriously, and terribly burned," etc. "That all of his said injuries were sustained as a result of the said negligence and carelessness of said defendants, and without fault on his part."

This complaint charges, in substance, that the appellants were guilty of negligence in laying a natural-gas pipe, as described, upon the public highway, and in transporting through such pipe, as so constructed, natural gas at the dangerous pressure of 300 pounds to the square inch. We think the charge is fully sustained by the evidence. That the pipe was carelessly put together is evident from the numerous leaks, in addition to the one at the crossing; which are testified to. It was additional negligence to lay such a poorly jointed pipe, containing such a dangerous explosive, loose upon the ground where the public, including children and other inexperienced persons, were passing day after day. Besides all this, it was a violation of the law to lay pipe upon the public highway. Whatever may be said as to the right to lay gas pipe or other pipe, in covered trenches along the highway, after due permission obtained from proper authority, and so laid as not in any manner to obstruct the highway or endanger public travel, there can be no question that it is unlawful to occupy the surface of the highway, as done in this case. The public roads, free from any obstructions to travel, are solely, and from fence to fence, for the use of the traveling public. *Ohio & M. R. Co.* v. *Trowbridge*, 126 Ind. 391; Elliott, Roads & Streets, chap. 24.

And we think that the jury were fully authorized from the evidence in finding, as they did by their general verdict, that this negligence attached to all the appellants. Snow actually put the pipe together, and laid it in the highway. Doxey furnished him with the pipe and the fittings, and located the several wells, and his agents took up the north and south line, cutting and unscrewing the second joint from the first at the crossing. The accident happened after this, and after Snow had ceased to use the pipe,

ligence. Oil City Gas Co. v. Robinson (1881) 99 Pa. 1, 5.

In Burrows v. March Gas & Coke Co. (1872) L. R. 7 Exch. 96, 41 L. J. Exch. 46, 26 L. T. N. S. 818, 20 Week. Rep. 498, the court held that the company were guilty of a double default, first in supplying a defective pipe, and secondly, in sending gas through it in quantities calculated to produce the catastrophe which occurred, the escape of gas being the direct consequence of their breach of contract and necessarily dangerous.

And where the defendant, a gas fitter, was employed by the plaintiff's master to repair a gas meter, and for such purpose took away the meter making a temporary connection by means of a flexible tube between the inlet pipe and the pipe connecting with the house, and the plaintiff going in performance of his duty with a lighted candle into the cellar, gas which had escaped by reason of the insufficiently connected tube exploded and injured him, the jury found the work negligently done and that the injury proceeded entirely from such negligence, and the court held the defendant liable. Parry v. Smith (1879) L. R. 4 C. P. Div. 325, 48 L. J. C. P. 731, 27 Week. Rep. 801, 41 L. T. N. S. 93.

e. *Insufficient to establish negligence.*

In Taylor v. Baldwin (1889) 78 Cal. 517, the defendant constructed gas works and laid pipes therefrom for the supply of his own property; the flow of gas decreasing, plaintiff, the superintendent of the works, acting under the suggestions of others, attempted to increase the pressure by taking the weights out of the buckets attached to the gas meter, when the latter tilted, the gas escaping thereby causing an explosion. The evidence showed that the taking of the weights out of the bucket removed the balance from the receiver and permitted it to tip over; that the utmost care and caution was used by the defendant in the construction of the works, the best mechanics and engineers being employed by him. The court held that the defendant was not liable inasmuch as the plaintiff knew of the danger and acted in the matter without the authority or instructions of the defendant, and further that the accident was caused by the defendant's own negligence, and not by the gunny sack alleged to have been left over the gas pipe in the construction of the works.

Where there was no evidence to show that the defendants had not made suitable provision against the consequences of all conflagrations in the city, or that the pipes from which the gas escaped were not of suitable material and properly laid, or that all appliances for the proper distribution or retention of gas were not fully provided, or that the officers and agents were not properly skilled, or that the work as a whole with the system of management adopted was not adequate to all the reasonable exigencies of the business no better system being shown to exist, the injury to the pipes and the leakage of gas being caused by the fall of heavy buildings, the excessive heat and all the distributive agencies of the fire,—the court held the defendants not liable. Hutchinson v. Boston Gas Light Co. (1877) 122 Mass. 219.

In that case it was contended that the company had notice early in the morning of the explosion "that the gas was escaping from somewhere," and more especially in the adjoining building, and failed to respond to the notice, but there being no evidence that the escaping gas as described by the party giving the notice was the cause of any explosion whatever, or that it had anything to do with the burning of the building, the fire originating at another point of the street. *Ibid.*

The fire in question followed close upon the great fire, which, although under control, required great efforts on the part of the public authorities to restore order and prevent further calamity, and the court was bound to take notice of it in considering the nature and weight of the evidence relied on to prove the defendant's negligence, and, upon a careful consideration thereof, there was not enough to justify a verdict for the plaintiff charging the defendant with negligence, it not being a case in which negligence could be inferred from the happening of the accident alone. *Ibid.*

And although there was evidence that the defendant company had a large number of valve boxes in the vicinity of the place where the explosion occurred none of which were closed for the purpose of shutting off the gas, but it was not shown that if all had been closed the leak would

which then belonged solely to Doxey. Doxey thereafter must be held to have assumed Snow's former charge of caring for the pipe; and he did in fact afterwards bury this line of pipe in the highway, using it as a part of the permanent line to Lebanon. And from the fact that, a month before the accident, gas was delivered to the city of Lebanon from well No. 1, which, by the pipe passing the crossing, was directly connected with well No. 3, the jury were amply justified in finding that the gas flowing through this pipe from well No. 3 was taken, along with the gas from No. 1, to be distributed by the appellant company to its patrons in the city. It does not appear from the evidence that any other use could be made of the gas, for Snow had ceased to use it before the north and south line was taken up, and two weeks before the date of the accident. If this inference of the jury that the company was in the actual use of the gas that flowed over the crossing at the date of the accident were incorrect, it was the duty of the appellant company to show that fact, and by introducing upon the trial its contract with Doxey, or by other competent evidence, to prove the absence of liability on its part. The evidence adduced makes a prima facie case against the company.

As said by Mr. Broom (Legal Maxims, 939): "Where a party has the means in his power of rebutting and explaining the evidence adduced against him if it does not tend to the truth, the omission to do so furnishes a strong inference against him." Notwithstanding, therefore, the fact that Doxey had not at the time fully completed his contract, nor formally turned over the plant to the company, yet the company, being in the actual use of the gas which flowed through the pipe over the crossings, cannot escape liability for the negligent manner in which the gas was conveyed through the pipe thus carelessly constructed along the public highway.

The other question—as to the liability of the appellee, and whether he was himself guilty of negligence contributing to his injury—is one not free from difficulty. In the complaint it is alleged that "plaintiff was on and prior to the 20th day of September, 1890, a strong, active, intelligent, and energetic young man, eighteen years of age, in good health, and in full possession of all his faculties." It is further alleged "that on the said 20th day of September, 1890, the plaintiff, who was a young man eighteen years old, as aforesaid, and who was passing by said public road crossings and said pipe line as aforesaid, and who stopped to look at said

have ceased, or that it was practically possible to reach and close them, and it was evident that there had been made a sudden demand upon all the resources of the company to meet the requirements of the occasion, gas escaping from all pipes of the burning district, the court held there was no evidence that all resources were not exhausted in duties that were equally or more pressing. *Ibid.*

The fact that the plaintiff made no claim on the defendants, or on their agent, on account of the damages sustained or alleged to have been caused by the escape of gas until some time after, is admissible in evidence as tending to show that the plaintiff did not originally attribute his illness to the gas which escaped into the house, of which fact defendants were entitled to avail themselves. Emerson v. Lowell Gas Light Co. (1862) 3 Allen, 410.

In Schmeer v. Gas-Light Co. of Syracuse (1892) 65 Hun, 378, plaintiff took a lighted candle for the purpose of finding the escape against the remonstrance of other people in the building, and the explosion occurred which caused his death, subsequent discovery showing that the end of a gas pipe which had been carried to the hall in the third story for the purpose of attaching a meter was open. A gas fitter and plumber of the city was employed to put the pipes through the building which was a new one, whose instructions were "to put the joints together in red lead, all pipes to be capped, proven tight with caps left on." It was proved that the service pipe was of proper size, properly put in and left in a proper condition with the gas shut off, a shut-off cock being properly placed in the pipe to admit of its being turned off in the street, the pipes in the building being connected with this service pipe a few days before the accident, and on application by a tenant for gas a meter was attached to the horizontal pipe in the cellar by means of a branch or riser, entirely separate from those in the stories above and the gas turned on in the street, the operation sending the gas through the meter into the store for which the application had been made, and also into the other part of the building, thus causing the accident. The court held the gas company not liable, as it merely in the ordinary course of its business allowed its gas to be taken into a receptacle furnished and owned by the party himself, preparatory to its being used in his building, and it had therefore no knowledge or reasonable ground for believing that such receptacle was defective, the court ordering a new trial.

So where the question was whether the defendant's negligence was established by a fair preponderance of proof, the evidence showing that on a given date gas was leaking in the cellar, that the plaintiff and another boy were lawfully standing upon the cellar door in front of the premises; that the housekeeper being notified of the leak called the attention of the defendant's employés to the fact; that an employé of the company went into the cellar to search for the leak, or its cause, when the explosion occurred,—the court held that under the circumstances the jury were not entitled to infer that the explosion occurred through the negligence of the employé, as by conjecture and presumption the cause of accident could be attributed to any one of several causes with quite as much certainty as to the negligence of the defendant, there being no evidence whatever of any defective workmanship, nor of the defendant's failure to make repairs, the defendant entering diligently upon the work and the explosion occurring before the discovery, the testimony failing to establish negligence, and that therefore a verdict of the court below in plaintiff's favor not supported by the evidence should be reversed. Krzywosynski v. Consolidated Gas Co. of New York (1895) 11 Misc. 61.

In Oil City Fuel Supply Co. v. Boundy (1888) 122 Pa. 449, 460, the court held that in order to warrant the proof of admissions by an agent as part of the *res gestæ* it must appear that the agent was specially authorized to make them, or his power must have been such as to constitute him the general representative of the principal, having the management of the entire business, or the admissions must have formed part of the consideration of the contract, or if they were noncontractual must have been part of the *res gestæ*. Therefore where the evidence showed that the witness was only agent for a certain line and that the general office of the company was in another county, and the accident

escaping and burning gas, and had but little knowledge and comprehension of the dangers of handling, using, and transporting natural gas, was in said highway at or near the point where this joint of pipe intersected with said line, and was at or near the north end of said pipe, and was standing there looking at said escaping and burning gas, and that without fault or want of care on his part, and on account of said negligence and carelessness of said defendants, the said joint of pipe was blown out," etc., causing the injury complained of.

While, therefore, the appellee was in the full possession of his strength and faculties, it does not appear from these allegations that on the occasion of his injury he was himself guilty of any negligence. He was at the time on the public highway, where he had a right to be. Whether he walked, or rode in a wagon at the invitation of his neighbor, or whether he stood talking with an acquaintance, and watching the gas pipe or any other object, was an affair that concerned himself alone, so long as he did not interfere with the equal right of any one else to use the highway. Least of all have the appellants, who had placed an unlawful obstruction upon the highway, a right to complain of his presence. If, however, it should appear that the appellee was aware of the dangerous character of the obstruction thus placed upon the highway, and, notwithstanding such knowledge, should persist in standing in the immediate presence of the danger, and, still more, if he should in any manner, either by his own act or by suggestion to another, have aided in liberating the dangerous explosive, he could not recover for an injury thus brought about. It appears from the evidence that the appellee lived near the crossing, and within a mile of the town of Sheridan, for fifteen years prior to the accident, and that for four or five years previous to that time gas wells were put down in and around that town.

The appellee had been present a few times at the drilling of the first well in Sheridan; also, when they fired the second well. He also knew of the use of gas for fuel in Sheridan, Noblesville, and other parts of Hamilton county, prior to the drilling of the wells for the Lebanon Company. He was also present at the drilling and firing of these wells, and knew that gas was piped around from well No. 1 to well No. 2. He saw the size of the flames from the wells, and heard the noise. He had been warned by his father

occurred when the agent was not there and had not been there and knew nothing of it and was accosted in another city by the plaintiff, the declarations of such agent were not within the rule.

Where the injury suffered resulted from gas in the street mains which was clearly traceable to negligence or improper meddling, and the facts as found by the referee showed that the fault did not lie at the door of the city, the court refused to find otherwise than for the defendant company. Strawbridge v. Philadelphia (1879) 18 Phila. 173, 36 Phila. Leg. Int. 276.

So the possibility of injury from gas escaping downward to coal in a mine 140 feet below the surface, instead of upward to the air, was under the evidence considered too doubtful, remote, and speculative to form an element of damage to coal lands crossed by a pipe line laid three feet beneath the surface. Wallace v. Jefferson Gas Co. (1892) 22 Pittsb. L. J. N. S. 293, 29 W. N. C. 349.

And in a case where the unlawful act of a thief, whose presence was neither caused nor procured by the defendant, was the immediate cause of the explosion, the damage thereby occasioned to the plaintiff was held to arise from a combination of circumstances, and accidental so far as the defendant was concerned. Sofield v. Sommers (1878) 9 Ben. 526.

In that case, the defendant was the owner of a lighter transporting petroleum, and had on board a deck load of refined petroleum in barrels, the lighter being moored for the night, without a watchman; the plaintiff's boat, at the same wharf and a short distance from the lighter, being set on fire through an explosion on the latter boat. It was claimed there was negligence on the defendant's part in leaving the lighter without a watchman, and that the destruction of the plaintiff's boat resulted therefrom, and that no precaution being taken to prevent the access of the thief amounted to negligence; but the court held that the placing of the lighted match was not the natural result of the nonpresence of a watchman, and that there was no evidence to show how the gas escaped into the cabin, nor to show that the presence of gas in the cabin was caused by any negligence on the part of the defendants; neither was it shown that the presence of such gas was to have been expected or that it was known to any one, and therefore there was no want of due precaution against fire.

IV *Contributory negligence.*

The question of contributory negligence forms an element in the consideration of the liability of such companies for damages occasioned by explosions and the escape of gas, and it has been held that in all such cases negligence being the gist of an action, a party claiming damages must show that he has not failed in the performance of his duty, in relation to the subject-matter out of which the suit has arisen. Hunt v. Lowell Gas Light Co. (1861) 1 Allen, 343.

As any degree of neglect on his part contributing to the injury in such cases destroys his right to recover; the negligence must contribute materially and essentially to the injury. Oil City Fuel Supply Co. v. Boundy (1888) 122 Pa. 449; Lanigan v. New York Gas-Light Co. (1877) 71 N. Y. 29.

Therefore if, after reasonable notice of the danger being aware of the inflammable and explosive character of gas the plaintiff heedlessly encounters it he is without redress. Brown v. New York Gas-Light Co. (1850) Anthon, N. P. 351, 355.

And must be held responsible for a disregard of the peril. Lanigan v. New York Gas Light Co. *supra.*

The maxim *volenti non fit injuria* applying with all its force. *Ibid.*

For the assertion of a right involves the necessity of showing the performance of a corresponding duty. Hunt v. Lowell Gas Light Co. *supra.*

Thus where it was probable that gas was escaping from the leak and would find its way into the sewer in quantities sufficient to produce an explosion, and plaintiff (a civil engineer) ought to have anticipated the result and not have entered the sewer with a lighted lamp, such act of entering being contributory negligence sufficient to prevent recovery. Oil City Gas Co. v. Robinson (1881) 99 Pa. 1, 5.

A civil engineer is presumed to have some knowledge of the dangerous nature of illuminating gas, of its penetrating powers, and explosive

not to light the gas at any of the leaks. Parties of young people with whom he joined had been in the habit, particularly on Sunday evenings, of congregating at the crossing, lighting the gas, and watching it burn. Appellee says he did not himself light the gas or touch the pipe. On these occasions he saw the end of the joint of pipe raised up and let down several times, sometimes when the gas was lit, and sometimes when it was not. On the Monday night previous to the accident he and his father were with the charivari party at the crossing. He saw the gas lit and the pipe raised up that evening. The fire blazed up two feet or more. He heard his father say at the time, "Boys, I would not do that," and they laid the pipe down. On the day of the accident, when talking to the boy Griffin, he said to him, "If the plug was took out, and it was lifted up, it would make a nice fire." On that occasion he noticed the fire stronger than usual, and that the earth near it was burned red, like tile. When he told Griffin about taking out the plug and lifting up the pipe, Griffin said, "What plug?" and they both walked around to the end of the pipe, and he showed Griffin the plug, when Griffin stooped down and lifted up the pipe. Appellee was then standing on one side of the pipe, and Griffin on the other, and appellee noticed Griffin turn to look at the fire as he raised the pipe. Appellee at the same time observed the fire himself. Then the explosion took place. The appellee does not appear, at the time, to have himself touched the pipe, and for this reason, perhaps, the jury did not think that he was guilty of contributory negligence. Considering the evidence adduced, it seems very doubtful whether this conclusion was correct.

As bearing on this question, the following, with other instructions given the jury, is complained of: "(7) On the subject of contributory negligence the question for your consideration is whether the plaintiff himself was in fault in any act he did or caused to be done at the time of the accident, if any such act has been proved which contributed to the injuries sustained by him. Anything any other persons may have done then and there, or at any other time, independently of himself, and for which he was not responsible, or anything he may have done himself, at any other time or place, in way of intermeddling with any of the gas wells or pipe lines of said defendants, or either of them, if any such acts have been proven, would not affect the right of the plaintiff to recover in this action, unless he was in fault at the time and place when the accident occurred, in doing something which contrib-

character, when mixed in certain quantities with common air, and where he knows that the gas escapes and saturates the adjacent earth, he is bound to be upon his guard. *Ibid.*

But an ordinary person, one not skilled as an expert, is not bound to know that natural gas when mixed in certain portions of the common air is explosive. Kibele v. Philadelphia (1884) 105 Pa. 41, 44.

And the same principles apply when the act is that of a fellow servant. Lehigh Valley Coal Co. v. Jones (1878) 86 Pa. 432.

If, therefore, the injuries were occasioned by the plaintiff's own carelessness, he can only recover for the natural and direct consequences of the wrongful act of the defendant, and not for the consequential damages which might have been avoided by ordinary care on his part. Sherman v. Fall River Iron Works Co. (1861) 2 Allen, 524, 79 Am. Dec. 799.

Yet if the plaintiff was put to expense in reasonable and proper attempts to exclude the gas, defendants will not be protected from responsibility to the extent that these facts were justified, because the plaintiff had negligently permitted such injurious consequences to follow for which he could have no remedy. *Ibid.*

And although there may be some slight evidence of contributory negligence yet if upon an examination of the testimony the court is satisfied that it is not of such a character as will warrant it in virtually declaring, as a matter of law, that either the plaintiff or the deceased was guilty of negligence which contributed to the latter's death, the plaintiff will be entitled to recover. Ottersbach v. Philadelphia (1894) 161 Pa. 111, 114.

The defendants, sued for personal injuries to a child caused by the escape of gas, may show conduct on the part of the father indicating a want of ordinary care in adopting suitable precautions against the hurtful effect of the gas after it has been discovered penetrating or pervading the house where they reside. Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 238.

It being competent to offer proof of the conduct of the parties in order that the jury may determine whether the plaintiff has not neglected to use ordinary care in seeking relief or resorting to expedients readily available for his own protection and security. *Ibid.*

Thus it is a want of due care to remain in a house after the plaintiff has had a reasonable opportunity to procure another house or place of residence and to remove thither, the defendants not being liable for consequences which ensued after such removal might have been made. Hunt v. Lowell Gas Light Co. (1861) 1 Allen, 343; Holly v. Boston Gas Light Co. *supra*; Bartlett v. Boston Gas Light Co. (1875) 117 Mass. 533, 538, 19 Am. Rep. 421; Sherman v. Fall River Iron Works Co. (1861) 2 Allen, 524, 79 Am. Dec. 799.

And he must either do this or take other precautions for his sake until the leak is discovered and stopped, as he cannot knowingly take upon himself such a risk and then seek to charge a city therewith. Kibele v. Philadelphia (1884) 105 Pa. 41, 44.

So if a tenant, upon discovering the presence of gas in large quantities upon the premises, neglects to give notice to the agents or servants of the company. Bartlett v. Boston Gas Light Co., Hunt v. Lowell Gas Light Co. and Sherman v. Fall River Iron Works Co. *supra*.

Where the husband, notifying the company of an escape of gas, sent a servant with a light to stop the leak, and followed with another light for the purpose of assisting him, the carrying of the light was held such contributory negligence on the husband's part as precluded a recovery for damages against the company. Vallée ès Qualité v. The New City Gas Co. (1872-3) (a Canadian case) 7 Am. L. Rev. 767.

So an experienced miner killed by an explosion occasioned by his lighted lantern in passing near an oil well from which he smelled gas escaping, which was so great and created so much noise that he was not in ignorance of its existence, and had perfect knowledge of the great danger of approaching it with the flame of fire, was charged

uted to his own injuries." This seems too broad. From it the jury were given to understand that anything which the appellee might have done before the date of the accident could not be taken into account. His experience as to the dangerous nature of natural gas, the admonition of his father not to light the leaks, and warning the boys of the charivari party to let the pipe alone, were matters of knowledge which would certainly affect his responsibility on the day of the accident, even though drawn from events that occurred on former occasions. Still more questionable is the clause of the instruction that "anything he may have done himself at any other time or place, by way of intermeddling with any of the gas wells or pipe lines, . . . would not affect the right of the plaintiff to recover."

It was charged as a part of the defense that the working up and down of the joint of pipe on the night of the charivari and at other times had so loosened the joint at the T that when, at the suggestion of appellee, Griffin lifted it up at the time of the injury, the loosened and weakened joint suddenly gave way, when but for the disturbances on former occasions it might have withstood the weakening caused by Griffin's raising it up. Whatever may have been the facts as to this, the appellants had a right to make such proof as they were able; and if, in fact, appellee himself, by his own act, or by participating in the acts of others, either on the occasion of the charivari, or at other times, had in any degree caused the loosening or weakening of the joint, and so helped to bring the injury upon himself, he ought not to recover. The effect of the instruction was to exclude from the consideration of the jury all former acts of the appellee in connection with the wells or the pipe lines, and to confine their attention strictly to his actions at the time and place of the accident.

We do not think that the error in this instruction is cured in any other instructions given, if, indeed, it could be cured by other instructions. The all-important question, after establishment of the negligence of appellants, is whether the appellee was or was not negligent, and we do not think that his negligence or want of negligence is to be measured solely by what he did on the occasion of his injury. The error was probably an inadvertence on the part of the learned and accomplished trial judge; but we think it was nevertheless calculated to lead the jury away from the consideration of important evidence in the case, and therefore that a new trial ought to be granted. Other alleged errors discussed by counsel need not, as we think, be considered.

The judgment is reversed, with instructions to grant a new trial.

with contributory negligence, although the owners of the well had not exercised care usual in such cases. McClafferty v. Fisher (1885) (Pa.) 1 Cent. Rep. 571.

And where the proximate cause of the explosion was the introduction of a light into the cellar by the servants of the plaintiff under his immediate directions, the plaintiff having for a long time been aware that the gas had escaped and was escaping into his cellar and finding its way into other parts of the building, it will be presumed that he knew it was accumulating in larger quantities and in more condensed form in the cellar, which was seldom opened. Lanigan v. New York Gas Light Co. (1877) 71 N. Y. 29.

In the above case plaintiff knew of the escape of gas and had occasion to visit that part of the premises with lights, and therefore it was a voluntary and negligent exposure of his property to danger not to see that the escape of gas was properly prevented, the fact that he had frequently before exposed himself and property to the same risk and escaped with impunity, not exempting him from the consequences of his carelessness when damage ensued, the prior acts not justifying his negligence on that occasion or proving it prudent to take a lighted match or candle into the cellar. *Ibid.*

Where it appeared that the house occupied by the plaintiff was situated several hundred feet from the leak in the pipe, and on a street through which the gas was not conducted, there being no direct communication with the pipe through which the gas flowed and the plaintiff's house, the escape being through a private drain into the cellar, of which matter the defendants had no knowledge or information such as would lead them to suppose that the gas had made its way into the house,—it was held that if the defendants did not know of the leak in the pipe which caused the gas to escape into the house, and by the use of reasonable care and after due inquiry could not ascertain the fact, the plaintiff had no right to remain passive and permit the nuisance to exist for a number of days to his injury and then claim the damages during the whole time, due diligence requiring some action on the plaintiff's part. Hunt v. Lowell Gas[Light Co. (1861) 1 Allen, 343.

But where the facts showed that the deceased was acting under a certain stress of duty, the jury would be warranted in finding that the risk run did not appear to be great, and in fact would not have been great if there had been ventilation, and that therefore the deceased could take such risk as was manifest without losing the protection of the law. Finnegan v. Fall River Gas Works Co. (1893) 159 Mass. 311.

So where a gas pipe had been injured by an accident occurring to the exterior pipe from which gas had escaped all the afternoon, and the workmen were notified thereof and expected to remedy it and finished their work later in the day, declaring that it was done, and an hour or two later the plaintiff closed his barn, but noticed a smell of gas which led him to look at the meter and occasioned remark, the facts showing that the odor of gas and the leak during the afternoon might have accounted for the smell, and that the workmen had been engaged thereon, the court held that the natural presumption was that the odor was not due to an undiscovered leak, but the escape of gas before the repairing of the discovered leak, and therefore was not sufficient to show contributory negligence on the plaintiff's part. Lee v. Troy Citizens Gas-Light Co. (1885) 98 N. Y. 115, 118.

And a boy six years old, who was ordered to keep away from a ditch across which he, with others, was jumping allowing the stuff to fall down, but who had no knowledge or was not warned of any danger from gas, was held not guilty of contributory negligence by remaining there, so as to prevent recovery for injuries received by an explosion. Rummele v. Allegheny Heating Co. (1888) (Pa.) 16 Atl. Rep. 78.

See also head V., *infra*.

V. *Questions for and instructions to the jury.*

The question of liability for the escape and ex-

Frederick L. McGAHAN, *Appt.*,
v.
INDIANAPOLIS NATURAL GAS CO.

(.....Ind.....)

1. **A complaint charging a gas company with negligence in failing to cut off the supply of gas** from a building in which there was a defective pipe, and denying that plaintiff was guilty of contributory negligence, is insufficient to show that the negligence of such company was the efficient cause of an injury to plaintiff from an explosion, as this would be impossible without some agency acting upon the leaking gas.

2. **It is a matter of common knowledge** that natural gas will not explode spontaneously without some agency acting upon it.

3. **A plaintiff must be presumed to have caused an explosion** of natural gas by his own act, where his complaint against a gas company for the explosion does not charge the company with any negligence except in failing to cut off the supply, and does not make any allegation as to the cause of the explosion.

(May 29, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Marion County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. P. Baker** for appellant.

Messrs. **Winter & Elam** for appellee.

Hackney, *Ch. J.*, delivered the opinion of the court:

This action was by the appellant, and by it he sought to recover damages for personal injuries resulting from an explosion of natural gas. The complaint was in two paragraphs, to each of which the lower court sustained the appellee's demurrer, and that ruling is the only assigned error. The material facts alleged were that the appellee was engaged in supplying natural gas, for fuel and other purposes, to the citizens of the city of Indianapolis; that a tenement occupied by one Kilburn was supplied with natural gas by said company, through a service pipe of said company, extending from its mains to the property line, and there connecting by a valve with the pipes of said tenement; that said tenant discovered that the gas was escaping from the pipes upon said premises and after passing through said valve; that she employed the appellant, an experienced plumber, to locate and remedy the defect in the pipes which permitted

plosion of gas is to be judged of by the jury according to the subject-matter and force and danger of the material under the defendant's charge, and the circumstances of the case. Holly v. Boston Gas Light Co. (1857) 8 Gray, 123, 69 Am. Dec. 238.

The plaintiff can only prove what care he has himself taken, and it is then to be determined by the jury whether it was sufficient, so far as depends upon that question, to entitle him to recover damages for the injury sustained. Emerson v. Lowell Gas Light Co. (1862) 8 Allen, 410.

So the question of contributory negligence on the plaintiff's part is for the jury to decide. Ribele v. Philadelphia (1884) 105 Pa. 41, 44; Ottersbach v. Philadelphia (1894) 161 Pa. 111, 114.

It is also within the province of the jury to decide whether the immediate communication to the officers or agents of the gas company that such a leak had occurred was not a necessary, or reasonable measure of precaution, of which those liable to suffer from inhaling the gases ought to have availed themselves. Holly v. Boston Gas-Light Co. *supra.*

And the jury should be instructed that if the defendants did not know, and by the use of due care could not ascertain, that the gas was escaping into the plaintiff's house, they would not be liable for damages sustained after the time when the plaintiff, in the exercise of due care, could have given notice to the defendants, and they had thereby opportunity given to prevent the further continuance of the escape. Hunt v. Lowell Gas Light Co. (1861) 1 Allen, 343, citing Peyton v. London (1829) 9 Barn. & C. 725, 8 Car. & P. 363.

It is a question for the jury whether upon the liability attending the construction of a sewer, a gas company having a proper system of inspection would or ought to have knowledge of a leak in its pipe caused by the construction of the sewer, sooner than the leak was in fact discovered. Koelsch v. Philadelphia Co. (1893) 18 L. R. A. 759, 153 Pa. 355.

So it is for the jury to consider whether remaining in a house after it becomes known to its inmates that it is being filled with the gas escaping from a leak in the pipes, is not a manifest want of prudence. Holly v. Boston Gas Light Co. and Kibele v. Philadelphia, *supra.*

And if the defendants in making the necessary excavations occupy more time than is reasonably requisite for the purpose, such delay and tardiness make the circumstances proper to be considered by the jury in forming an opinion upon their alleged inattention and negligence. Emerson v. Lowell Gas Light Co. *supra.*

Where the break on the inside of the foundation wall was caused by one of two causes, either by the blow of the heavy stone on the service pipe, or by a forcible twisting of the inner couplings, in the process of putting on a new elbow on the outside of the foundation, whichever it was; and whether the workman could or should have discovered the leak and repaired it,—are questions which the court should submit to the jury. Lee v. Troy Citizens Gas-Light Co. (1885) 98 N. Y. 118.

In an action against a gas company for negligently allowing the escape of gas from their main into premises where lights were known to be burning, the plaintiff's case being that the gas found entrance through an open window nearly level with the trench from the main, after a hole had been made in the main for the purpose of inserting the service pipe, it was held that even if the jury thought the gas so entered, it was still a question for them whether the defendant's men might reasonably have foreseen and were bound to have the window closed. Blenkiron v. Great Central Gas Consumers Co. (1860) 2 Fost. & F. 427.

Where the witnesses and among them the city patrolmen testified to smelling the escape of gas for some time prior to the accident, and the evidence indicated a broken pipe and the need of immediate repairs, it was held it might well be supposed that the proper officers ought to have discovered the leak, and that it was part of the business of the patrolmen to have informed them thereof, such matters being questions for the jury which ought to be submitted to them. Kibele v. Philadelphia (1884) 105 Pa. 41, 44.

the gas to so escape; that said valve was for the purpose and was the only means of cutting off the supply of gas from the appellee's mains to said premises, and it was under the exclusive control of the appellee; that, to repair said defect, it became necessary to have said supply of gas cut off, and for that purpose the appellee was repeatedly requested and promised to have said valve turned without delay, but, through the negligence of said company and its incompetent servants, said valve was not so turned, and said gas continued to escape, within said tenement, for more than twenty-four hours; that during that period, and while upon a second visit to said premises, the appellant was

An instruction to the jury that it was in law the duty of the defendants to exercise reasonable care and supervision of gas boxes placed by them in the public streets of the city, is correct. District of Columbia v. Washington Gas Light Co. (1891) 9 Mackey, 39.

So where the defendant contends that plaintiff might have prevented the damage by using a proper trap, a charge to the effect that while that might have been proper in guarding against sewer gas, it was for the jury to consider whether he ought to expect to find, or be bound to guard against, illuminating gas in a common sewer, and whether his not providing such a trap showed want of care on his part, is correct. Butcher v. Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 626.

And a charge, that when the defect was discovered the defendant should have adopted reasonable remedies to prevent the injury, and that if the injury resulted from the joint carelessness of plaintiff and defendant, plaintiff could not recover, was held sufficient. *Ibid.*

An instruction to the effect that whether the plaintiffs were made sick by the defendant's gas alone, or by the gas generated in the same drain through which it passed, if carried by the defendant's gas into the house, the defendants are equally liable, provided the jury should find the plaintiffs not guilty of negligence and that the defendants were guilty of negligence, is correct. Hunt v. Lowell Gas Light Co. (1864) 8 Allen, 169, 85 Am. Dec. 697.

Where the jury in the main part of the charge were told that the burden of proof was on the plaintiff to show affirmatively "that the injury was occasioned by the negligence of the servants of the defendant company; and that in no material degree did the negligence of the tenant of the plaintiff contribute to that injury;" that "the question was whether either of the parties were negligent, or not, if either, which;" that the plaintiff must satisfy "upon the whole evidence by a fair preponderance of the evidence that he was in the exercise of due care, of such care as a prudent man might reasonably be expected to exercise under the circumstances; that the explosion was caused by the negligence of the defendants" the company being liable in damages "if the plaintiff's tenant was in the exercise of due care;" if the tenant "having discovered the presence of gas in unusual quantities in the house, or in a room of the house, did not take reasonable means and precautions to remove and exclude the gas, or, not knowing what such precautions were, did not inform the servants of the defendant that gas was escaping, or make some reasonable effort to notify them, and if he recklessly brought the flame of the candle into contact with gas and air of the room, his want of care will prevent recovery,"—the court held such instructions were not erroneous. Bartlett v. Boston Gas Light Co. (1877) 122 Mass. 209.

Where the plaintiff's request for instructions to the jury had reference to the duty imposed upon the tenant in using a light while trying to find the escape of illuminating gas, and the tenant had testified that he supposed the gas to come from the furnace and therefore not liable to explode, and that he went into the cellar to examine the furnace, the whole question presented was as to the single act of going into the cellar with a light; whether that act was negligence depending on whether the tenant acted reasonably in supposing it was a kind of gas which would not ignite and explode from the flames of a candle, and therefore the judge in giving such instructions took nothing from the jury improperly. *Ibid.*

But if there is no evidence to prove negligence, it is not for the jury but for the court to decide, the case being a specific instruction to return a verdict for the defendant. Allegheny Heating Co. v. Rohan (1888) 118 Pa. 223, 228.

And in such a case it is error to instruct the jury that it is for them to consider and decide whether there is negligence or not. *Ibid.*

Therefore where there was no evidence to show that the plaintiff knew that gas was escaping, and omitted natural and necessary precautions, a refusal of the judge to present to the jury a question for which there is no foundation in the proof, will be sustained. Lee v. Troy Citizens Gas-Light Co. (1885) 98 N. Y. 115, 118.

On a charge to the jury to the effect that if the plaintiff had reason to believe that the gas was escaping, and knew the danger of escaping gas, and left his horse in the stable without providing for the danger, thinking the escape was not sufficient to do any damage, he could not recover, the court held that, as an absolute matter of law that could not properly be said because negligence was not an inevitable and necessary inference, and although there was reason to believe that gas was escaping, yet such reason was in that case balanced and neutralized by other reasons to the contrary, it being possible that gas may escape sufficiently to taint the air with its odor and yet not sufficiently to endanger animal life, so that the plaintiff's closing of the barn after the workmen who has been attending to the gas had left for a single night might not be absolutely and necessarily a negligent act. *Ibid.*

See also Flint v. Gloucester Gas Light Co. (1862) 3 Allen, 343, and Butcher v. Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 626, *infra*, head VII.; Fuchs v. St. Louis (1895) (Mo.) 31 S.W. Rep. 115, *infra*, head XIII.

VI. *Effect of contributing causes.*

In an action against a gas company to recover damages for an escape of gas, the fact that other causes contribute to the plaintiff's damage is no bar to the action, but may affect the question of damages. Sherman v. Fall River Iron Works Co. (1862) 5 Allen, 213.

The mere fact that furnace gas co-operated in producing the injury will not excuse the defendant from liability for so much of the injury as the jury find due to the negligent escape of gas. Butcher v. Providence Gas Co. *supra.*

A gas company is not relieved from liability for personal injuries resulting from its negligence in not exercising a reasonable supervision over a gas box beneath a sidewalk, by the fact that its position had become dangerous by reason of the city's widening the sidewalk, as the more dangerous its location becomes by an authorized act of the city, the greater is its duty to keep it safely covered. District of Columbia v. Washington Gas Light Co. (1891) 9 Mackey, 39.

A lateral connection with a gas company's main pipes, including a gas box in the street, being in legal contemplation a part of the company's apparatus, where the company alone is authorized by

engaged in searching for said defect, and, while so engaged, said natural gas, then being inflammable and liable to explode, did explode, with such violence as to produce the injuries complained of. It is also alleged that appellant was free from contributory negligence, and that the appellee knew of the dangerous character of said natural gas; but there is no allegation as to the cause of such explosion, nor that the gas would have exploded without some intervening agency.

That it was negligence to omit to turn off the gas from said premises when so requested is not controverted, and we do not decide otherwise; but it is insisted that this alleged negligence was not the proximate cause of

the legislature to make such connections, although in fact made and paid for by the lot owner under an authorized municipal ordinance, and the company is liable for personal injuries resulting from its failure. *Ibid.*

If gas pipes laid in a street are broken by heavy piles of bricks removed from old buildings through an unlawful use of the streets, and also by the carelessness of dumping heavy building materials, the gas company will not be liable, but if they are broken from the ordinary and customary use of the streets, the contrary is the case. Brown v. New York Gas Light Co. (1850) Anthon, N. P. 351, 355.

VII. *Effect of negligence of third person.*

Where a person employs a man to furnish materials, and another to do the work with those materials, if the second man is guilty of negligence, the first will not be relieved from liability where the primary cause of the injury sustained was the defective material so supplied. Burrows v. March Gas & Coke Co. (1872) L. R. 7 Exch. 96, 41 L. J. Exch. 46, 26 L. T. N. S. 318, 20 Week. Rep. 498.

Thus where the defendant's liability arises from a breach of contract in not supplying a proper service pipe, even if the person whose negligence is the immediate cause of the explosion had been in the plaintiff's service, the defendants are nevertheless liable. Burrows v. March Gas & Coke Co. (1870) L. R. 5 Exch. 67, 39 L. J. Exch. 33, 22 L. T. N. S. 24.

If the intervening misconduct of the occupant of the premises produced the explosion which was the immediate cause of the injury to plaintiff's building, the latter cannot charge the legal responsibility for that result upon the original negligent act or omission of the defendant company, the reason resting upon the relation that the tenant, as to the property, is having the present control and charge of it, and whose duty it therefore is to take reasonable care to prevent damage from such causes. Bartlett v. Boston Gas Light Co. (1875) 117 Mass. 533, 538, 19 Am. Rep. 421.

A tenant of a house is *pro hac vice* the owner. *Ibid.*

If the gas company has never assumed in fact to furnish or interfere with the pipes inside of the meters in the building to which it furnishes gas, or with furnishing the gas fixtures, but has uniformly permitted without objection the person who had been employed by gas consumers to furnish and put up such pipes and fixtures, to let on the gas after furnishing and putting them in, such permission will not constitute such person the agent of the company for whose acts it will be responsible, and an instruction to this effect in an action against a gas company for damages occasioned by an explosion of gas is pertinent and according to the particular question in hand essential as a proper explanation of the law upon the subject. Flint v. Gloucester Gas Light Co. (1862) 3 Allen, 343.

In Flint v. Gloucester Gas-Light Co. (1865) 9 Allen, 552, the nonliability of the gas-light company for the act of the party in making the connection in the plaintiff's house, such person having ceased to be an employé of the company and merely permitted to continue to let on the gas at the request of consumers, was somewhat placed upon the question that the party injured had notice that his employment by the company had ceased.

In that case the facts showed that plaintiff's husband, the owner of property, employed and paid a certain person to put gas pipes therein connected with a service pipe laid for that purpose by the defendant, and also to put up and arrange the necessary fixtures and burners in some of the rooms, no fixtures being placed in the room and no cap kept over the end of the pipe which opened into it; that after adjusting the fixtures the party examined all the rooms except the one in question, and then turned on the gas, and lighting up the house went away and an explosion occurred later. Further facts disclosed that the party employed, then the only gas fitter in the town, had several years previously been the superintendent and agent of the company, and still continued as before to turn on the gas with the knowledge of and without any objection on the company's part, but not at the request of the superintendent or any other officer of the company, although within the superintendent's knowledge and without his objection, he afterwards collected the bills for the gas. It was the defendant's business to turn on the gas and no one except under its authority had such right such person making in advance a careful examination. Plaintiff contended that under the circumstances the party so employed was the agent of the defendant for turning on the gas in supplying it to consumers, and that he acted as such agent in turning on the gas in that case. The court held the facts not sufficient to constitute such person the company's agent so as to render it liable, the mere fact of it permitting or consenting to the party turning on the gas not being sufficient.

The New York Statutes of 1859, chap. 311, § 6, imposes no duty upon a gas company towards the protection of the occupants against the negligence of the use of the owner's or occupants' property, but merely gives them a right to inspect, for the purpose of protecting their rights, as to the quantity of gas consumed or supplied. Schmeer v. Gas-Light Co. of Syracuse (1892) 65 Hun, 378.

In Chartiers Valley Gas Co. v. Lynch (1868) 118 Pa. 362, a natural gas corporation having entered into a written contract for the laying of certain pipes upon a certain street, with a certain contractor, whose work was done in such a negligent manner as to cause an explosion, the court held that the company was not liable provided there was nothing to show an acceptance of the work with knowledge of the contractor's negligence.

And this even though the 10th section of the Pennsylvania Act of May 29, 1885, Pamphlet Laws, 29, makes provision that a company laying a pipe should be liable for all damages occasioned by the negligence of the company. Chartiers Valley Gas Co. v. Lynch, *supra.*

Where the contention was that the fault lay in the city officers not packing back the dirt properly in the sewer, whereby it settled and broke the defendant's pipe, the court charged that if the city was liable it did not follow that the defendant was excused, as, if others were at work around the pipes, a new duty was imposed upon the company to guard against the want of care in others, and to use proper care in remedying defects caused by such

the injury, and that the specific facts pleaded disclose the negligence of the appellant contributing to the injury. That the injury complained of must appear from the facts alleged to have been the proximate result of the appellee's negligence is not questioned by the appellant, but it is argued that the injury resulted proximately from the failure to turn the gas from said premises. It is said that, "had not the appellee been guilty of the negligence alleged, the injuries to the appellant would not have happened." This argument is not tenable, since it can be said with equal propriety that the injury would not have been sustained if the appellant had not undertaken the known danger-

want of care. Butcher v. Providence Gas Co. (1878) 12 R. I. 149, 34 Am. Rep. 626.

In Milwaukee Gas Light Co. v. Schooner Gamecock (1868) 23 Wis. 144, 99 Am. Dec. 138, the company sought to recover damages for injuries done to its gas pipes through the negligence of the defendant, caused by the towing of an anchor of a vessel up and down a river; the court held that if such act was done without negligence on the part of the manager of the vessel there was no liability, *aliter* if negligence were proved.

In Rapson v. Cubitt (1842) 6 Mees. & W. 710, Car. & M. 64, 6 Jur. 606, the defendant, a builder, was employed to execute alterations about the premises, including the preparation and fixing of gas fittings, and made a subcontract with a gas fitter to execute the latter work and an explosion occurred through the negligence of the gas fitter, whereby the plaintiff was injured, and it was held the defendant was not liable.

In Burrows v. March Gas & Coke Co. (1870) L. R. 5 Exch. 69, 39 L. J. Exch. 33, 22 L. T. N. S. 24, the defendants contracted to supply plaintiff with proper service pipe to convey gas from the main outside to a meter inside of his premises. The gas escaping from the pipe laid down under the contract, the servant of a gas fitter employed at the plaintiff's house at another job at the time, went into the shop to discover the leak, holding a lighted candle in his hand, when an explosion took place. The jury found that the escape was occasioned by a defect in the pipe which existed at the time it was supplied, and secondly negligence on the part of the gas fitter's servant in carrying the candle; and the court held the plaintiff entitled to recover, the negligence of the gas fitter's servant not relieving them from responsibility.

VIII. *Act of fellow servant.*

In an action brought by an employé against the gas company to recover damages occasioned by an explosion of gas caused through the negligence of another servant, if such servant was a fellow servant of the plaintiff, there can be no recovery. Allegheny Heating Co. v. Ronan (1888) 118 Pa. 223, 228.

In Hatfield v. St. John Gas Light Co. (1893) 32 N. B. 106, the facts showed that defendant's manager, engaged in laying a new main and connecting the service pipes to the house, finding their own men unable to make the connections as fast as desired, applied for the plaintiff to assist the company in making the connections, and while working the gas was allowed to escape through the main and became ignited by the fire from a salamander, used in carrying on the work, part of that in which the plaintiff was engaged being performed at the shop where he was previously employed, the connections of the main being made by him at places shown to him by its servant; his wages being paid by his former employer who charged defendant therewith. The jury found the plaintiff was acting under the directions of the defendant as a servant of his former employer and under his control, and the court held that he was not the servant of the defendant so as to become a fellow servant engaged in a common employment, and was therefore entitled to recover against the defendant for the negligence of its servants.

In the above case, however, there was a dissenting opinion by *Justice* Tuck in which he considered the plaintiff the servant of the gas company, and therefore a coemployé. Hatfield v. St. John Gas Light Co. *supra*.

IX. *The question of notice.*

It is the plaintiff's duty to use reasonable efforts to avoid or prevent the danger, and to give defendants notice of the injury to which he is subjected, and afford defendants an opportunity to remedy the difficulty. Hunt v. Lowell Gas Light Co. (1861) 1 Allen, 343.

If the defendants are notified, it is their duty to remedy the evil with all speed whatever may be the cause of the breakage, and having sufficient notice of the impending danger and failing in this, they are liable independent of every other consideration, provided the plaintiff has not been guilty of contributory negligence. Brown v. New York Gas Light Co. (1850) Anthon, N. P. 351, 355.

Notice or knowledge will be presumed where the circumstances are such that the authorities, by the exercise of proper and reasonable diligence, might have known of the defects which caused the damage complained of. Kibele v. Philadelphia (1884) 105 Pa. 41, 44.

It is competent for the plaintiff to prove that an inmate of his family communicated to the defendants the fact that gas was escaping from some leak in their pipes into the house, making its occupancy either unsafe, disagreeable or offensive. Hunt v. Lowell Gas Light Co. (1862) 3 Allen, 418.

A wife is competent to send a message to that effect by any person to whom she may think fit to entrust it. *Ibid.*

As it is immaterial how and by what means or through whom the company obtained information. *Ibid.*

It being sufficient that they have by any means been made acquainted with the fact that their pipes have become imperfect and leak, and that the gas is thereby emitted into the plaintiff's house, to make it their duty to attend immediately to it, and to use due diligence to stop the leak and exclude the gas from the premises. *Ibid.*

A gas company is bound to keep up such a reasonable inspection of its mains and pipes as will enable it to detect when there is such an escape by fracture or imperfection of the pipes, as may lead to danger of an explosion; and if an explosion takes place from a fracture or defect which has existed for several days, during which time it has also been discoverable by reason of the smell of escaping gas, and would have been discovered by proper inspection, the court held that there was evidence of negligence on the company's part and it was not enough to relieve them from liability that upon notice of the escape they sent a workman to repair the defect, who arrived too late. Mose v. Hastings & St. Leonard's Gas Co. (1864) 4 Fost. & F. 324.

X. *As between landlord and tenant.*

If the owner of property let to one on the first floor, and by reason of his negligent introduction of an insufficient fixture on the second, or any other floor, whether in the occupation of himself or a second tenant, the tenant below suffers damage, he may have resource to the landlord. Kimmell v. Burfeind (1866) 2 Daly, 155. See also Bartlett v. Boston Gas Light Co. (1877) 122 Mass. 209, heads VI. and VII., *supra*. See also head XI., *infra*.

ous experiment of searching for the defect while the gas was flowing into the pipes of the tenement. But we can say as a matter of common knowledge that the injury was not due to spontaneous combustion, and that it was impossible without some agency acting upon the leaking gas. Therefore we can say, further, that but for such agency the injury had not been. We cannot say that the intervening agent was not a responsible agent,

XI. *Rights of the owner of the reversion.*

The conduct of a tenant will affect the landlord's right to recover for the injury in the same way as it affects the right of the tenant to recover for his own injuries, although no identity of interest is established in the subject-matter of either action, no mutual or successive relationship of the same right of property involved being shown, the landlord being in no sense surety for the conduct of the tenant, neither party representing the other in either action. Bartlett v. Boston Gas Light Co. (1877) 122 Mass. 209.

In Bartlett v. Boston Gas Light Co., *supra*, the action was brought to recover injuries to the plaintiff's reversionary interest and estate caused by an explosion of gas, the facts showing that the house wherein the explosion occurred was occupied by a tenant of the plaintiff under a written lease; that the gas escaped through a leak in the street pipe of which the company had notice, and worked through the soil into the house; that the tenant smelling gas took a candle, went through the house, and tried the gas fixtures without discovering the leak, but during the night the smell of the gas became stronger especially in a hot-air register in a closet in the sleeping room, by which the plaintiff thought that the smell came from the furnace; that he then took a lighted candle and descended to the cellar to examine the furnace when the explosion occurred, seriously injuring the tenant and causing damage to the house. The court held that although the tenant had himself recovered damages against the company for the injuries thus inflicted, it was no bar to the plaintiff's action for the injury to his reversionary interest, the plaintiff's right to recover for the destruction of his building being entirely independent of the tenant's claim for personal injury, the defendant not claiming through or under the tenant.

It is not enough that both actions were brought to recover damages for injuries from the same cause and were supported by the same evidence. Bartlett v. Boston Gas Light Co. *supra*.

XII. *Effect of, upon insurance.*

As to the liability of an insurer for loss caused by explosions, see *note* to Heuer v. Northwestern Nat. Ins. Co. (1893) (Ill.) 19 L. R. A. 594.

In Lindsay v. Bridgewater Gas. Co. (1894) 24 Pittsb. L. J. N. S. 276, 14 Pa. Co. Ct. Rep. 181, the defendants sought a new trial, upon the ground that the plaintiff's damages were covered by the amount of insurance money received by him from an insurance company. The court held the fact that the insurance company had paid the amount of insurance did not relieve the defendant company from damages occasioned by its negligence in the explosion of natural gas, the plaintiff's claim against the defendant company being for the wrong done him, while the money received from the insurance company was due upon a contract to which the defendant was in no way privy, and in respect to which his own wrongful act can give him no equities.

XIII. *Gas generated by accident.*

Where crude oil kept for fuel was negligently permitted to leak into the soil and escape into the sewer, where it generated gases which damaged the plaintiff's premises, the defendant was held liable. Brady v. Detroit Steel & Spring Co. (1894) 26 L. R. A. 175, 102 Mich. 277.

In Fuchs v. St. Louis (1895) (Mo.) 31 S. W. Rep. 115, the question was whether the facts tended to show a liability on the part of the defendants, the explosion occurring through the generated gasses created by petroleum running into the sewer and having no ready means of escape. The court held with respect to the question whether or not the case should have gone to the jury on the question of negligence, or irrespective of any inquiry as to the capacity or construction of the sewer, in that state, the city was liable for any omission of reasonable or ordinary care in the management of such a property, the question of ordinary care depending upon the facts and circumstances of each particular case which were to be submitted to the jury.

See also Hunt v. Lowell Gas Light Co. (1884) 8 Allen, 169, 85 Am. Dec. 697, *supra*, head V.

XIV. *Right of action over.*

A municipal corporation against which a recovery has been had for personal injuries caused by an explosion of gas, is not deprived of its right to maintain an action over against one primarily liable, such as a gas company, by the fact that the injuries were caused in part by a defect in the street for which the city was primarily liable, where it is not shown that the city had any notice of such defect. District of Columbia v. Washington Gas Light Co. (1891) 9 Mackey, 39.

In Philadelphia Co. v. Central Traction Co. (1895) 165 Pa. 456, where trespass was brought to recover money paid by the plaintiff for injuries caused by the negligence of the defendants, the facts showing that an explosion occurred from gas leaking through a broken pipe of the plaintiff company, against whom judgments had been recovered by the parties injured, appeals being taken in the cases which were subsequently compromised, the plaintiff seeking to recover from the defendants the damages they had sustained by reason of their negligence in excavating the street and causing the breakage of the pipe,—the court held the action maintainable.

The writer of this note in his search among the authorities has come across the following cases of which he has been unable to find any official report, the only reference thereto being the Gas Journal to which he has, after several attempts, been unable to obtain access. He therefore appends a list of them so that the practitioner may, should he be able to reach that journal, determine for himself the exact point decided in each. They would, however, appear to be merely lower court and *nisi prius* cases. Sauvage v. English Gas Co. 4 Gas Jour. 136; Malling v. Gas Co. 12 Gas Jour. 99; Perrin v. Gas Co. Id. 99; Hills v. Gas Co. 13 Gas Jour. 877; Grange v. Gas Co. 14 Gas Jour. 309; Hampton v. Cradle Heath Gas Co. Id. 606; Ward v. Gas Co. Id. 915, 15 Gas Jour. 45, 75, 16 Gas Jour. 10; Medex v. Gas Co. 15 Gas Jour. 75; Vickerman v. Gas Co. Id. 654; Robinson v. Gas Co. Id. 883; Tilly v. Slough Gas Co. 17 Gas Jour. 231; Hann v. Gas Co. 18 Gas Jour. 188; Boothman v. Mayor, 20 Gas Jour. 585; Warren v. Wilder, Id. 862; Hendrie v. Lea Dist. Gas Co. 21 Gas Jour. 949; Farquharson v. Gas Co. 22 Gas Jour. 1085; Fellwood v. Pearson, 23 Gas Jour. 248 Fare v. Gas Light Co. 25 Gas Jour. 566; Mersey Docks, etc., Board v. Gas Co. 26 Gas Jour. 327; Parkin v. Wirksworth Gas Co. Id. 946; Chadwick v. Corporation of Wigan, 28 Gas Jour. 562; Hulett v. Pudsey Gas Co. Id. 663; Mito. Gas Co. v. Wimbladon, 30 Gas Jour. 600; Hacker v. London Gas Co. 32 Gas Jour. 781; Ellis v. London Gas Co. Id. 849; Wragg v. Commercial Gas. Co. 33 Gas Jour. 119.

In addition to the above, attention is drawn to the case of Fiskin v. City Gas Co. 12 Dunl. (Scotch) 757, a report of which is not at hand. E. W.

not conscious of the presence and dangerous character of the explosive, or an infant, or an insane person.

The facts essential to a consideration of this important question are wholly absent. The burden rested upon the appellant to allege facts showing that the injury was due to the appellee's negligence, and from the facts alleged we learn that the omission complained of supplied the condition upon which necessarily some agent acted in producing the injury. The omission was an antecedent to the explosion. If the omitted facts should disclose an agency for which the appellee was responsible, a different case would be made; and if such facts disclosed that the appellant sought the defect in the pipe carrying a lighted lamp, which caused the explosion, the question would then arise as to whether his own act was not the intervening agency, and whether the act so operating did not insulate the negligence of the appellee from the injury, and establish contributory negligence. The facts alleged do not disclose peril to the appellant, or any other person, urging him to hazard his life in searching for the defect before the gas was cut off, and thereby possibly excusing the intervention of such agency. The defective pipe is not charged to any negligence of the appellee, and the presence of the escaping gas and its dangerous character are not alleged to have been unknown to the appellant. The facts, as they are presented, raise the inquiry as to whether the alleged negligence of the company was the proximate cause of the injury, regardless of whatever agency intervened. If it can be said that the escaping gas was the direct and efficient or proximate cause of the injury, to the exclusion of every fact or circumstance that might have operated upon it, and that no agency could have taken it up, and employed it so as to have become the dominating and effective cause, then this complaint is sufficient so far as this question is concerned; otherwise it is not.

In *Cuff* v. *Newark & N. Y. R. Co.*, 35 N. J. L. 17, 10 Am. Rep. 205, it was said, in considering the question of intervening agencies: "A. places a log in the highway, which B. casts into an adjoining close, or puts an obstruction upon the sidewalk, which passers-by throw into the roadway of the street, and a traveler is injured by coming in contact with it. A. cannot be held for the trespass in the one case, nor for the injury in the other."

Mercur, *J.*, in *Oil Creek & A. R. R. Co.* v. *Keighron*, 74 Pa. 320, said: "'Natural and proximate cause' I understand to be that the cause alleged produced the injury complained of, without any other cause intervening."

In *Carter* v. *Towne*, 103 Mass. 507, gunpowder had been sold to a boy, and subsequently came under the control of adults, who permitted the boy to fire it off. For the injury resulting to the boy from the explosion of the powder, it was held that the merchant was not liable, because of the intervening negligence of the adults in so permitting the use of the powder. The rule that an intervening responsible agent cuts off the line of causation from the original negligence has been many times recognized by this court, and is not questioned by the learned counsel for the appellant; and if we may indulge the ordinary presumptions against the pleading under consideration, in the absence of any allegation as to the agency necessary to have intervened, we will presume that it was a responsible agent. The presumption most favorable to the appellee must be indulged, and that is that the intervening agency was the appellant's own act in carrying a lighted lamp, which caused the explosion. Leaving out of view the doctrine of contributory negligence, the skill of the appellant in the business of plumbing, and his acquaintance necessarily with the explosive character of natural gas, gives emphasis to his responsibility for the explosion. See *Bartlett* v. *Boston Gas Light Co.* 117 Mass. 533, 19 Am. Rep. 421; *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155.

The complaint was insufficient, and the circuit court committed no error in sustaining the appellee's demurrer.

The judgment is affirmed.

Rehearing denied.

NEW YORK COURT OF APPEALS.

Luther KOUNTZE *et al.*, *Appts.*,
v.
Edward S. T. KENNEDY, Exr., etc., of John P. Kennedy, Deceased, *Respt.*

(147 N. Y. 124.)

1. A representation upon which an action for fraud can be based must be false, material, and made knowing it was false, or recklessly made not knowing or caring whether it was true or false.

2. Intentional fraud as distinguished from mere breach of duty or omission to use due care, is an essential factor in an action for deceit.

3. A misrepresentation designed to influence the conduct of another and upon which he acts to his prejudice, if honestly made believing it to be true, cannot create liability to an action for deceit.

4. The omission of a claim then in litigation from a statement of the entire assets and liabilities of a corporation, which is made by the president of the company but not stated or understood to be made upon his personal knowl-

NOTE.—In connection with the very valuable presentation in the above case of the law respecting liability to actions for fraud on account of misrepresentations honestly made attention is particularly called to the similarly valuable case of Nash v. Minnesota Title Ins. & T. Co. (Mass.) 28 L. R. A. 753, and references therewith.

See also 36 L. R. A. 631.

edge, does not make him liable for fraud and deceit to a person purchasing bonds of the company on the faith of such statements, where the president believed and had reasonable cause to believe that the claim was not valid or enforceable against the company.

(October 8, 1895.)

APPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment entered in the office of the Clerk of New York County upon the report of the referee in favor of defendant in an action brought to hold decedent's estate liable for deceit alleged to have been practiced by him in inducing plaintiffs to buy certain corporate stock. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Wheeler H. Peckham** and **George W. Van Slyck,** for appellants:

The facts essential to maintain an action for deceit, are "representation, falsity, scienter, deception, and injury."

Arthur v. *Griswold*, 55 N. Y. 400; *Brackett* v. *Griswold*, 112 N. Y. 467.

Here we have representations of liabilities.....$500,000.00

Falsity—actual liabilities..... 656,788.98

Scienter, in that defendant knew of and defended against these liabilities and was president of the company.

Deception, in that plaintiffs did not know of these liabilities but relied on the statement as an exhibit of "the entire assets and liabilities."

Injury, in that plaintiffs purchased the bonds and stock of the company, which were substantially worthless.

Given the facts of falsity and scienter, the intent to deceive follows.

Pappenheim v. *Metropolitan Elev. R. Co.* 25 Jones & S. 281; *Welsh* v. *Metropolitan Elev. R. Co.* 25 Jones & S. 458.

Plaintiffs are entitled to select the findings most favorable to themselves, and to rely on them in aid of their exceptions.

Schwinger v. *Raymond*, 83 N. Y. 193, 38 Am. Rep. 415; *Bonnell* v. *Griswold*, 89 N. Y. 122.

When the defendant made representation as to the "entire assets and liabilities" of the company, he was bound to state all he knew.

1 Benjamin, Sales, p. 685, *note 51; Gough* v. *Dennis*, Hill & D. Supp. 55; *Patterson* v. *Kirkland*, 34 Miss. 423; *Nickley* v. *Thomas*, 22 Barb. 652.

As president and active director defendant is charged by law with knowledge of the financial condition of the company.

Huntington v. *Attrill*, 118 N. Y. 367.

His making representations as if he knew them to be true, when, in fact, he did not know them to be true, is deceit, and if they are false and injury follows, the cause of action is made out.

Bullitt v. *Farrer*, 6 L. R. A. 149, 42 Minn. 8; *Stone* v. *Denny*, 4 Met. 151; *Chatham Furnace Co.* v. *Moffatt*, 147 Mass. 403; 1 Bigelow, Fr. p. 512; *Litchfield* v. *Hutchinson*, 117 Mass. 195.

The person in a position to know, having all the outward *indicia* of knowledge, and speaking without limiting language, is presumed to be making a statement as within his own knowledge, and if he has not that knowledge and the thing turns out to be not true, he is liable therefor.

That rule has constantly been applied to the position of a president of a corporation.

Barnes v. *Union Pac. R. Co.* 12 U. S. App. 1, 54 Fed. Rep. 87.

There are cases in which the nondisclosure of a material fact may be equivalent to active misrepresentation; for withholding of that which is not stated may make that which is stated absolutely false.

1 Benjamin, Sales, p. 559; *Peek* v. *Gurney*, L. R. 6 H. L. 403; *Arkwright* v. *Newbold*, L. R. 17 Ch. Div. 317; *Smith* v. *Chadwick*, L. R. 20 Ch. Div. 58; *Lee* v. *Jones*, 17 C. B. N. S. 506; *Phillips* v. *Foxall*, L. R. 7 Q. B. 679; *Devoe* v. *Brandt*, 53 N. Y. 462; *Rothmiller* v. *Stein*, 26 L. R. A. 148, 143 N. Y. 581; *Brackett* v. *Griswold*, 112 N. Y. 467.

Concede that the defendant thought that, if the plaintiffs did invest their money, and that if he invested his own money, the enterprise would be successful, and the question of his liability for not disclosing the facts as to its affairs at the time would never arise; for just that kind of a fraud the defendant is liable.

Cross v. *Devine*, 46 Hun, 421; *Ward* v. *Wiman*, 17 Wend. 193; *Haight* v. *Hayt*, 19 N. Y. 464.

Mr. **William R. Bronk,** for respondent:

The rule that general findings of a referee are controlled by special findings, and that an appellant is entitled to select and rely upon the findings most favorable to him, has been changed.

Redfield v. *Redfield*, 110 N. Y. 671; *Green* v. *Roworth*, 118 N. Y. 462; *Traders Nat. Bank* v. *Parker*, 130 N. Y. 415.

It cannot be inferred, as claimed by appellants, that because it was found that the company and Mr. Kennedy defended against the credit company claim, that, therefore, he must have known of it.

The effect of this would be for this court to make a finding which the referee has expressly refused to make, which this court has held it will not do.

Meyer v. *Amidon*, 45 N. Y. 169.

The findings of fact of the referee, affirmed as they are by the general term upon conflicting evidence, are binding and conclusive on this court.

McCarthy v. *McCarthy*, 143 N. Y. 235; *Dibble* v. *Dimick*, Id. 549.

Assuming that the defendant made representations to the plaintiffs, and assuming further that he made them so as to convey to plaintiffs the impression that he had actual knowledge of their truth, and assuming still further that they were not in fact true, but that the defendant did not know they were not true, but believed and had reasonable cause to believe that they were true, he is not under the authorities liable for fraud.

Daly v. *Wise*, 16 L. R. A. 236, 132 N. Y. 306; *Marsh* v. *Falker*, 40 N. Y. 562; *Meyer* v. *Amidon*, 45 N. Y. 169; *Oberlander* v. *Spiess*, 45 N. Y. 175; *Chester* v. *Comstock*, 40 N. Y. 576, *note*; *McIntyre* v. *Buell*, 132 N. Y. 192; *Constant* v. *University of Rochester*, 133 N. Y. 640; 2 Pom. Eq. Jur. § 884; *Cowley* v. *Smyth*, 46 N. J. L. 380, 50 Am. Rep. 432.

The danger that might result from asserting a conclusive presumption of knowledge in directors or officers of a corporation is well stated in *Wakeman* v. *Dalley*, 51 N. Y. 27, 10 Am. Rep. 551.

Statements of value do not, even if false, vitiate a contract, for value is a matter as to which neither party is supposed to trust the other, but upon which each is bound to exercise his own judgment.

Smith v. *Countryman*, 30 N. Y. 681; *Gordon* v. *Butler*, 105 U. S. 553, 26 L. ed. 1166; *Simar* v. *Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Ellis* v. *Andrews*, 56 N. Y. 83; *Chrysler* v. *Canaday*, 90 N. Y. 272, 43 Am. Rep. 166; *Veasey* v. *Doton*, 3 Allen, 380; *Parker* v. *Moulton*, 114 Mass. 100, 19 Am. Rep. 315; *Holbrook* v. *Connor*, 60 Me. 584, 11 Am. Rep. 212.

Plaintiffs did not rely upon the representations made by Mr. Kennedy, but made and had offered to them every facility for making their own independent examination as to every item of the statement.

Schumaker v. *Mather*, 133 N. Y. 590; *Southern Development Co. of Nevada* v. *Silva*, 125 U. S. 248, 31 L. ed. 679; *Long* v. *Warren*, 68 N. Y. 426; 5 Am. & Eng. Encyclop. Law, p. 332; *Slaughter* v. *Gerson*, 80 U. S. 13 Wall. 379, 20 L. ed. 627; *Cooper* v. *Harvey*, 41 N. Y. S. R. 594; *Poland* v. *Brownell*, 131 Mass. 138, 41 Am. Rep. 215; *Nelson* v. *Luling*, 62 N. Y. 545.

Under the form in which this action is brought it is immaterial whether the representations made were entirely and precisely true in every item and detail or not, unless it is also made to appear (as is not the fact), that the representations made an appreciable diminution of the value of the plaintiff's bonds.

A party who claims to have been defrauded has one of three courses open to him:

1. He can rescind the transaction, and on offering to restore what he has received can maintain an action to recover what he parted with; or

2. He can bring suit in equity to obtain a rescission and offer in his pleading to restore what he has received, and in that suit recover what he parted with; or,

3. He can keep what he has received and sue for damages for the fraud.

Gould v. *Cayuga County Nat. Bank*, 86 N. Y. 75, 99 N. Y. 338; *Bowen* v. *Manderville*, 95 N. Y. 237; *Vail* v. *Reynolds*, 118 N. Y. 297.

The effect of the election by a party of one or the other of these courses is important, and the rules which govern them and the kind and degree of proof necessary to sustain them widely different.

Rothmiller v. *Stein*, 143 N. Y. 581.

In the case at bar the plaintiffs have elected to keep what they have received and to sue for damages for the alleged fraud. In this form of action the plaintiffs must allege and prove that they have sustained damages by reason of the fraud, *i. e.*, that the question of damages is part of the cause of action; and if no damages be shown to result from the identical fraudulent act complained of, plaintiff cannot recover.

Deobold v. *Oppermann*, 2 L. R. A. 644, 111 N. Y. 531; *Hedden* v. *Griffin*, 136 Mass. 229, 49 Am. Rep. 25; *Dawe* v. *Morris*, 4 L. R. A. 158, 149 Mass. 193; *McIntyre* v. *Buell*, 132 N. Y. 192; *Vail* v. *Reynolds*, 118 N. Y. 297; Bigelow, Fr. 628, 629; *Morse* v. *Hutchins*, 102 Mass. 439; *Williams* v. *McFadden*, 23 Fla. 142.

Neither in the kind nor degree of their proof have the plaintiffs brought their case within the rigid requirements of an action for damages for fraud. Every presumption is in the defendant's favor.

Baird v. *New York*, 96 N. Y. 592; *Morris* v. *Talcott*, Id. 107; Kerr, Fr. p. 384; *Constant* v. *University of Rochester*, 133 N. Y. 640.

Plaintiff must establish five separate things to succeed, viz:, representations, falsity, scienter, deception and injury. Each must be established separately and independently, and if any one of these be lacking their case falls.

Brackett v. *Griswold*, 112 N. Y. 467.

An intent to defraud is not proven by and is not necessarily to be inferred solely from the falsity of a representation. It must be clearly proven as a separate fact and defendant knew the falsity.

Southern Development Co. of Nevada v. *Silva*, 125 U. S. 248, 31 L. ed. 679; 5 Am. & Eng. Encyclop. Law, p. 320; *Oberlander* v. *Spiess*, 45 N. Y. 177; *Meyer* v. *Amidon*, Id. 169; *Marsh* v. *Falker*, 40 N. Y. 565; *Chester* v. *Comstock*, 40 N. Y. 576, *note; Duffany* v. *Ferguson*, 66 N. Y. 484; *Wakeman* v. *Dalley*, 51 N. Y. 27, 10 Am. Rep. 551; *McIntyre* v. *Buell*, 132 N. Y. 192; *Daly* v. *Wise*, 16 L. R. A. 236, 132 N. Y. 306; *Kelly* v. *Gould*, 47 N. Y. S. R. 5, affirmed 141 N. Y. 596; Kerr, Fr. p. 382.

If a person believes that the representations he makes are true at the time he makes them, he is not guilty of fraud, however false they may be in fact.

Gaffney v. *Burton*, 12 How. Pr. 516; *Marsh* v. *Falker*, 40 N. Y. 565; *Griswold* v. *Sabin*, 51 N. H. 167, 12 Am. Rep. 76; *Derry* v. *Peek*, 14 App. Cas. 337; *Lord* v. *Goddard*, 54 U. S. 13 How. 198, 14 L. ed. 111; 5 Am. & Eng. Encyclop. Law, p. 319; *Morgan* v. *Skiddy*, 62 N. Y. 319; *Lefever* v. *Lefever*, 30 N. Y. 27.

Representations, to be actionable, must relate to existing material facts, and not to future expectations.

La Societa Italiana di Beneficenza v. *Sulzer*, 47 N. Y. S. R. 292; *Kley* v. *Healy*, 9 Misc. 93.

Andrews, *Ch. J.*, delivered the opinion of the court:

The plaintiffs on this appeal are met by the serious difficulty that the finding of the referee, affirmed by the general term, exonerated the defendant's testator from the charge of fraud in making the representations upon which the plaintiffs relied in purchasing the bonds and stock of the Howe Machine Company. If this finding has support in the evidence it ends all controversy upon the merits here, because, although it was found that the statement of the liabilities of the company presented by Kennedy to the plaintiffs, upon the faith of which the purchase was made, was grossly inaccurate, and largely understated the actual liabilities of the company, nevertheless, if Kennedy believed the statement to be a true exhibit of the affairs of the company and was guilty of no dishonesty, the action must fail. The principle stated by Croke, *J.*, in [*Baily* v. *Merrell*], 3 Bulst.

95, in respect to actions for damages for deceit, that "fraud without damage, or damage without fraud, gives no cause of action, but when these two concur an action lies," has ever since been recognized as the true rule governing the subject. The cases are numerous. The principle has been obscured by the use by judges of the phrase "legal fraud," which has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit. The gravamen of the action is actual fraud, and nothing less will sustain it. The representation upon which it is based must be shown not only to have been false and material, but that the defendant when he made it knew that it was false, or not knowing whether it was true or false and not caring what the fact might be, made it recklessly, paying no heed to the injury which might ensue. Misjudgment, however gross, or want of caution, however marked, is not fraud. Intentional fraud, as distinguished from a mere breach of duty or the omission to use due care, is an essential factor in an action for deceit. The man who intentionally deceives another to his injury should be legally responsible for the consequences. But if through inattention, want of judgment, reliance upon information which a wiser man might not credit, misconception of the facts or of his moral obligation to inquire, he makes a representation designed to influence the conduct of another, and upon which the other acts to his prejudice, yet, if the misrepresentation was honestly made, believing it to be true, whatever other liability he may incur he cannot be made liable in an action for deceit. The law affords remedies for the consequences of innocent misrepresentation. A contract induced thereby may, in many cases, be avoided, and the equitable powers of courts are frequently interposed for the rescission of contracts or transactions based upon mistake or innocent misrepresentation. While the common-law action of deceit furnishes a remedy for fraud which ought to be preserved, we think it should be kept within its ancient limits, and should not by construction be extended to embrace dealings which, however unfortunate they may have proved to one of the parties, were not induced by actual intentional fraud on the part of the other. We have referred to a representation made without knowing whether it was true or false, and where the party making it was indifferent whether it was true or false, as sufficient to sustain the action if the representation was in fact untrue. The making of a representation to influence the conduct of the person to whom it is made, carries with it an assurance, necessarily implied from the situation, of the belief of the party making it in the truth of the affirmation. As was said by Maule, *J.*, in *Evans* v. *Edmonds*, 13 C. B. 777, "he takes upon himself to warrant his own belief of the truth of that he asserts, and a man who makes a representation which he neither knows nor cares whether it is true or not, can have no real belief in the truth of what he asserts, and is justly guilty of deception." So, also, it has been held that one who falsely asserts a material fact, susceptible of accurate knowledge to be true of his own knowledge, and thereby induces another to act upon the fact represented to his prejudice, commits a fraud which will sustain an action for deceit. This is not an exception to, but an application of, the principle that actual fraud must be shown to sustain such an action. The purpose of the party asserting his personal knowledge is to induce belief in the fact represented, and if he has no knowledge, and the fact is one upon which special knowledge can be predicated, the inference of fraudulent intent in the absence of explanation naturally results. We shall refer to the subject again when we come to consider one of the points made by the plaintiffs.

In the present case the plaintiffs invested more than $100,000 in the bonds and stock of the Howe Machine Company in April, 1884, and the company went into the hands of a receiver in the fall of 1885, and the plaintiffs practically lost their whole investment. They purchased upon the application of Kennedy, who was president of the corporation, and the statement of assets and liabilities furnished by Kennedy at their request after the application and before the purchase, showed that the assets, real and personal, as valued in the statement, exceeded one million dollars, and that the liabilities were five hundred thousand dollars. And the referee found that the statement was presented by Kennedy as a statement of the entire assets and liabilities. The voluminous record before us is taken up to a large extent with the evidence on the one side to show the untruthfulness of the statement both as respects the assets and liabilities, and of circumstances which as was claimed tended to establish that the defendant's testator knew of its falsity when he presented it to the plaintiffs, and on the other side with evidence in rebuttal and by way of explanation of the discrepancies between the value of the assets as given in the statement and what was realized therefrom, and between the actual liabilities and the liabilities as represented, and also evidence bearing upon the good faith of the defendant's testator in making the representation. The evidence was taken before an intelligent and able referee, and we are satisfied that his conclusion that the defendant's testator acted in good faith, and that the statement, although in material respects untrue, was believed by him to be true, is supported by evidence. The facts were fully considered in the opinion of the general term, and a recapitulation here to any considerable extent is unnecessary.

The learned counsel for the plaintiffs insists that the omission from the statement of liabilities of the claim against the Howe Machine Company in favor of the Credit Company, Limited, of England, was upon the undisputed facts a fraudulent concealment. The claim originated in or prior to 1878, and was based on acceptances alleged to have been made by the Howe Machine Company of drafts drawn by one Stockwell upon the company, accepted by his brother, the secretary and treasurer, in the name of

the company. It seems to be conceded that the acceptances were made without authority of the company, and that the proceeds were used by the Stockwells in stock speculations in London on their own account. Suit was brought against the company on the drafts in the state of Connecticut in 1878, and as in all cases in that state were commenced by attachment. The company defended the action. In the fall of 1883 the facts were reported, and in 1886, two years after the plaintiffs had purchased their bonds, the court rendered judgment in the action against the Howe Machine Company for the sum of $62,475, the chief justice dissenting. The existence of this claim was not disclosed to the plaintiffs and was not embraced in the items of liabilities mentioned in the statement. It was claimed on the part of the defendant Kennedy that this item was omitted for the reason that the company was advised by counsel that the acceptances did not bind the company and that it could not be made liable in the action, and evidence was given that neither the company nor its counsel regarded the claim as a valid obligation of the company. The referee further found that the defendant Kennedy and the other officers and directors of the company "had reasonable cause to believe that said company was not liable on said claims," and he refused to find the request of the plaintiffs, "that the said defendant (Kennedy) knew of said claim and suit and concealed and intended to conceal the same from the plaintiffs." The defendant's testator was bound to include in the statement all labilities of the company known to him. He was not required to include claims made which were not valid or enforcible obligations. The defendant omitted this claim from the schedule because he believed it was not a liability of the company. It may be admitted that he was blameworthy in not calling the matter to the attention of the plaintiffs, leaving them to determine whether it constituted a reason for declining the transaction. But if the non-disclosure was attributable to an honest belief that the claim was not valid and could not be enforced, the fraudulent intent is lacking and the charge of deceit fails. The recent case of *Derry* v. *Peek*, 14 App. Cas. 337, decided in the house of lords, contains a very full discussion of the principles governing the action for deceit and of the adjudged cases. The action was brought against directors of a company for damages for a false representation contained in a prospectus issued by them, to the effect that the company had authority to use steam-motor power on its tramway, whereby the plaintiff was induced to buy shares of the company. The judges who gave the opinion united in asserting that actual fraud, that is, fraud in intention, and not constructive or implied fraud, was necessary to be shown to uphold the action, and applying this general principle they held that if the defendant believed the representation made by him to be true, although without reasonable cause for such belief, the action would not lie. It is not necessary to go to this extent to uphold the present judgment, for the referee, as has been stated, found that the belief of Kennedy that the claim of the Credit Company, Limited, of London, was unfounded, was based upon reasonable grounds.

The plaintiffs requested the referee to find that the representations of Kennedy to the plaintiffs were so made as to convey the impression that he had actual knowledge of their truth and the referee refused to find as requested. This, it is urged was error requiring a reversal of the judgment. It must be assumed that the referee found that the representations contained in the statement presented by Kennedy were not made, or understood by the plaintiffs to have been made, by him upon his personal knowledge. The evidence and the circumstances support this conclusion. Kennedy testified that when the plaintiffs requested a statement of the assets and liabilities of the company, he informed them that he would request the secretary to prepare it, and after the statement was delivered to the plaintiffs, Luther Kountze, at Kennedy's request, went to Bridgeport to examine the property and while there the items of the statement were gone over between him and Mr. Parmly, the person having the principal management of the business, and the referee found that the inquiries of Mr. Kountze were truthfully answered. It cannot be assumed from the mere form of the statement that the assets and liabilities were given upon the personal knowledge of Kennedy. It related to the affairs of a large corporation, widely extended and having agencies in a great number of the large cities of the country. It would ordinarily be understood that a statement furnished by the president or director of the company of its assets and liabilities would be furnished upon information derived from the books and other sources. Certainly the mere presentation of such a statement, without more, would not amount to an affirmation that the statement was true to his knowledge. There was conflicting evidence upon the trial upon the point whether outside of the statement such an affirmation was made, but that issue was decided against the plaintiffs. Their claim, therefore, that Kennedy represented that the statement was true of his own knowledge, rests solely on the facts that he was president of the corporation, and that he furnished the statement as a statement of the entire assets and liabilities. The most that the plaintiffs could claim was that it became a question of fact, but we are of opinion that the evidence was wholly insufficient to have warranted a finding that Kennedy asserted the truth of the statement as of his own knowledge.

Upon a full examination of all the questions presented by the plaintiffs we have reached the conclusion that there was no material error committed on the trial and *the judgment should, therefore, be affirmed.*

All concur, except **Bartlett, J.**, who dissents on the ground that it is not proper for an officer of a corporation making a written statement of its indebtedness to a proposed purchaser of its stock to omit therefrom the amount involved in a pending action against the company for the reason that he is of opin-

tion that the company will not be held in final judgment; that it is the manifest duty of such officer to inform the proposed purchaser of stock of the existence of this contingent liability, and the failure to do so is a fraud.

Peckham, J., not voting.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania, *Appt.*,
v.
James B. FORREST.

(.....Pa.....)

1. **Riding a bicycle on a sidewalk** or footway incurs the penalty provided by Act May 7, 1889, against driving any horse or any other animal upon such walk, by virtue of the Act of April 23, 1889, declaring that bicycles and persons using them are entitled to the same rights and subject to the same restrictions as are prescribed in case of persons using carriages drawn by horses.
2. **One who did not contribute to the construction or maintenance of a sidewalk** which he has a right to use, may be an informer for unlawfully riding a bicycle on the sidewalk, the penalty for which is for the use of a school district.
3. **The fact that a sidewalk was on land appropriated by a turnpike company,** and had been constructed and kept up by the turnpike company aided by contributions from village residents, does not exempt it from the provisions of the Act of 1889 prohibiting the use of such walks by persons riding bicycles.
4. **The consent of a turnpike company to the use by bicyclers,** of a sidewalk established alongside the highway and on land appropriated by the company, cannot make such use lawful under the Act of 1889 prohibiting the use of bicycles on sidewalks.
5. **The unlawful use of a sidewalk by bicyclers** for a time without complaint cannot avail as a defense to the prosecution of a person for such offense.

(July 18, 1895.)

APPEAL by the Commonwealth from a judgment of the Quarter Sessions for Union County reversing a judgment of a justice of the peace imposing a fine upon defendant for unlawfully riding a bicycle upon the sidewalk. *Reversed.*

Prior to the hearing of the cause the appellee moved to quash the appeal because:

First: The commonwealth had no right of appeal.

(a) Because no writ of error (now appeal) lies upon a summary conviction.

(b) Because this is a case of summary conviction before a magistrate under a special statute, which provides for no appeal from the quarter sessions of the supreme court.

(c) Because the constitution and statute giving the right of appeal in cases of summary conviction, limit the appeal to the quarter sessions.

(d) Because the commonwealth has no right to a bill of exceptions in this case.

Second: Even if this case were within the act allowing exceptions to the commonwealth in cases of nuisance or forcible entry and detainer or forcible detainer, that act provides that the appeal must be specially allowed by this court or a judge thereof, and the record shows no such allowance.

Third. And if an appeal would lie, it must be taken in this court; whereas the record shows the appeal in this case was entered only in the quarter sessions.

Fourth. The record shows further that the appeal was entered in the quarter sessions on the 8th of December, 1894, to wit, after the writ of certiorari issued out of this court (dated 4th of December, 1894), had been lodged in the quarter sessions, to wit, on December 7, 1894.

Fifth: The appeal assigns error, not the final order and judgment of the quarter sessions, but an interlocutory order.

There was also a motion to quash the writ of certiorari because:

First: The writ was not specially allowed as required by statute and rule of court.

Second. Defendant having been acquitted and discharged cannot be again put in jeopardy for the same offense.

The facts upon which the decision of the case depended sufficiently appear in the opinion.

Messrs. **D. H. Getz,** *Dist. Atty.*, **J. M. Linn,** and **P. B. Linn,** for appellant:

Penal statutes are construed as other statutes, with the further rule that they are construed strictly when their penal provisions are invoked against one charged with the violation.

18 Am. & Eng. Encyclop. Law, p. 270.

Strict construction is not the same as construing everything to defeat the action.

Bartolett v. *Achey*, 88 Pa. 273.

Where there are different statutes *in pari materia*, though made at different times, or even expired, and not referring to each other, they shall be taken and construed together as one system, and as explanatory of each other.

Rex v. *Roxdale*, 1 Burr. 447; *Philadelphia* v. *Davis*, 6 Watts & S. 278; *Twilley* v. *Perkins*, 19 L. R. A. 632, 77 Md. 252.

A bicycle is a carriage or vehicle within the meaning of a statute requiring every person traveling with any carriage or other vehicle, on any highway or bridge, to turn to the right on meeting another person so traveling.

State v. *Collins*, 3 L. R. A. 394, 16 R. I. 371. See also *Collier* v. *Worth*, L. R. 1 Exch. Div. 464; *Taylor* v. *Goodwin*, L. R. 4 Q. B. Div.

NOTE.—For regulation of bicycle riding in general, see Twilley v. Perkins (Md.) 19 L. R. A. 632, and *note* therewith. For a later case, see Geiger v. Perkiomen & R. Turnp. Road (Pa.) 28 L. R. A. 458, as to the right to tolls for bicycles, and Thompson v. Dodge (Minn.) 28 L. R. A. 608, as to the fright of a horse by a bicycle on a highway.

See also 33 L. R. A. 356; 36 L. R. A. 615; 41 L. R. A. 208; 44 L. R. A. 821.

228; *Parkyns* v. *Priest*, L. R. 7 Q. B. Div. 313; 23 Am. & Eng. Encyclop. Law, p. 382.

Whenever a city ordinance can be so construed and applied as to give force and validity, this will be done by the courts although the construction so put upon it may not be the most obvious and natural one, or the literal one.

Swift v. *Topeka*, 8 L. R. A. 772, 43 Kan. 671; *Titusville's App.* 108 Pa. 600.

The Act of April 23, 1889, is part of the road system of Pennsylvania.

Under this act the bicycle is subject to the same restrictions, and is liable for any violation of the road law, as is prescribed in cases of persons using carriages drawn by horses.

It is clearly within the police power of the state; and in all respects reasonable and valid.

Twilley v. *Perkins*, 19 L. R. A. 632, 77 Md. 252; *State* v. *Yopp*, 97 N. C. 477; *Re Wright*, 29 Hun, 358, 65 How. Pr. 119.

Where one of two constructions would lead to absurdity the other is to be adopted.

Philadelphia v. *Ridge Ave. Pass. R. Co.* 102 Pa. 190.

Bicycles are vehicles, and may be lawfully used upon streets. Their proper place is the roadway rather than sidewalks, and their use may be regulated by the legislature.

24 Am. & Eng. Encyclop. Law, p. 119; *State* v. *Collins*, 3 L. R. A. 894, 16 R. I. 371; *State* v. *Yopp*, *supra*; *Com.* v. *Forrest*, 3 Pa. Dist. Rep. 797, *note*; 28 Irish, L. J. 287; 47 Alb. L. J. 404; Elliott, Roads & Streets, p. 635; *Holland* v. *Bartch*, 120 Ind. 46; 33 Cent. L. J. 262.

Messrs. **William R. Follmer** and **Andrew A. Leiser**, for appellee:

The Act of 1889 by its title shows that the prohibition of the third section extends only to sidewalks erected in accordance with said act, and such prohibition cannot be extended to any other sidewalk.

The sidewalk being wholly within the limits of the turnpike road, this act could not apply in any event, nor authorize the construction of such a sidewalk.

Riding a bicycle is not riding a horse, etc., within the meaning of this statute.

Riding a bicycle upon a sidewalk is not "willfully and maliciously riding or driving any horse or any other animal upon or into" such sidewalk and within the prohibition of said Act of May 7th, 1889.

Penal statutes are to be construed strictly.

23 Am. & Eng. Encyclop. Law, p. 375; *Com.* v. *Wells*, 110 Pa. 463; *Stewart* v. *Com.* 10 Watts, 306; *Daggett* v. *State*, 4 Conn. 60, 10 Am. Dec. 100; *United States* v. *Wiltberger*, 18 U. S. 5 Wheat. 76, 5 L. ed. 37.

A court cannot create a penalty by construction, but must avoid it by construction, unless it is brought within the necessary meaning of the act creating it.

Burgh v. *State*, 108 Ind. 132; *Western U. Teleg. Co.* v. *Wilson*, 108 Ind. 308.

Dean, J., delivered the opinion of the court:

A turnpike road, chartered as early as 1812, extends from the borough of Lewisburg to the borough of Mifflinburg, with an authorized width of roadway of 60 feet. Outside the borough of Lewisburg, and in the township of East Buffalo, is the village of Linnville, which is built up on both sides of and along the turnpike for the distance of about a mile. Although most of the houses are along the turnpike, the village is regularly laid out, and to some extent built upon streets and squares. For a mile on the north side of the turnpike a smooth foot walk, about four feet wide, is constructed for the use of the residents of the village. This walk is within the limits of the 60 feet which the turnpike company had appropriated for its highway, but the walk had been put there by permission of the company. It had been constructed and kept up by contributions from the residents of the village and by the turnpike company, and had been in existence about ten years on July 9, 1894. On that day, Forrest, the defendant, rode a bicycle on this walk, and on information made before a justice by George Kling, an owner of property fronting on it, was arrested for violation of the Sidewalk Act of May 7, 1889. After hearing, judgment was given against him, and a fine of six dollars for the use of the school district, as directed by the act, imposed. From this judgment, the defendant appealed to the court of quarter sessions, which, after a rehearing, reversed and set aside the judgment; and from that the commonwealth appeals.

The controlling reason assigned for setting aside the judgment of the magistrate by the learned judge of the court below is that, a bicycle not being a horse or "other animal," as specified in the Act of May 7, 1889, no penalty can be imposed for propelling it upon a sidewalk. The third section of the act is as follows: "If any person or persons shall willfully and maliciously ride or drive any horse or any other animal upon or into any boardwalk or sidewalk or footway laid, erected, or being on and along the side of any road or highway in any township of this commonwealth, or shall otherwise willfully break, injure or destroy the same, the person or persons so offending shall upon conviction thereof before any magistrate," etc., "be sentenced," etc. Standing by itself, we think this act, being penal in its provisions, would not have embraced the bicycle rider; but read in connection with the Act of April 23, 1889, an opposite conclusion is clearly warranted. The last-named act is as follows: "Bicycles, tricycles, and all vehicles propelled by hand or foot, and all persons by whom bicycles, tricycles, and such other vehicles are used, ridden, or propelled upon the public highways of this state, shall be entitled to the same rights and subject to the same restrictions in the use thereof, as are prescribed by law in the cases of persons using carriages drawn by horses." The first-named act imposed a penalty upon the driver of a horse who should willfully drive him upon any sidewalk in any township within the commonwealth. The last-named act subjected the bicycle rider to the same restriction as the driver of the horse. The driver of the carriage and the bicycle have the same rights, and are subject to the same restrictions and penalties. The one by whip and lines drives his horse, with vehicle, upon the sidewalk. The other drives

his vehicle upon it with his feet and legs. It will scarcely be disputed that a bicycler is within the spirit of the act. It is wholly improbable the legislature intended to exempt him. The sidewalk is for foot travelers, men, women, and children. A very few years of observation and experience in the new mode of traveling by bicycle has resulted in the conclusion that this vehicle is fully as dangerous to those walking on the same road as the carriage drawn by a horse. A carriage, with rider, weighing together two to three hundred pounds, propelled with the speed of a trolley car on a sidewalk, is full of peril to the life and limb of the foot traveler. No bicycler, with due regard to the safety and rights of his fellows, should demand the use, in common with foot travelers, of a walk, with such a vehicle; and the intention of the legislature to debar him from such use is manifest, not only from the terms of the two acts, when read together, but also from the reason and spirit that prompted their passage.

To the argument here that the Act of the 7th of May only specifies the driving of a horse not hitched to a wagon or carriage, and that, although a bicycle may be a carriage or vehicle, yet by no liberality of construction can it be called a horse, we can only answer that such a construction of the act is absurd. The legislature declared that "if any person or persons shall willfully or maliciously ride or drive any horse or other animal." By this, they meant the two and only known methods of using the horse,—riding astride of him, or driving him in a vehicle. To suppose they intended to prohibit that which no one had done or would do—drive a horse by following at his heels on foot—would be altogether an unreasonable interpretation. Where one of two constructions would lead to absurdity, the absurd construction ought not to be adopted. *Philadelphia* v. *Ridge Ave. Pass. R. Co.* 102 Pa. 190.

We do not think it material that the informer in this case had not contributed to the original construction of the sidewalk. Nor, although he aided in keeping it in repair, do we think that fact material. It was a sidewalk by design, construction, and use, alongside a highway in a township, and he, with his family, had the right to its use, to the exclusion of a dangerous vehicle; and this even though he had in no way aided in constructing or keeping it in repair.

Nor does the fact that the walk was on land appropriated by the turnpike company deprive it of its character as a sidewalk. The company was asserting no right. If it had been constructed and used as a sidewalk by its consent, it had none to assert. That it was so constructed and used clearly appears by the testimony of the company's manager. And the consent of the company to its use by bicyclers would not avail defendant. A law of the commonwealth cannot be repealed by the manager of a turnpike company. If this was an established sidewalk alongside a highway in a township, as it clearly was, then it is subject to the laws of the commonwealth regulating and restricting its use. It is not in the power of any individual or corporation to license a violation of law.

The further argument of appellee that he and all other bicyclers have used the sidewalk heretofore without complaint avails nothing as a defense, for it only demonstrates the extent of the grievance, which at last became unbearable. Such use in any considerable numbers by such vehicles of a four-foot sidewalk would soon result in foot passengers, men, women, and children, taking to the turnpike for safety. This would not continue long, until the law would be invoked to decide whether the sidewalk was for foot travelers or for vehicles; whether the bicycler was in the exercise of a lawful right, or was a usurper of the rights of others. We have tried to answer this question in this opinion.

Therefore *the judgment of the court below is reversed*, and it is directed that judgment for the amount of the fine imposed by the magistrate—six dollars—be entered in favor of the commonwealth, and against defendant, with costs; appellee to pay the costs of proceedings on this appeal.

CONNECTICUT SUPREME COURT OF ERRORS.

NEW YORK, NEW HAVEN & HARTFORD R. CO.

v.

BRIDGEPORT TRACTION CO., *Appt.*

(.....Conn.....)

1. An injunction against constructing a trolley road across a steam railroad track at grade the effect of which will be dangerous to passengers cannot be defeated on the ground that it will be simply an injunction against trespassers or involves simply a claim for damages.

2. A special act permitting a grade crossing by an electric railway over the track of a steam railroad which is made subject to general laws "except as otherwise herein expressly provided" is not affected by a general law previously passed but which does not take effect until subsequently, which prohibits such grade crossings "except upon approval by the railroad commissioners."

NOTE.—As to compensation to a railroad company for intersection of its track by a street railway on a highway crossing, see also Chicago & C. Terminal R. Co. v. Whiting, H. & E. C. Street R. Co. (Ind.) 26 L. R. A. 337, and Chicago, R. & Q. R. Co. v. West Chicago Street R. Co. (Ill.) post, —, and *note* thereto.

That a horse railroad is not a railroad within the meaning of a statute as to intersections, see Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. App. 8th C.) 24 L. R. A. 693.

See also 44 L. R. A. 269.

3. No presumption that grade crossings expressly authorized by a special statute were intended to be subject to the general law requiring approval of the railroad commissioners can arise from the mere fact that they are numerous while the general policy of the law has been to restrict such crossings if the act does not increase the total number and indicates that they will be temporary because of the possible elevation of the track.

4. Compensation to a railroad company for the inconvenience to it is not a necessary condition to the crossing of its tracks at grade by an electric street railway under legislative authority.

(Hamersley, J., and Andrews, Ch. J., dissent from propositions 2 and 3.)

(January 8, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Fairfield County in favor of plaintiff in an action brought to enjoin defendants from constructing electric railway tracks across plaintiff's railroad at grade. *Reversed.*

The facts are stated in the opinions.

Messrs. **Seymour & Knapp** and **Paige & Carroll**, for appellant:

Injunctions to restrain repeated trespasses are not favored exercises of the power of a court of equity, where the defendant is pecuniarily responsible. Even to avoid multiplicity of actions, courts will not favor such proceedings.

High, Inj. §§ 84, 722; Bispham, Eq. § 486; *Whittlesey* v. *Hartford, P. & F. R. Co.* 23 Conn. 421; *Smith* v. *King*, 61 Conn. 511; *Hale* v. *Point Pleasant & O. R. R. Co.* 28 W. Va. 454; *Randall* v. *Jacksonville Street R. Co.* 19 Fla. 409; *Mead* v. *Stirling*, 62 Conn. 596.

Diminution in value of property without irreparable mischief furnishes no ground for equitable relief.

Halsey v. *Rapid Transit Street R. Co.* 47 N. J. Eq. 380.

The provision of defendant's charter, "except as otherwise herein expressly provided, this charter shall be subject in all its parts to the general laws relating to street railways and street railway companies," clearly removes the charter of the defendant company from the operation of the general law wherever any provision exists differing from or inconsistent with it.

Coe v. *Meriden*, 45 Conn. 156.

Particular statutes are not repealed by subsequent general statutes, unless so expressed in definite terms.

Sutherland, Stat. Constr. § 157; *Mobile & O. R. Co.* v. *State*, 29 Ala. 573; *Fitzgerald* v. *Champneys*, 2 Johns. & H. 54; *Walsall Overseers of Poor* v. *London & N. W. R. Co.* 4 App. Cas. 467; *State* v. *Stoll*, 84 U. S. 17 Wall. 425, 21 L. ed. 650; *Van Denburgh* v. *Greenbush*, 66 N. Y. 1; *Com.* v. *Richmond & P. R. Co.* 81 Va. 855; Endlich, Interpretation of Statutes, § 229; *Mobile & O. R. Co.* v. *State, supra; Pearce* v. *Bank of Mobile*, 38 Ala. 702; *Furman* v. *Nichol*, 75 U. S. 8 Wall. 44, 19 L. ed. 370; *Brown* v. *Lowell*, 8 Met. 172; *Nichols* v. *Bertram*, 8 Pick. 342; *Cascades R. Co.* v. *Johns*, 1 Wash. Terr. 558; *Gunnarsohn* v. *Sterling*, 92 Ill. 569; *Third Nat. Bank of St. Louis* v. *Harrison*, 8 Fed. Rep. 721; *Tyler* v. *Elizabethtown & P. R. Co.* 9 Bush, 510; *Ex parte Crow Dog*, 109 U. S. 556, 27 L. ed. 1030; 1 Dill. Mun. Corp. § 87; *Hyde Park* v. *Oakwoods Cemetery Asso.* 119 Ill. 141; *Chew Heong* v. *United States*, 112 U. S. 536, 28 L. ed. 770; *Beach* v. *Meriden*, 46 Conn. 502.

Where two acts are passed at the same session of the legislature on the same subject, it shows the intent that one is not repealed by the other, but they are to be construed together.

Curtwright v. *Crow*, 44 Mo. App. 563; *State* v. *Clark*, 54 Mo. 216; *Com.* v. *Huntley*, 15 L. R. A. 839, 156 Mass. 236; *Powers* v. *Shepard*, 48 N. Y. 540; *Cheezem* v. *State*, 2 Ind. 149; *Gorley* v. *Sewell*, 77 Ind. 319.

It is the duty of the court to avoid a construction, if possible, which leads to manifest injustice.

People v. *Jaehne*, 103 N. Y. 182.

The legislature had full, complete, and ample authority and power to grant the defendant the privilege to use Fairfield avenue, as it is proposed to, and that without compensation to the plaintiff, and if in doing so it should be found that it did injure the plaintiff or its rights, that loss is *damnum absque injuria*.

Elliott v. *Fair Haven & W. R. Co.* 32 Conn. 579; 2 Beach, Railways, § 808; *Elfelt* v. *Stillwater Street R. Co.* 58 Minn. 68; *Rafferty* v. *Central Traction Co.* 147 Pa. 579; *Lockhart* v. *Craig Street R. Co.* 139 Pa. 419; *Finch* v. *Riverside & A. R. Co.* 87 Cal. 597; *Hudson River Teleph. Co.* v. *Watervliet. Turnp. & R. Co.* 17 L. R. A. 674, 135 N. Y. 393; Booth, Street Railways, § 88; *Williams* v. *City Electric Street R. Co.* 41 Fed. Rep. 556; 1 Beach, Pub. Corp. § 664; *Koch* v. *North Ave. R. Co. of Baltimore City*, 15 L. R. A. 377, 75 Md. 222; *Du Bois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co.* 149 Pa. 1.

Even if the charter of the plaintiff company was a close charter, the legislative power granting the traction company the right to cross its road at grade would be legal as the exercise of a police power.

8 Am. & Eng. Encyclop. Law, pp. 621, 622; *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Boyd* v. *Alabama*, 94 U. S. 645, 24 L. ed. 302; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Stone* v. *Farmers Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636; *Barlow* v. *Gregory*, 31 Conn. 261; *Baker* v. *Boston*, 12 Pick. 184, 22 Am. Dec. 421.

Railroads and highways are of such public character, especially where they cross each other, as to be subject to public supervision.

Woodruff v. *Catlin*, 54 Conn. 295; *Westbrook's App.* 57 Conn. 104; *Woodruff* v. *New York & N. E. R. Co.* 59 Conn. 65; *Doolittle* v. *Branford's Selectmen*, 59 Conn. 402; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 9.

The defendant has abandoned an old crossing, one that it has used uninterruptedly for years and the right to use which was unquestioned, in reliance upon a legislative promise that in return for such abandonment, it should have another crossing in another place.

Is there not here, not only a contract in that it has been executed on the part of this defend-

ant, and because executed, incapable of being impaired, but also a contract in the strictest sense of the word based on a consideration?

Fletcher v. *Peck*, 10 U. S. 6 Cranch, 87, 3 L. ed. 162; Cooley, Const. Lim. 3d ed. pp. 273, 274, and cases cited in *notes; Piqua Branch of State Bank of Ohio* v. *Knoop*, 57 U. S. 16 How. 369, 14 L. ed. 977; *Wabash & E. Canal Co.* v. *Beers*, 67 U. S. 2 Black, 448, 17 L. ed. 327; *Planters Bank of Mississippi* v. *Sharp*, 47 U. S. 6 How. 301, 12 L. ed. 447; *Chenango Bridge Co.* v. *Binghamton Bridge Co.* 70 U. S. 3 Wall. 51, 18 L. ed. 137; *New Jersey* v. *Wilson*, 11 U. S. 7 Cranch, 164, 3 L. ed. 303; *Landon* v. *Litchfield*, 11 Conn. 251.

Mr. **Thomas N. McCarter** also for appellant.

Messrs. **Stoddard, Bishop & Shelton,** for appellee:

All crossings of highways by railroads at grade are practically dangerous, and it is the policy of the state to abolish them as fast as is practicable.

Dyson v. *New York & N. E. R. Co.* 57 Conn. 21; *New York & N. E. R. Co's App. from Railroad Comrs.* 58 Conn. 540; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 9, affirmed *New York & N. E. R. Co's App. from Railroad Comrs.* 62 Conn. 534.

The Public Act of 1893 requires the defendant to apply to and obtain the approval by the railroad commissioners to enable it to cross Fairfield avenue crossing at grade.

The legislature cannot bargain away the police power of the state.

8 Am. & Eng. Encyclop. Law, p. 621.

The enactment of a general law by the legislature, after having conferred such power on the corporation, regulating the same matter which had been before permitted to be regulated by such by-law, would, in the absence of the clearest evidence to the contrary, show most satisfactorily that the legislature intended to take the regulation of the matter out of the hands of the corporation.

Southport v. *Ogden*, 28 Conn. 128.

A later statute, covering the same subject-matter, and embracing new provisions, operates to repeal the prior act, although the two acts are not in express terms repugnant.

People v. *Jachne*, 103 N. Y. 195.

The particular danger of crossings of this character is referred to by the court in *Pennsylvania R. Co.* v. *Braddock Electric R. Co.* 152 Pa. 116.

The legislature, in passing the General Act of 1893, intended to so restrict the exercise of the power granted by the defendant's charter as to require application to and approval by the railroad commissioners.

A statute passed at a future day must be understood as speaking from the time it goes into operation and not from the time of passage.

28 Am. & Eng. Encyclop. Law, pp. 217, 218.

The defendant cannot construct the crossing in question, without at least first making compensation for the direct damage done to the property of the plaintiff.

The property of the plaintiff, impaired or destroyed by the defendant, consists not only of its tangible and corporeal property, but also of its franchise.

Bridgeport v. *New York & N. H. R. Co.* 36 Conn. 266, 4 Am. Rep. 63; *People* v. *O'Brien*, 2 L. R. A. 255, 111 N. Y. 40; *Enfield Toll Bridge Co.* v. *Connecticut River Co.* 7 Conn. 47.

The acts of the defendant constitute "a taking" within the modern definition of that term.

Lewis, Em. Dom. § 56; Tiedeman, Police Powers, 397; Cooley, Const. Lim. 6th ed. 670; *Vanderlin* v. *Grand Rapids*, 3 L. R. A. 247, 78 Mich. 522; *Rigney* v. *Chicago*, 102 Ill. 64; *Hooker* v. *New Haven & Northampton Co.* 14 Conn. 146, 36 Am. Dec. 477.

How can it be claimed that an invasion of the property and rights of the plaintiff which must necessarily produce so serious a result is not a "substantial impairment" of the object for which plaintiff was incorporated, and therefore not within the power of condemnation.

Commissioners on Inland Fisheries v. *Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247; *Holyoke Water-Power Co.* v. *Lyman*, 82 U. S. 15 Wall. 500, 21 L. ed. 138; *Citizens Water Co. of Bridgeport* v. *Bridgeport Hydraulic Co.* 55 Conn. 1; *New York, H. & N. R. Co.* v. *Boston, H. & E. R. Co.* 36 Conn. 201; *Boston & A. R. Co.* v. *Cambridge*, 159 Mass. 284; *Imlay* v. *Union Branch R. Co.* 26 Conn. 249, 68 Am. Dec. 392; *Bridgeport* v. *New York & N. H. R. Co.* 36 Conn. 266, 4 Am. Rep. 63; *Memphis & C. R. Co.* v. *Birmingham, S. & T. R. R. Co.* 18 L. R. A. 166, 96 Ala. 571; *Kansas City Suburban Belt R. Co.* v. *Kansas City, St. L. & C. R. Co.* 118 Mo. 599.

Baldwin, J., delivered the opinion of the court:

The plaintiff's complaint is in the nature of a pure injunction bill. It avers that it sends about 200 hundred regular trains of cars daily, some of which carry the mails of the United States, and the rest passengers and freight, across Fairfield avenue, in the city of Bridgeport, at grade; that the defendant threatens to obstruct the plaintiff's right of way by forcibly laying tracks for an electric railway over said crossing and upon the plaintiff's tracks; and that, if such new tracks are so laid and used, it will seriously impair the plaintiff's power to fulfill its chartered purposes, disarrange its train service, put it to great additional expense in the operation of its road, and greatly endanger the lives of the passengers and employés on all trains crossing such avenue. The defendant's answer admits the character and extent of the plaintiff's business, as alleged, but sets up a grant by the last general assembly of express authority to construct the crossing in question, at grade. It appears by an agreed statement of facts (made subject to the opinion of the court as to their relevancy) that Fairfield avenue was a public highway long before the plaintiff's railroad was constructed, and that the proposed crossing by the defendant's railway "impairs the property of the plaintiff, interferes with the accustomed and necessary operation of its road,

and endangers the lives of its passengers and employés. But the defendant does not intend to injure the property of the plaintiff, or interfere with the accustomed and necessary operation of its road, or endanger the lives of its passengers, and will not, except such as naturally follows from the location and operation of its trolly road across the tracks of the plaintiff at grade." These facts are relevant and material to the issue. They show that the proposed crossing, if constructed, will interfere with the necessary operation of the plaintiff's road, and endanger the lives of all whom it transports across Fairfield avenue in the 200 trains which daily pass there. It would be difficult to make out a stronger case for the interposition of a court of equity, if it has the power to interpose. Only by an injunction can the defendant be prevented from setting up across the tracks of a steam railroad, in constant use, an obstruction of a continuing character, which would daily put in peril hundreds or thousands of human lives.

It is argued that the plaintiff's claim is, in substance, simply one for an injunction against threatened trespasses or repeated obstructions of a right of way, and that it is not claimed that the defendant is not pecuniarily responsible for any damage it may do, nor that the plaintiff will be exposed to irreparable injury. But the plaintiff holds its right of way charged with the performance of a public trust for its continuous use for public accommodation. *Gates* v. *Boston & N. Y. Air Line R. Co.* 53 Conn. 333, 341, 343. Its railroad is a great avenue of communication between one part of the state and another and between this and other states. Any impediment to its safe and proper use is a matter of public concern, not to be measured by money, or dealt with on the footing of a claim for damages. If erected without authority from the state, it may be that the state's attorney might properly sue for an injunction; but the same remedy would be open to the plaintiff, for it suffers a special injury, and is charged by the state with a special duty of maintaining its road at this crossing in uninterrupted use under safe conditions. *Stamford* v. *Stamford Horse R. Co.* 56 Conn. 381, 395, 1 L. R. A. 375; *Frink* v. *Lawrence*, 20 Conn. 120, 50 Am. Dec. 274. As the plaintiff has stated a case sufficient to support its action, we are brought to the consideration of the merits of the defense founded on a legislative grant. In June, 1893, the East End Railway Company owned and operated a horse railroad in Bridgeport and Stratford, under a charter granted many years before, which railroad crossed the tracks of the plaintiff's railroad at grade, upon a highway known as "Seaview Avenue. By an amendment to this charter, approved June 28, 1893, it was authorized to extend its lines in each town by laying tracks through certain designated streets, "and also from Stratford avenue on and along Pembroke street, across the tracks of the New York, New Haven & Hartford Railroad Company at grade, until said tracks are elevated, to Old Mill Green; subject to such regulations and restrictions as to said railroad crossing as the board of railroad commissioners may at any time order upon the application of either of said companies; and from the lower bridge westerly, over and under the tracks of said railroad to the junction of Fairfield avenue and Water street; provided, however, that when said railway company shall abandon its present crossing with its tracks at grade with the New York, New Haven & Hartford Railroad Company at Seaview avenue, in the city of Bridgeport, it may cross the tracks of said steam railroad at grade at or near the junction of Fairfield avenue and Stratford avenue, at the southerly end of the railroad station of said steam railroad in the city of Bridgeport; subject, however, to such regulations and restrictions as the railroad commissioners may at any time order upon the application of either of said companies; and from the junction of Fairfield avenue and Water street southerly along Water street, westerly to Main street; . . . also from the northerly terminus of the line of said horse railway on East Main street across the tracks of the New York, New Haven & Hartford Railroad Company at grade, until said tracks are elevated, to the north side of East Washington avenue; subject, however, to such regulations and restrictions as the railroad commissioners may at any time order, upon the application of either of said companies." Special Acts 1893, pp. 878, 879. This amendment also empowered the company to equip and operate its road with electric power, and to consolidate and make common stock with any other street-railway company having lines in Bridgeport, or to transfer to it its property and franchises. A horse railroad had been in operation in Bridgeport for many years, owned by the Bridgeport Horse-Railroad Company. By an amendment to its charter, approved June 28, this company was authorized to consolidate with any other street-railway company, to equip its lines with electric power, and to extend them through various streets, among which were Congress street, "across the railroad tracks of the New York, New Haven & Hartford Railroad Company at grade, until said grade crossing is abolished by the steam railroad company; . . . subject to such regulations and restrictions in the matter of crossing the tracks of said steam railroad at grade as the railroad commissioners may at any time make upon the application of either of said companies;" and also North avenue, Broad street, Lafayette street, South avenue, and "Fairfield avenue in the western section of said city,"—each of which five streets was crossed by the plaintiff's steam railroad at grade, and in respect to each of which the company was empowered to construct a grade crossing over such steam railroad, in the same words used regarding the Congress street crossing, and subject to the same restrictions. On the same day the Bridgeport Railway Company was chartered, with power to construct and operate an electric railway through certain streets in Bridgeport; to cross the tracks of any steam railroad at grade, under such regulations and restrictions as the railroad commissioners should establish for the safety of the public; to acquire all the rights

and franchises of the East End Railway Company and of the Bridgeport Horse-Railroad Company, and to become consolidated with them by the name of the Bridgeport Traction Company. The concluding section of this charter ran thus: "Except as otherwise herein expressly provided, this charter shall be subject in all its parts to the general laws relating to street railways and street railway companies." Special Acts 1893, p. 877, § 19. The amendment to the charter of the Bridgeport Horse-Railroad Company also contained substantially the same provision. The consolidation and transfer of franchises thus authorized was duly made prior to August 16, 1893.

By a public act, which took effect on June 1, 1893 (Pub. Acts 1893, p. 307), it was enacted that no street-railway company already existing or thereafter incorporated should lay new tracks in any city until its plan of construction and operation had been approved by the mayor and court of common council. Soon after the consolidation, the defendant, as owner of the rights and franchises of each of the three companies so consolidated, presented its plan of construction and operation (which involved the abandonment of the Seaview avenue grade crossing, and the laying of a double track on Fairfield avenue, to cross the plaintiff's railroad at grade by means of electric power supplied to a trolley from overhead wires), to the mayor and court of common council of Bridgeport, and it was duly approved. On June 14, 1893, a public act was passed (Pub. Acts 1893, chap. 208, p. 361) amending chapter 168 of the Public Acts of 1889, so as to read as follows: "No electric, cable, or horse railroad shall hereafter be constructed across the tracks of a steam railroad at grade, except upon application to and approval by the railroad commissioners, nor shall any steam railroad cross any such electric, cable, or horse railroad at grade, except upon like application and approval." By another act, approved June 30, it was enacted that all the public acts of the session, unless otherwise provided, should take effect thirty days from the rising of the general assembly. The assembly rose on June 30. On August 16, the defendant, after having abandoned the grade crossing at Seaview avenue, applied to the railroad commissioners for permission to construct the tracks of its "horse railroad" at grade across the plaintiff's railroad on Fairfield avenue, under such regulations and restrictions as the commissioners might approve. The application was afterwards amended by adding a request that they would establish, pursuant to the charter of the Bridgeport Railway Company, such regulations relative to such crossing of the two railroads at grade as they should see fit for the safety and protection of the public. The commissioners decided that the general assembly had given the defendant the right to cross, and that they had no jurisdiction to approve or disapprove the proposed crossing; but proceeded to establish certain regulations as to the manner of its construction and operation. The main contention of the plaintiff is that the Public Act of June 14, which took effect July 30, repealed or modified those parts of the special grants made on June 28 (when the private acts took effect under the provisions of the general statutes), under which the defendant claims an absolute right to construct the crossing in question.

The doctrine that a later statute repeals by implication all provisions of former ones which are inconsistent with it rests on the ground that the last expression of the legislative will ought to control. It assumes that there have been successive and different expressions of such will in relation to the same subject; and the latest of these governs, precisely as the last word of a master governs his servants, however much it may vary from his previous directions. Such is presumed to be his intention; and the intent of a statute is determined by the same rule and the same reason. The general assembly, on June 14th, provided that no street railway should thereafter be constructed across a steam railroad at grade, except upon application to and approval by the railroad commissioners. By the general laws then existing (Pub. Acts 1889, chap. 29) this act would have taken effect on the 1st day of July following the rising of the assembly; but on June 30, the time when it went into operation was postponed to July 30. The Act of June 14 was designed either to change the general laws as to the crossing of steam railroads by street railways, or to make clear their meaning. In either case it was intended to remove impediments to the construction of such crossings. It declared it to be the general policy of the state that such crossings might be made with the approval of the railroad commissioners, and not otherwise. On June 28, the assembly granted permission for the construction of certain crossings of this kind in a particular city. These grants must have been based on petitions which sought permission to construct street railways on the streets in question, and were brought on due notice to the public and all parties adversely interested. Gen. Stat. §§ 388, 392, 393. The attention of the legislature was specially directed to the railroad problem in Bridgeport, and it decided to give the defendant and its predecessors in title power, after abandoning the Seaview avenue crossing, to lay tracks across those of the plaintiff on Fairfield avenue at grade, upon such plan of construction and operation as the city authorities should approve, subject only to such regulations and restrictions as the railroad commissioners might order on the application of either company.

There can be no question that the defendant could have proceeded to make this grade crossing after the fulfillment of the three preliminaries above mentioned, at any time between June 28, and July 30, notwithstanding the passage of the Public Act of June 14. *Powers* v. *Shepard*, 48 N. Y. 540, 545. To say that that act, on July 30, imposed the new restriction which is claimed upon the exercise of the defendant's franchises, is virtually to make it nullify the special grants obtained after its enactment, so far as they relate to grade crossings of steam railroads. On July 30, the defendant, had its charter contained no

provision on the subject, other than the permission to extend its lines through Fairfield avenue, could have constructed the crossing in question, under the general law, upon obtaining the approval of a crossing at that place by the railroad commissioners, and of the method of constructing and operating it by the mayor and court of common council. By the general law (Pub. Acts 1893, p. 308, § 8), the city authorities have "exclusive direction over the placing or locating of any tracks, wires, conductors, fixtures," or structures by any electric railway company in the highways of the city, "including the power of designating the material, quality, and finish thereof," and "may make all orders necessary to the exercise of such power of direction and control." If, then, all these general laws affect the defendant, and it is also bound by the provisions of its charter, its construction of the crossing in question must, in any case, be subject to the regulations of the city and also of the railroad commissioners, as to methods of construction and operation. But other companies, laying tracks without any special privileges as to the mode of construction across a steam railroad at grade, would have nothing to do with the railroad commissioners, except to get their approval of the crossing; the regulation of the mode of constructing and using it being left to be determined by the municipal authorities exclusively. Unless, then, the defendant is exempted by its charter from recourse to the railroad commissioners for the approval of this crossing, it is in a worse condition than if its charter had been silent on the subject; for as to modes of construction it is subject to two masters, instead of one. "A special and local statute, providing for a particular case or class of cases, is not partially repealed or amended, as to some of its provisions, by a statute general in its terms, provisions, and application, unless the intention of the legislature to repeal or alter the particular law is manifest; although the terms of the general act would, taken strictly, and but for the special law, include the case or cases provided for by it." *Re Central Park Comrs.* 50 N. Y. 493, 497. Where a special charter is followed by general legislation on the same subject, which does not in terms or by necessary construction repeal the particular grant, "the two are to be deemed to stand together; one as the general law of the land, the other as the law of the particular case." *State* v. *Stoll*, 84 U. S. 17 Wall. 425, 486, 21 L. ed. 654, 655. The defendant's charter expressly contemplates and regulates the effect of general legislation inconsistent with its provisions by the declaration with which it concludes, that it is to be subject to the general laws relating to street railways, "except as otherwise herein expressly provided." The "general laws intended" must have been both those then in force and those which might come into force thereafter. The Act of June 14 was one of the latter class. It required electric railway companies generally to obtain the approval of the railroad commissioners before constructing a grade crossing upon a steam railroad. But, as respects the grade crossing at Fairfield avenue, the charter of the defendant had expressly provided otherwise, for it had given explicit and full permission for the construction of this crossing whenever that at Seaview avenue should be abandoned. The general police power of the state resides in the general assembly. It can forbid grade crossings of highways by railroads, or of one railroad by another, at any particular place. *Woodruff* v. *Catlin*, 54 Conn. 277, 295. It can, by the same authority, permit them at any particular place, conditionally or unconditionally. By an amendment to the charter of the State Street Horse-Railroad Company, approved June 23, that company was authorized (Special Acts 1893, p. 846) to equip its lines with electric power, and to extend them through certain streets in Fair Haven, "or said company at its option may lay its tracks and operate its cars across the tracks of the Shore Line Railroad on Ferry street until said tracks of the Shore Line Railroad are removed; provided, that during said time this company place a watchman at said railroad crossing at its own expense;" and it was declared that the act should be subject in all its parts to the general laws relating to street railways, "except as otherwise expressly provided herein." In this instance also, therefore, the legislature, in regard to a designated crossing, exercised its own judgment as to the expediency of allowing its construction at grade, and the mode of regulating its use, when constructed, so as to secure public safety; thus expressly providing for a course of proceeding, as to a particular locality, differing from that prescribed by the general laws.

The plaintiff contends that the number of grade crossings of steam railroads apparently authorized by the various charters and amendments of charters to which reference has been made is so great as to raise a necessary presumption that the general assembly must have intended them to be subject to the approval of the railroad commissioners, under the general law previously enacted and subsequently taking effect. It is true that grade crossings of highways by steam railroads have repeatedly been pronounced by this court to be dangerous to human life, and that the general policy of the legislature for a considerable period of years has been to secure their abolition as speedily as it can reasonably be effected. *Dyson* v. *New York & N. E. R. Co.* 57 Conn. 21; *New York & N. E. R. Co's App. from Railroad Comrs.* 62 Conn. 527, 540; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269. But the special legislation now under consideration does not increase the number of such crossings. It increases, no doubt, the danger of their use; but if, notwithstanding this, the general assembly has seen fit to make the grants relied on, they must be construed, like every other statute, according to the intention which they express, rather than that which might perhaps have been anticipated in view of the course of previous legislation. The frequent references, indeed, to the temporary character of most of the proposed crossings, as that they are to continue until the steam-railroad tracks are removed or elevated, may be some indication that the legislature thought the

very construction of the electric railway tracks across those of the steam railroad might be an incentive to the speedier removal of the latter from the surface of the highway.

The plaintiff urges that the state cannot bargain away its police power, and that any permission, however explicit and unqualified, to construct a dangerous crossing, may be modified or repealed as soon as it is given. This is undoubtedly true. *Pennsylvania R. Co.* v. *Braddock Electric R. Co.* 152 Pa. 116. But the question before us is not whether there was a right of repeal, but whether such a right was exercised. We think that there is no sufficient ground for the contention that it was the intent of the legislature by the Public Act of June 14, to repeal the special and local grants not yet made, under which the defendant claims, and which were afterwards inserted in the Private Acts of June 28. The case falls within the rule, "*Generalia specialibus non derogant.*"

It is further insisted that these special grants, if otherwise effectual, give the defendant no right to construct the crossing without first making compensation for the direct damage it will do to the plaintiff's property. The injunction was asked to prevent a threatened obstruction of the plaintiff's "right of way." It is not alleged or found that it owns the fee of the highway. It has only a right to cross it at grade. The defendant's tracks are laid upon the highway by the authority of the state, and as a mode of rendering it more serviceable as a highway for public travel. We are not called upon to consider whether electric car tracks impose any additional burden upon land occupied for a highway, for which the owner of such land can claim compensation. The plaintiff is not in a position to raise that question. It claims that the proposed crossing at Fairfield avenue will affect the safe and beneficial use of its right of way at that point, and thereby impair the general value of its franchises and property. But it holds these subject to the police power of the state, under which the use of highways for all purposes of public travel is fully within the control of the legislature. *Elliott* v. *Fair Haven & W. R. Co.* 32 Conn. 579, 582. The same authority which can make it lawful for electric railways to cross at grade any and every highway intersecting the street upon which their tracks are laid, can make it lawful for them to cross at grade any and every steam railroad intersecting that street. To raise or depress the street or the structure bearing the electric track, so as to carry it above or beneath the steam railroad, might, in a particular case, cause more inconvenience or even danger to the traveling public than it would avoid. The failure of a brake upon an electric car to act would naturally cause more peril to the passengers, and to those traveling on the street, if the car were, at the time, on an up or down grade. The difficulty of hauling heavy loads increases with every considerable ascent or descent in the highway. To divert the electric tracks from the street in order to effect a crossing of a steam railroad elsewhere necessarily leaves part of such street unsupplied with the facilities for quick communication which it might otherwise enjoy. To stop the electric cars on each side of the steam railroad for the transfer of their passengers on foot from one car to another involves them in personal inconvenience and delay, and without absolutely freeing them from the danger of being struck by a passing train. The approval given in behalf of the state to the location of the plaintiff's railroad across Fairfield avenue made it lawful to construct and use the crossing at grade; but it conferred no greater power to control the use of the highway by others than any individual traveler possesses. The company could not use the highway without legislative authority, but its rights of passage are not superior in kind to those of the individual, who needs no such authority, or to those of any other corporation which the state may authorize to use it for purposes of travel. The legislature has deemed it proper to allow the construction of electric railways in certain streets of the city of Bridgeport. It was bound to regard the safety and convenience of those who were to ride upon them, as well as the safety and convenience of those who were to ride over the steam railroads already laid upon those streets. In full view of the danger attending a grade crossing of the plaintiff's by the defendant's road on Fairfield avenue, it has deemed it for the public interest to permit its construction; and it was no more bound to provide for compensation to the plaintiff for the injury it may suffer than to provide for it in favor of any individual who may have occasion to cross the defendant's tracks at the hazard of a possible collision with its cars. *Bridgeport* v. *New York & N. H. R. Co.* 36 Conn. 255, 267, 268, 4 Am. Rep. 63; *Massachusetts Cent R. Co.* v. *Boston, C. & F. R. Co.* 121 Mass. 124; *Metropolitan R. Co.* v. *Highland Street R. Co.* 118 Mass. 290; *New York & N. E. R. Co.* v. *Waterbury*, 60 Conn. 1.

The plaintiff took the risk of suffering such an inconvenience or peril when it elected to build its road over Fairfield avenue at grade. Such a crossing, in the center of a busy city, was a source of danger before the defendant's charter was granted. Had it been constructed above grade, no use of the street by the defendant could have impaired the value or safety of the plaintiff's road. The defendant's charter does not create a danger so much as increase a danger; and as it is one incident to the lawful use of the highway, the plaintiff suffers nothing which it should not have contemplated as possible when it made its original location, and nothing to which such a location did not necessarily make it subject. The impairment of its property, the interference with the accustomed and necessary operation of its road, and the danger to the lives of those whom it transports, present simply a case of *damnum absque injuria*.

It was claimed by the defendant that the grant to the East End Railway Company of permission to construct its crossing at grade when it should abandon the grade crossing then existing at Seaview avenue, the acceptance of this charter amendment, and the

abandonment of that crossing, show an executed contract between the state and the defendant, as the successor to the original company, the obligation of which could not be impaired by subsequent legislation. It is unnecessary to inquire whether such a claim would be tenable, since it does not appear that the Seaview avenue crossing was abandoned before the Act of June 14 came into effect.

There is error, and *the judgment of the superior court is reversed.*

Torrance and Fenn, JJ., concurred.

Hamersley, J., dissenting:

It has become the settled policy of this state that the intersection of a railroad and highway at grade is a dangerous public nuisance that should be abated as rapidly as possible. *Dyson* v. *New York & N. E. R. Co.* 57 Conn. 21; *New York & N. E. R. Co's App. from Railroad Comrs.* 62 Conn. 540. If this is true of a railroad crossing a highway, how much more true is it of one railroad crossing another. The latter crossings were not sufficiently numerous to call for general legislation until 1882, when it was enacted that "no railroad shall cross any other railroad at grade without the consent and approval of the railroad commissioners." Pub. Acts 1882, p. 215. And in the following year it was enacted that such consent and approval should not be given unless the commissioners should find the avoidance of grade crossing to be impracticable. These laws are now in force. Until about 1889, horse-railroads were the only street railroads, and were mainly used in highways that did not cross railroads at grade, and were treated as a part of the highway, requiring no special legislation as to crossings; but when the electric railroad became an accomplished fact, and threatened to occupy highways, it became evident that the intersection at grade of an electric and steam railroad might be as dangerous as such intersection by two steam railroads, or even more dangerous. And so, in 1889, the legislature treated electric railroads (including also cable and horse railroads), in respect to grade crossings, substantially as steam railroads had been treated, and provided that there should be no intersection of such railroads without application to and approval by the railroad commissioners; and this law was re-enacted in 1893. It is thus apparent that the intersection at grade of the tracks of a steam railroad and an electric railroad is by law a nuisance highly dangerous to human life; and that any legislative permission to maintain such a nuisance must be exceptional and contrary to the general policy of the state as expressed by the legislative and judicial departments.

The defendant claims that its charter, granted at the session of 1893, gives it express permission to establish this nuisance, and to cross the tracks of the plaintiff at grade, without application to and approval by the railroad commissioners. Its charter does say that the defendant may cross the plaintiff's tracks at grade, but it does not in express terms authorize the defendant to construct such crossing without application to and approval by the railroad commissioners; and the question at issue is, Does the right given to cross at grade imply a permission to exercise such right in violation of the general law which declares that no such right shall be exercised without application to and approval by the railroad commissioners. In passing on the question it should be remembered that "charters of corporations which confer exclusive privileges for the particular advantage of the grantees are to be construed liberally for the benefit of the public, and strictly as against the corporation." *Burritt* v. *New Haven*, 42 Conn. 202. And this principle should be applied with the most strictness where an exception from the public law is claimed that is inconsistent with the settled policy of the state, and may prove a constant menace to the lives of thousands of its citizens. The Act of 1893 forbidding the construction of any intersecting tracks at grade, except on application to the railroad commissioners, went into effect after the rising of the general assembly of that year, and operated as the last expression of the legislative will on all antecedent laws relative to the same subject, and therefore upon the charter of the defendant. I do not deem it material whether this act did or did not alter the legal effect of the prior Act of 1889,—the question may be doubtful,—but in either case, in the view I take of the legislation of the session, the act was, and was intended to be, the last expression of the legislative will on that subject. The defendant, however, claims that it does not modify the exercise of any right granted by its charter, because such modification would be a repeal of its charter by implication, and such repeals are not favored by law. As to the soundness of this principle there can be no question, but it does not apply to this case. The principle is accurately stated in *Goodman* v. *Jewett*, 24 Conn. 589: "It [the later law] does not in terms repeal the Law of 1853, or any part of it; nor does it impliedly repeal the fifth section of it by force of the principle that later statutes abrogate prior contrary statutes. That maxim applies only when the later statute is couched in negative terms, or when its provisions are so clearly repugnant to the former act that it necessarily implies a negative. 1 Bl. Com. 89. If both statutes can be reconciled, they must stand, and have a concurrent operation." See also *Norwich* v. *Story*, 25 Conn. 47; *Kallahan* v. *Osborne*, 37 Conn. 490. In this case the later statute is couched in negative terms. "No electric railroad shall hereafter be constructed across the tracks of a steam railroad at grade." The two statutes cannot be reconciled. The repugnancy is direct, and does not depend upon any implied inconsistency. The maxim that a later statute abrogates a prior contrary statute applies, and the principle invoked by the defendant has no application.

Again, the defendant claims that a special and local statute, providing for a particular case, is not repealed by a statute general in its terms, provisions, and application, unless the intention to repeal the particular law is manifest, although the terms of the general

act, taken strictly, and without reference to the special act, would include the case provided for by that act; and further claims that where a special charter is followed by general legislation on the same subject, which does not in terms or by necessary construction repeal the particular grant, the two are to be deemed to stand together,—one as the general law of the land, and the other as the law of the particular case. The principle here advanced, as a general rule of construction, is unquestionable. The difficulty lies in its application to the defendant's case. The special act says: "The defendant may cross the tracks of the plaintiff's steam railroad at grade at the junction of Fairfield and Stratford avenues." The general act says: "No electric railroad shall hereafter be constructed across the tracks of a steam railroad at grade, except upon application to and approval by the railroad commissioners." Can it fairly be said that the intention of the legislature to affect the particular law is not manifest? Can it fairly be said that this general legislation, following the special charters of the defendant and others neither in terms nor by necessary construction affects the particular grants, especially when it is remembered that every special charter is granted and accepted subject to such police regulations as to the exercise of granted powers as the legislature may establish? This general statute forbidding the construction of a grade crossing without application to the railroad commissioners cannot operate except where a particular statute has given the right to cross at grade; certainly not until a new legislature has enacted new particular laws granting new particular rights to cross at grade. It is aimed at nothing unless it is aimed at the particular rights claimed by the defendant and others under special charters. In this sense the law is not of general application. Its first range of operation is wholly confined to the particular cases specified in existing special charters. The rule of construction, that a particular grant, which may stand together with the provisions of a statute of general application, is not repealed by the enactment of such statute, unless the intention of the legislature to repeal the particular grant is manifest, cannot apply when the operation of the general statute is confined to such particular grants, and the maintenance of the grants unaffected by the statute must render the statute wholly inoperative. In such case, and in this case, the two statutes cannot stand together. They are wholly repugnant, unless these special charters are construed as granting the right to cross at grade subject to the police regulations of the state.

The defendant also seems to claim that the circumstances attending the passage of these laws, as shown by the record, and those facts of which the court has judicial knowledge, indicate an actual intent on the part of the legislature to permit the grade crossing in question without any application to the railroad commissioners, and without their approval, based upon a searching investigation as to the relation of the loss of human life to railroad profits and increased facilities for travel involved in the establishment of this crossing. It seems to me that a consideration of these circumstances fairly indicates an opposite actual intention. When the Legislature of 1893 met, it found a large number of applications for special charters for building electric railroads awaiting its action. Thirty-five or more such charters were finally granted, authorizing electric railroads in every portion of the state. Many of these charters contained, in terms more or less particular, the right to cross steam-railroad tracks at grade. All of them required special legislation as to the exercise of the franchises asked. The incorporation by the legislature into each one of these charters of the particular regulations demanded by public interest seemed impracticable, and they were provided for by public laws. One, relating to the detail of location and operation and to special regulations to be complied with before the work of construction should begin, was passed June 1, and given immediate effect; one, amending the Act of 1889 (which, as was claimed forbade all grade crossings) so that the various particular grants to cross steam railroads at grade could not be exercised without the approval of the railroad commissioners, was passed June 14, to take effect after the rising of the general assembly. Until June 14, none of these thirty-five special charters, applications for which had been pending since January, were passed. Between that date and the adjournment on June 30 they were all passed. It seems very clear that the legislature in fact understood that the passing of these charters with the right to cross steam railroads at grade might repeal the existing law, if that absolutely forbade such crossing; and so did not pass them until it had passed a general act, which, by taking effect after the rising of the general assembly, would thereby prevent the exercise of the various particular rights that might be granted without the approval of the railroad commissioners; and intended, in passing the defendant's charter, to couple the right to cross at grade at a point notoriously dangerous with the additional burden of being subject at all times to such regulations as the railroad commissioners, on application, might make, but did not intend that such crossing should be constructed unless its construction should be approved by the commissioners. But the actual intent of a legislature, as distinguished from the legal effect of its laws, is a thing impossible to ascertain, and has no existence for the purpose of judicial construction. During the session of a legislature its actual intent can operate at its will on legislation; but at the moment of adjournment its actual intent, as distinguished from its acts, ceases to exist. It is expressed only by the legal effect of its laws, and what that legal effect is becomes a judicial, and not a legislative, question. When obscure language has been used, when laws apparently conflicting have been passed, it is for the court to say what has legally been done. We speak of being guided by the intent of the legislature in reaching such judicial judgment, but such phrase is really a figure of speech. The court can see and

give effect, if possible, to the patent purpose of the law, but it cannot, in fact, be guided by any supposititious legislative intent, actual or artificial. It can only ascertain, as accurately as possible, the most reasonable effect that can be given to uncertain legislation, in view of all the language used, and in accordance with those general principles of construction which experience has established as safe guides in reaching a just conclusion. Not infrequently the result reached is of necessity directly contrary to what we have every reason to suspect might prove to be the actual intent of the legislature, if such intent were susceptible of ascertainment. These general principles oftentimes conflict with each other when applied to a particular case, and the court is then obliged to weigh their relative importance, not always absolutely, but as applied to the case in hand. The question of construction now presented is in some respects a very peculiar one, and well-established rules of construction, if followed without reference to each other, might point to different results. But it seems to me that, giving due weight to all the considerations the court should entertain, the only reasonable effect that can be given to this conflicting legislation is that the special charters give particular rights to cross steam-railroad tracks at grade, and that the general act prohibits the exercise of such particular rights without the approval of the railroad commissioners. But, if this result were doubtful, if the true legal effect of this legislation were open to grave doubt,—and the able and plausible arguments which have been made on both sides of the question, as well as the fact that the court is divided in opinion, suggest strong reasons for holding that such a doubt really exists,—then it seems to me entirely clear that such doubt must be solved by the application of the well-established rule that, in case of serious doubt, the court ought not to give a construction which will make the law inconsistent, instead of consistent, with the settled policy of the state; especially when such construction will authorize, without the investigation heretofore required in such cases, the establishment of a public nuisance admittedly dangerous to human life, and apparently uncalled for by any adequate public necessity.

Concurring with the majority of the court in the views expressed on the other questions involved, I think there is no error in the judgment of the superior court.

Andrews, *Ch. J.*, concurred.

MAINE SUPREME JUDICIAL COURT.

James WOOD
v.
City of AUBURN *et al.*

(.....Me.....)

1. **A city which has undertaken to furnish its inhabitants with water** cannot, after accepting the rates and furnishing water to a consumer for a period beyond that for which a disputed unpaid claim against him exists, shut off the supply for the purpose of coercing payment of such claim.
2. **A consumer may enjoin a city** which has undertaken to furnish water to its inhabitants from shutting off his supply for the purpose of coercing payment of an old claim against him after it has accepted the rates and furnished water for subsequent periods.
3. **The question of the validity of an old claim against a water consumer** will not be investigated in an injunction proceeding by him against the city to prevent its shutting off his supply after it has accepted the rates and furnished water for periods subsequent to that covered by the disputed claim.

(March 13, 1895.)

REPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the full court in a suit brought to enjoin defendants from shutting off the supply of water from several of complainant's tenement houses. *Judgment for complainant.*

The facts sufficiently appear in the opinion.

Messrs. **Savage & Oakes,** for complainant:

The city assumed the right to shut off a citizen's water after offer of payment and tender, not for the purpose of enforcing payment of the current water rates, but to collect an old bill, a bill, too, which was not contracted with the city itself, but with its predecessor in title, and to which it has no claim except by assignment; a bill, also, to which the complainant claims to have a fair offset.

Stock v. *Boston*, 149 Mass. 410.

It was beyond the power of the city to make or attempt to enforce such a regulation.

Merrimac River Sav. Bank v. *Lowell*, 10 L. R. A. 122, 152 Mass. 556; *Lumbard* v. *Stearns*, 4 Cush. 60.

Mr. **James A. Pulsifer,** for respondent:

Even if there were any justice in this claim for set-off there would be no statute or rule of law to support this unliquidated claim for damages as a set-off against these water bills.

Hall v. *Glidden*, 39 Me. 445; *Smith* v. *Ellis*, 29 Me. 422.

It is only when the plaintiff has exercised due precaution to prevent an injury that he can be relieved by an injunction.

Russ v. *Wilson*, 22 Me. 207.

The complainant in this case could have prevented all injury and trouble by paying his water bills; nor do we see any legal impediment in the way of his having his rights in his claim for damages fully determined in an action at law.

Merrimac River Sav. Bank v. *Lowell*, 10 L. R. A. 122, 152 Mass. 556.

NOTE.—As to the right to shut off supply of water to compel payment of arrears in water rents, see also *note* to Rushville v. Rushville Natural Gas Co. (Ind.) 15 L. R. A. 321.

See also 30 L. R. A. 447; 32 L. R. A. 697; 33 L. R. A. 59; 37 L. R. A. 675; 40 L. R. A. 171.

Emery, J., delivered the opinion of the court:

Mr. Wood, the complainant, has been for some time the owner of dwelling houses in Auburn connected with the system of waterworks formerly owned by the Auburn Aqueduct Company, but now owned by the city of Auburn. For some time prior to November 1, 1892, the aqueduct company had supplied water to these houses, and had been paid the regular rates therefor six months in advance, on May and November 1st of each year, agreeably to the regulations of the company. When November 1, 1892, came round, Mr. Wood did not pay or tender the water rates for the ensuing six months as usual. He claimed that water was not being sufficiently supplied, and that in other respects the company was not fulfilling its duty to him. The company did not shut off the water, but allowed it to run into the complainant's houses during the whole period of that six months ending May 1, 1893.

In May, 1893, the aqueduct company transferred this system of waterworks, and all its bills against the water takers, to the city of Auburn. Immediately after the transfer, and in the same May, the complainant, Wood, tendered to the proper officer the regular water rates for the then ensuing six months, to end November 1, 1893. The city accepted the money, and supplied the water for that six months as usual. In November, 1893, Mr. Wood tendered, as before, the water rates for the then next ensuing six months. This time the city refused to receive the money, and notified Mr. Wood that the water would be shut off from his property unless he also paid the water bills of the old company for the six months between November 1, 1892, and May 1, 1893, which had not been paid, and which had been assigned to the city, as above stated. Mr. Wood remonstrated, claiming that nothing was due from him on old bills; but the city insisted, and thereupon he filed this bill to restrain the city from shutting off the water from him.

The complainant concedes that the rules of the old aqueduct company and of the present city water board are reasonable, so far as they require him to pay six months in advance. He contends, however, that when the city has taken his money for one six months, paid according to its rules, it has waived any right to use the summary remedy of shutting off water to collect a disputed bill for any prior six months; that the city has thereby elected to continue him as a water taker, and resort to the usual legal remedies for settling the prior dispute; that any rule of the water board of Auburn which assumes the power to receive the water taker's money from six months to six months, and then, at any time, deprive him of water because of an old and disputed bill, is unreasonable, and therefore void.

We think this contention must be sustained.

Water companies and municipalities undertaking to supply water to the people have an undeniable right, when not affected by legislation, to impose such reasonable rules as will husband the supply and economize the use of the water, as will protect the plant and keep up its efficiency, and as will insure a reasonable revenue and its prompt receipt. On the other hand, such companies and municipalities are bound to supply water at reasonable rates to every person within the range of the system of works. Their rules must be reasonable, and not oppressive or vexatious. The citizen should not be subject to any whims of the officials. He should have a secure right to the water so long as he promptly pays the current installments, and makes no waste or misuse of the water. So far as appears, Mr. Wood has fully complied with these conditions.

The only trouble is over an old and disputed bill. The aqueduct company cou'd have insisted on payment of this bill in advance, but did not. It could have shut off the water during the time covered by the bill, but did not. It preferred to let the bill and the dispute stand. Its successors, the city, with presumed knowledge of all the facts, did not shut off the water. It accepted Mr. Wood's money for the next installment; furnished water for that six months to him, as one within his rights and its rules; allowed him to suppose that the old bill in dispute would be ignored, or would be adjusted as are disputes between other parties. After having resumed these relations with Mr. Wood, and taken his money therefor, the city now insists that he shall now be summarily deprived of an instant and constant necessity, in order to coerce him into a surrender of his position of defense against the old bill. Assuming that the rules of the old company and of the city contemplate this course, we think they are to that extent unreasonable, and therefore without legal force.

The parties are not upon equal ground. The city, as a water company, cannot do as it will with its water. It owes a duty to each consumer. The consumer, once taken on to the system, becomes dependent on that system for a prime necessity of business, comfort, health, and even life. He must have the pure water daily and hourly. To suddenly deprive him of this water, in order to force him to pay an old bill claimed to be unjust, puts him at an enormous disadvantage. He cannot wait for the water. He must surrender, and swallow his choking sense of injustice. Such a power in a water company or municipality places the consumer at its mercy. It can always claim that some old bill is unpaid. The receipt may have been lost, the collector may have embezzled the money; yet the consumer must pay it again, and perhaps still again. He cannot resist, lest he lose the water.

It is said, however, that the consumer can apply to the courts to recover back any sum he is thus compelled to pay, if it was not justly due from him, or, if he can show affirmatively that it is not a just claim against him, he can, by judicial process, restrain the company or municipality from shutting off the water. To oblige a person to follow such a course would be a violation of the fundamental juristic principle of procedure. That

principle is that the claimant, not the defendant, shall resort to judicial process; that he who asserts something to be due him, not he who denies a debt, shall have the burden of judicial action and proof. It is only in the case of dues to the state that this principle is suspended.

It is said, again, that, Mr. Wood having resorted to this judicial proceeding, the city may now, in this same proceeding, show that there is no defense to the old bill, and thus justify its action, and have the prayer of Mr. Wood denied. The court cannot be required in this proceeding to investigate and determine whether there is anything due on that old water bill. The city, or its predecessor, at one time had the right to insist on its payment before furnishing water. That right, as to that bill, was waived fully and effectually. It cannot be resumed at the pleasure of the respondent. The water must be supplied to the complainant so long as he will promptly pay current installments, and otherwise conform to the reasonable rules governing the supply of water. The respondent must now, in its turn, resort to judicial process, if it desires to enforce any further payment.

Bill sustained, with costs. Injunction made permanent.

KANSAS SUPREME COURT.

STATE of Kansas, *ex rel.* John T. LITTLE, *Atty-Gen.*,
v.
BOARD OF REGENTS OF UNIVERSITY OF KANSAS *et al.*

(.....Kan.....)

***1. An action in the nature of quo warranto may be maintained** in the name of the state by the attorney-general, to oust the board of regents of the University of Kansas from the exercise of corporate powers in excess of those conferred on it by law. The board of regents is such a corporation as is subject to the control of this court in such an action.

2. Admission into the university is made free by statute, and the board of regents has no power to collect a fee of $5, or any other fee, for the use of the library, or to exclude students from the use of the library for the nonpayment of such fee.

3. The assumption by the board of the power to collect such fees, and to exclude

*Headnotes by ALLEN, J.

NOTE.—*Nature of incorporated institutions belonging to the state.*

I. *In general.*
 a. *Banks.*
 b. *Educational institutions.*
 c. *Other state institutions.*
II. *Liabilities of such institutions.*
III. *Directors, trustees, and officers.*
 a. *In general.*
 b. *Personal liability.*

I. *In general.*

There is an important class of corporations represented by that considered in the above case as to which text-books and treatises are almost entirely silent. It is that of incorporated institutions belonging to and controlled by the state. The attempt is here made for the first time, so far as it appears, to collate all the decisions of the courts respecting the nature of this class of corporations. This is at much risk of failing to find some cases pertaining to the subject because of the wide and vague range of subjects under which the cases may have been placed in digests or other law books. The most frequent example of this class of corporations now existing is probably that of a state university which can be found in a large number of states, in some of which it is created or recognized by the constitution itself.

There is a clear distinction between this class of corporations and private corporations in the fact that the only property interests involved in the former belong to the state. Between this class of public corporations and municipal corporations the distinction is not so easy to state. But municipal corporations are generally understood to include only that class of public corporations, each of which represents in some respects and for some purposes a particular local portion of the public. That is to say, it is a local subdivision of the state. It also exercises a certain governmental function with respect to that portion of the public within its territory. On the other hand the class of public corporations here considered may be described with some approach to clearness as incorporated state agencies or institutions created to carry on certain special kinds of work for the benefit of the state or for the public interest, but not constituting any local or territorial division of the public for any governmental purposes.

This class of corporations is also distinguishable, but with some difficulty, from the large class of official boards, many of which possess powers very similar to those of a corporation, some of which might perhaps for some purposes be treated as corporations. Thus the power to hold property in trust for the state has been given in such a case to the board in charge of an asylum without expressly declaring the board to be a corporation. So boards of education not expressly declared to be corporations often have powers quite similar to those of corporations, and in this respect seem to belong to that class of quasi corporations which include the townships in many states. But in this note the intention is to present the law of *incorporated* institutions or agencies of the state as described above, keeping as clear a distinction as may be between them and municipal corporations as well as all classes of quasi corporations which represent either the whole or a part of the public.

a. *Banks.*

The relation to the state of a state bank not only created but owned by the state has been a subject on which the decisions are not entirely in harmony. But by the great weight of authority these institutions are held to be for most purposes equivalent to private corporations. In some early Illinois cases the contrary was held.

Thus in State Bank of Illinois v. Brown, 2 Ill. 103, an action by a state bank on a note was held to be exempt from the statute of limitations on the ground that the state was the real party.

So in Ernst v. State Bank of Illinois, 1 Ill. 51, Appendix, a release by the state of all debts due to the state was held to include the release of a note

See also 29 L. R. A. 708, 798; 30 L. R. A. 747; 34 L. R. A. 150; 40 L. R. A. 677; 43 L. R. A. 703; 44 L. R. A. 364; 45 L. R. A. 675; 47 L. R. A. 577.

students from the library for the nonpayment thereof, is an unwarranted assumption of corporate powers, from the exercise of which they will be ousted by this court in a suit brought in the name of the state by the attorney-general.

(June 8, 1895.)

APPLICATION for a writ of quo warranto to oust defendants from exercising power in reference to the imposition of fees for the use of the University library which was alleged to be in excess of their jurisdiction. *Application granted.*

The facts are stated in the opinion.

Messrs. **John T. Little,** *Atty-Gen.*, and **Morton & Clark,** for plaintiff:

The object of this action is similar to that in *State* v. *Topeka*, 31 Kan. 454, viz.: to oust the board from the exercise of a power which is plainly forbidden by law.

The acts of the legislature are constitutional and effective to confer corporate powers.

Dill. Mun. Corp. § 22; *Beach* v. *Leahy*, 11 Kan. 28; *Knowles* v. *Board of Education of Topeka*, 33 Kan. 692.

The form of the action is proper.

Civil Code, § 653, cl. 4; Gen. Stat. 1889, p. 1573; *State* v. *Topeka*, *supra*.

Messrs. **D. M. Valentine** and **J. W. Green,** for defendants:

The supreme court has original jurisdiction in quo warranto only as it obtains the same from the State Constitution, art. 3, § 3.

This jurisdiction is of course only such as was understood and settled to be quo warranto jurisdiction prior to or at the time when the constitution was adopted.

State v. *Wilson*, 30 Kan. 661; *State* v. *Allen*, 5 Kan. 213.

Quo warranto cannot be maintained against any body of men simply because they are a body of men.

High, Extr. Legal Rem. §§ 618, 636.

Quo warranto has nothing to do with anything except with the illegal existence or illegal acts of regular corporations or assumed regular corporations or with the illegal holding or attempted illegal holding of an office.

The language used in the statute is similar to the language used in other statutes having reference to counties (Gen. Stat. 1889, par. 1611), townships (Id., par. 7061), and school districts (Id. par. 5577), yet the decisions of this court are uniform that counties, townships, and school districts are not corporations within the meaning of the constitution.

Beach v. *Leahy*, 11 Kan. 23; *State* v. *Pawnee County Comrs.* 12 Kan. 439; *Pottawatomie County Comrs.* v. *O'Sullivan*, 17 Kan. 58; *Eikenberry* v. *Bazaar Twp. of Chase County*, 23 Kan. 561, 31 Am. Rep. 198; *State* v. *Sanders*, 42 Kan. 228; *Freeland* v. *Stillman*, 49 Kan. 197; *State* v. *Lewelling*, 51 Kan. 562; *Cleaver* v.

and mortgage to the state bank. But it is shown that the act establishing the bank provides that notes and mortgages given to the bank shall be "for the use of the state." This seems to make the bank more directly an agency of the state than has been usually the case with state banks.

So in Moreland v. State Bank of Illinois, 1 Ill. 208, the failure of a board of directors of the state bank to protest a note and foreclose a mortgage as required by statute was held not to release the sureties on a note which was given for accommodation. The decision is based in part at least on the accommodation character of the note, but the court seems to regard the negligence of the board of directors as within the rule which denies that the state shall be prejudiced by an omission of duty on the part of its officers.

In Linn v. State, 2 Ill. 87, 25 Am. Dec. 71, overruling Snyder v. State Bank of Illinois, 1 Ill. 122, it was held in 1833 that bills of the state bank were bills of credit issued by the state within the prohibition of the United States Constitution. This decision is, in its result, contrary to decisions by other state courts and by the Supreme Court of the United States as shown in the cases hereafter following. But the state bank of Illinois was not only owned by the state and its cashiers gave bonds directly to the state, but its bills were by statute made receivable at all times for any debt due to the state, or to any county, as well as for debts due to the bank. Moreover all the revenues of the state were "pledged" for the redemption of the bills of the bank and the legislature "pledged" itself to redeem in gold and silver all the bills issued by the bank.

But the mere fact that the bills of a bank which was owned by the state were made receivable in all payments of debts due to the state was held in Woodruff v. Trapnall, 51 U. S. 10 How. 190, 13 L. ed. 383, insufficient to make them bills of credit issued by the state or on the faith of the state. That case may possibly be distinguished from the Illinois case by reason of the fact that the bank had a cash capital with resources and property of its own subject to judicial process, and it did not appear that the state had guaranteed the bills or in any way pledged its credit to secure them. Although the Illinois case is at first sight in conflict with the other decisions it is by no means clear that it is so in principle. The pledging of the credit of the state for the payment of the bills in addition to making them receivable for all debts to the state would seem to be very nearly an indirect way of emitting bills of credit by the state. This responsibility of the state of Illinois for the payment and redemption of the bills of the bank is an element which does not seem to have existed in the case of the state banks in other states.

That the notes of a state bank, which was the property of the state, are not bills of credit issued by the state within the meaning of constitutional prohibitions against the issuing of bills of credit by a state, is decided in Owen v. Branch Bank at Mobile, 3 Ala. 258; McFarland v. State Bank, 4 Ark. 44, 37 Am. Dec. 761; State v. Calvin, R. M. Charlton (Ga.) 151; Lampton v. Commonwealth's Bk. 2 Litt. (Ky.) 301; Bank of the Commonwealth v. Spilman, 3 Dana, 150; Bank of the Commonwealth v. Swindler, 2 Dana, 393; Jones v. Bank of Tennessee, 8 B. Mon. 122, 46 Am. Dec. 540; Bank of Commonwealth of Kentucky v. Clark, 4 Mo. 59; Griffith v. Commonwealth Bank of Kentucky, Id. 255; Craighead v. State Bank, Meigs, 199; Woodruff v. Trapnall, 51 U. S. 10 How. 190, 13 L. ed. 383, and Briscoe v. Bank of the Commonwealth of Kentucky, 36 U. S. 11 Pet. 257, 9 L. ed. 709, affirming 7 J. J. Marsh. 349; Darrington v. Branch Bank of Alabama, 54 U. S. 13 How. 12, 14 L. ed. 30.

In the leading case on this subject in the Supreme Court of the United States, that of Briscoe v. Bank of the Commonwealth of Kentucky, *supra*, this decision was based on the ground that the funds of the bank and its property of every description were responsible for the payment of its debts and could be reached by legal or equitable process so that the bank in this respect could claim no exemption under the prerogatives of the state. The court said: "It is a simple corporation, acting

Com. 34 Pa. 283; *State* v. *Evans*, 3 Ark. 585, 36 Am. Dec. 468; *People* v. *Whitcomb*, 55 Ill. 172; *Stultz* v. *State*, 65 Ind. 492.

The public cannot sue.

State v. *McLaughlin*, 15 Kan. 228, 22 Am. Rep. 264; *Center Twp.* v. *Hunt*, 16 Kan. 488; *Atchison* v. *State*, 34 Kan. 379; *Argentine* v. *State*, 46 Kan. 431.

Quo warranto will not lie to determine disputed private rights or to determine any disputed rights where another plain and adequate remedy exists, or to oust a corporation from the exercise of assumed powers where such powers cannot technically be called franchises.

State v. *Minnesota Thresher Mfg. Co.* 3 L. R. A. 510,40 Minn. 213; *McDonald* v. *Alcona County Supvrs.* 91 Mich. 459; *People* v. *Cooper*, 139 Ill. 461; *State* v. *Pittsburgh, Y. & A. R. Co.* 50 Ohio St. 289.

Allen, J., delivered the opinion of the court:

This action is prosecuted in the name of the state, on the relation of the attorney-general, against the regents of the university, the chancellor, and the treasurer, to oust them from the exercise of the power, which it is alleged they have usurped, of charging the students who are residents of the state an annual library fee of five dollars, and a graduating fee of five dollars, and of excluding such students who fail to pay the library fee from the use of the books. It is alleged that the university is a corporation, and that enforcing the payment of such fees by residents of the state is an assumption of unwarranted corporate powers by the regents; that the statute makes admission to the university free to all residents of the state. It

within the sphere of its corporate powers, and can no more transcend them than any other banking institution. The state, as a stockholder, bears the same relation to the bank as any other stockholder." The court also said: "If a state may own a part of the stock of a bank, we know of no principle which prevents it from owning the whole."

The same court in Darrington v. Branch Bank of Alabama, *supra*, in making a similar decision said: "The charter of the bank gave to it all the means of credit with the public, that banks usually have or could desire. That some reliance may have been placed on the guaranty, of the eventual payment of the notes of the bank by the state may be admitted. But this was a liability altogether different from that of a state on a bill of credit. It was remote and contingent. . . . No one received a bill of this bank with the expectation of its being paid by the state." As in the preceding case the court emphasizes the fact that the property of the bank was subject to judicial process by its creditors in which the state in its sovereign capacity could not interfere.

Another phase of the doctrine appears in Curran v. Arkansas, 56 U. S. 15 How. 304, 14 L. ed. 705, to the effect that a state which is the sole stockholder in a bank is not a creditor of the bank within the rule giving preference to the state over other creditors of an insolvent. It was held that the assets placed by the state in the hands of the bank constituted a fund upon the credit of which the bank issued its bills, and that when the bank became insolvent it had no longer any capital stock belonging to the state which the state could withdraw. Therefore it was held that the state could not cancel its bonds given for money borrowed of the bank, or withdraw any part of the specie or other property of the bank, as to do so would impair the obligation of contracts made with the owners of the bills issued by the bank.

This decision was expressly followed in Baring v. Dabney, 86 U. S. 19 Wall. 1, 22 L. ed. 90, where it was held that the assets of an insolvent bank although it was altogether owned by the state, could not be appropriated by legislative act or otherwise to pay the debts of the state as distinguished from the debts of the bank, but that its assets were a trust fund first applicable to the payment of the bank's debts.

The denial of any attribute of sovereignty to such a state bank is also made in Bank of State v. Gibson, 6 Ala. 814, where it was held that a bank owned by the state was subject to the same rule as other creditors of a decedent's estate in respect to presenting its claim within eighteen months after the grant of administration.

So in Bank of State v. Gibbs, 3 McCord, L. 377, the rule that a state is entitled to priority over other creditors in enforcing payment of an obligation due to it is denied application in the case of a debt due to a bank which was owned entirely by the state. The court held that it was on the same level as other corporations.

That a state bank although owned entirely by the state has no priority over other creditors of a decedent's estate was also decided in Fields v. Wheatley, 1 Sneed, 351, on the ground that no part of the sovereignty of the state resides in the bank.

Likewise it is decided that a debt due the Bank of Tennessee is not due to the state, in Bank of Tennessee v. Dibrell, 3 Sneed, 379, holding that a statutory provision for deducting an indebtedness to the state from the salary of a public officer did not apply to a debt due to the bank because the bank was not an integral part of the state sovereignty.

That bills of the Bank of Tennessee shall be receivable at the treasury and in payment of taxes was held a statutory provision subject to repeal except as it affected bona fide holders who took the bills prior to the repeal. Furman v. Nichol, 8 Coldw. 482.

That the Bank of Tennessee chartered for the benefit of the state is a public corporation is decided in Bank of Tennessee v. Woodson, 5 Coldw. 176, which decides that the removal of the assets to a place not authorized by law was beyond the authority of the trustees of the bank.

The property of the bank is also so far recognized as the property of the state as to be exempt from taxation. Nashville v. Bank of Tennessee, 1 Swan, 269.

See other cases as to taxation of state institutions under heading as to *Liabilities of such institutions, infra*, II.

But the fact that the state is sole owner of the stock of a bank is held not to make a suit against the bank the same as a suit against the state so as to defeat the jurisdiction of the courts Bank of Kentucky v. Wister, 27 U. S. 2 Pet. 318, 7 L. ed. 437.

The above case followed that of Bank of United States v. Planters Bank of Georgia, 22 U. S. 9 Wheat. 904, 6 L. ed. 244, in which case the state was a corporator as well as a proprietor of stock, but was not the sole proprietor.

In State Bank v. Clark, 8 N. C. 36, it was held that a so-called state bank was a private corporation so that its books were not admissible in evidence, but the facts as to the character of the bank are not discussed or stated.

b. *Educational institutions.*

Although this note relates only to institutions which are owned by the state and are also incor-

is admitted that the regents have been collecting such library fee, and claim the right to do so, and also the right to exclude students who refuse to pay from the use of the library. But it is contended that the exercise of this assumed power cannot be inquired into by an action in the nature of quo warranto, for the reason that the state university is not a corporation, or, if a corporation in any sense, then only a quasi corporation, whose doings cannot be inquired into in an action of this kind. It is contended that the jurisdiction of this court of original proceedings in the nature of quo warranto is confined to such cases as were regarded as proper ones for the exercise of the jurisdiction of the courts by proceedings in quo warranto at the time of the adoption of the constitution; that the jurisdiction of the court cannot be extended by legislative enactment to cases of a different nature. It is claimed that quasi corporations are creatures of the law, established for the purposes of government, and while they have some of the attributes of corporations, yet that they are not such corporations as those over the actions of which the courts exercise their supervisory power by actions of this nature. In the fourth subdivision of section 653 of the Code it is provided that this action may be maintained "when any corporation do or admit acts which amount to a surrender or a forfeiture of their rights and privileges as a corporation, or when any corporation abuses its power or exercises powers not conferred by law." In *State* v. *Topeka*, 31 Kan. 452, it was held that, "whenever a municipal corporation usurps any power which might

porated, it is proper to refer merely for the sake of distinction to similar institutions which receive state aid. On this point it is settled that the fact that an institution of learning receives aid from the state does not of itself make it a public corporation. Cleaveland v. Stewart, 3 Ga. 283; Illinois Board of Education v. Greenebaum, 39 Ill. 610; Board of Education of the State v. Bakewell, 122 Ill. 339; Regents of University of Maryland v. Williams, 9 Gill & J. 365, 31 Am. Dec. 72.

In Cleaveland v. Stewart, *supra*, it is said, "this bounty it can receive or not. It is the beneficiary of the state, but that gives the state no rights over it."

In Illinois Board of Education v. Greenebaum, *supra*, it is said that the fact that no appropriation has been made from the state treasury for the maintenance of an institution is one feature which distinguishes it from state institutions properly so called.

But in Board of Education of the State v. Bakewell, *supra*, it is held that appropriations for a university by the state do not change the private character in which it was established by private benefactions, and that a declaration by the legislature that a state normal university, which was in fact a private corporation, was a state institution and that its property belonged to the state, is a mere harmless declaration upon the statute book having no effect.

In Regents of University of Maryland v. Williams, *supra*, it was said of the University of Maryland that it had none of the characteristics of a public corporation because the state was not the founder of it but merely gave it capacity to acquire and hold property, and that its private character was not affected by subsequent endowment by the state.

That an incorporated state university although established by public law and endowed and supported by the state is not a public corporation, or is at most a quasi public corporation, is declared in State v. Carr, 111 Ind. 335. But the question really decided was that the university fund, which by a certain statute was to be loaned at seven per cent, was not a part of the "public funds" within the meaning of a later statute requiring eight per cent interest on a loan of public funds. Therefore while the declaration in the case that the corporation was not a public one is in conflict with the weight of authority respecting similar corporations, the decision on the point actually involved is in no respect opposed to the other authorities.

A later Indiana case decides that the State Board of Agriculture which is created a body corporate with perpetual succession, including as *ex officio* members the president of each county agricultural society, and which is in a sense an educational institution required to hold meetings, receive reports from county societies, and make an annual report to the legislature, but receives its funds for the most part from other sources than the state, is not a public but is a private corporation, although no shares of stock are issued. Downing v. Indiana State Board of Agriculture, 13 L. R. A. 664, 129 Ind. 443. But in addition to the fact that its funds were chiefly derived from other sources than the state the court laid stress on the fact that the legislature had itself treated the corporation as a private one by making it a loan of state money and taking a mortgage upon its property. The question arose in this case in respect to the validity of a statute abolishing the board and transferring its property to another board, but the statute was held unconstitutional because of the private character of the corporation.

But neither of these Indiana cases refers to State v. White, 82 Ind. 278, 42 Am. Rep. 496, in which the court held that Purdue University being endowed by virtue of an act of congress donating public lands for agricultural colleges and kept in existence very largely by legislative appropriations, was "therefore an educational institution sustaining relations to the people at large analogous to those occupied by other public schools and colleges of the state maintained at public expense, and one in which all the inhabitants of the state have a common interest." Consequently the court by mandamus compelled the trustees and faculty of the institution to admit as a student a person who had been improperly refused admission because he would not promise to disconnect himself from active membership in a Greek letter fraternity or secret college society.

That a state university although recognised by the constitution of the state may not be a corporation is the decision in Weary v. State University, 42 Iowa, 335. In this case it was held that while the legislature had declared that school lands were granted to such university by the state and others were donated to it, this meant simply that such lands had been appropriated to its benefit when the lands were sold and patents were issued by the state. It was accordingly held that no action could be maintained against the university. But in many states incorporated state universities have been established, and in some cases this has been done by the constitution of the state.

The Agricultural & Mechanical College in Ohio is held not to be a corporation, therefore the constitutional provision as to special statutes conferring corporate powers is held not to apply to it. Neil v. Ohio Agricultural & Mechanical College Trustees, 31 Ohio St. 15.

In South Dakota the state was held liable in Jew-

be conferred upon it by the sovereign power of the state, but which has not been so conferred, such corporation may be ousted from the exercise of such power by a civil action in the nature of quo warranto in the supreme court." In that case judgment was entered ousting the city from the assumed power of raising a revenue from the sale of intoxicating liquors by granting licenses or permits therefor.

Is the university such a corporation as is referred to in the statutory provision above quoted? The present state university is the successor of the Lawrence University of Kansas, incorporated under an act of the territorial legislature approved January 29, 1861. This act provided for the establishment of a private corporation. Under subsequent legislation the school was taken in charge by the state, and is now a public institution, established and maintained under the following provision of the Constitution (art. 6, § 7): "Provision shall be made by law for the establishment at some eligible and central point of a state university for the promotion of literature, and the arts and sciences, including a normal and an agricultural department. All funds arising from the sale, or rents of lands granted by the United States to the state for the support of a state university, and all other grants, donations, or bequests either by the state or individuals for such purpose, shall remain a perpetual fund, to be called the university fund, the interest of which shall be appropriated to the support of the state university." Article 6 of the Constitution treats of the subject of education. In the section quoted it not only au-

ell Nursery Co. v. State, 4 S. Dak. 213, 59 N. W. Rep. 1025, for trees and shrubbery on the grounds of the state agricultural college, but it does not appear that the institution was a corporation.

Where incorporated universities exist which are founded and supported by the state they are generally treated by the courts as public rather than private corporations. The main case of STATE v. BOARD OF REGENTS OF UNIVERSITY OF KANSAS is in accord with other decisions on this point.

The University of Alabama is held in University of Alabama Trustees v. Winston, 5 Stew. & P. (Ala.) 17, to be a public corporation the charter of which is subject to alteration, amendment, or repeal at the pleasure of the general assembly. This is declared to be in every respect a public institution created by legislative enactment without the aid of private contributions. The court says: "It is true this instrumentality (of government) is confined to the disposition of a particular part of the public domain, the collection and appropriation of the proceeds in a particular way, the erection of college buildings and other duties attendant upon the establishment and support of an institution of learning." But it is regarded as an instrumentality of the state.

The California Statute of 1879, art. 9, § 9, declared that the University of California should be continued in the form and character prescribed in the acts then in force, subject to legislative control for certain specified purposes only. The Hastings College of Law having been made a part of the University, as decided in Foltz v. Hoge, 54 Cal. 28, it is decided in People v. Kewen, 69 Cal. 215, that the legislature could not therefore change the form of its government by creating a board of trustees to take the place of the board of directors provided for by the act creating the college.

The medical college of Virginia which is owned by the state and was incorporated by act of the legislature after a transfer to the state of the property of a previously existing medical school, is held in Lewis v. Whittle, 77 Va. 415, to be in every sense a public corporation holding its life and property at the pleasure of the legislature.

The University of Louisiana created and provided for by the constitution of the state is a public institution and property belonging to it is devoted to public use. Tulane Education Fund v. New Orleans Board of Assessors, 38 La. Ann. 292.

See further, *infra* II., as to taxation of property of state institutions.

An appropriation to the University of Louisiana, made under the requirement of the Constitution, article 230, is entitled to preference in payment over all other warrants drawn against the general fund except warrants in favor of the Mechanical & Agricultural College and of the University for the education of colored persons, which are concurrent in rank therewith, and warrants for salaries of constitutional officers which are entitled to preference over all others. State v. Burke, 35 La. Ann. 457.

The University of Michigan is a corporation capable of owning property and is a corporation of a public character, having been erected and supported by a public fund, and the corporators of which have no private interest whatever connected with their corporate character. The regents of the University of Michigan located at Ann Arbor, are the successors to the functions and property rights of the trustees of the University of Michigan located at Detroit. Regents of University of Michigan v. Detroit Board of Education, 4 Mich. 213.

They are entitled to maintain an action for the purchase price of lands lawfully sold by them. Regents of University of Michigan v. Detroit Young Men's Soc. 12 Mich. 138.

The board of regents of the University of Nebraska, being a body corporate with power to sue and be sued and to acquire property, is a public corporation within the control of the legislature. The whole interests and franchises of the corporation are the exclusive property and domain of the government itself and therefore it is in the strictest sense a public corporation. Regents of University of Nebraska v. McConnell, 5 Neb. 426.

The state treasurer being by statute the custodian of the funds of the University and the office of treasurer of the University having been abolished, the University has no longer any power to sue for moneys belonging to the regents' fund which a former treasurer has refused to turn over to the state treasurer. *Ibid.*

Since this institution is a public corporation and the funds are in the hands of the state treasurer an appropriation is necessary in order to permit warrants to be drawn on the regents' fund in his hands. State v. Babcock, 17 Neb. 612; State v. Liedtke, 9 Neb. 468.

The University of North Carolina is a public institution and body corporate and therefore subject to legislative control. The fact that it has received private donations does not affect its public character as it was originally and still is a creature of the legislature absolutely dependent on the legislature for its existence. Therefore the legislature has power to change the laws so that funds formerly payable to the institution will be diverted in other directions. University of North Carolina v. Maultsby, 43 N. C. 257.

In Oregon it is held that the number of directors of the State University constitute a corporation although the legislature has not expressly declared

thorizes, but it requires, special legislation for the establishment of a university. The legislation must be special, because but one university is contemplated. It is claimed that section 1, article 12, of the Constitution, which treats of corporations, and provides that "the legislature shall pass no special act conferring corporate powers," would render void a special act conferring corporate powers on the university, and that the legislation with reference to the university can only be upheld on the ground that it is a quasi corporation, and not a corporation proper. It is conceded by the very learned counsel for the defendant that universities are generally corporations proper, but it is claimed that our state university, while a valid public institution, cannot be a valid corporation because of section 1, article 12. We think this section has no application to legislation with reference to the university. It is in the article which treats of corporations in general. The section of the constitution first quoted, however, is in the article treating of the subject of education, and applies specifically to the establishment of a university. It directs the establishment of such an institution, leaving the legislature free in determining as to particulars. It is true that there is no express grant of authority to make it a corporation, but in view of the fact that such institutions are generally corporations, and of the difficulty, if not utter impracticability, of establishing a school authorized to receive donations, and to hold extensive properties intended for the use of each succeeding generation, without conferring corporate powers, we think it clear that

them to be such, since some of the powers conferred could only be exercised by a corporation. Dunn v. University of Oregon, 9 Or. 357.

The University of Washington established by the Washington statutes is under the administration of the board of regents constituted by the Act of March 27, 1890, the sources of revenue being tuition fees and legislative appropriations. The board of land and building commissioners are held to have no power to draw on the university fund. State v. Lindsley, 3 Wash. 125.

The board of regents of the University of Wisconsin having been abolished and a new and different corporation established under the same name, it is held that a contract of the old board for the services of a professor is unaffected by the change. Butler v. Regents of the University, 32 Wis. 124.

Under Colorado Const., art. 8, § 5, making the University located at Boulder, the Agricultural College at Fort Collins, the School of Mines at Golden, the Institution for the Education of Mutes at Colorado Springs, institutions of the state, their location is held to be permanently fixed as thus designated and subject to change only by constitutional amendment. State Institutions, 9 Colo. 626.

The Florida Agricultural College having been founded by the state with public moneys derived in trust from the government of the United States, is a public corporation and the legislature has power to change the trustees thereof. State v. Knowles, 16 Fla. 577.

The State Agricultural Society in Oregon is a corporation capable of taking and holding title to a farm bought by subscription for the purpose of instruction in agriculture. Liggett v. Ladd, 23 Or. 26.

The State Agricultural Society of Vermont is treated in Selinas v. Vermont State Agr. Soc., 60 Vt. 249, as a private corporation, but without discussion of its character and without stating the facts bearing on this question.

c. *Other state institutions.*

Many institutions of the kind referred to in this subdivision are maintained by different states without any incorporation of them. Such are not within the scope of this subject since the corporate character of state institutions is all that is here considered.

The deaf and dumb institution is spoken of as a corporation, in Ellis v. North Carolina Inst. for Deaf, Dumb & Blind, 68 N. C. 425, which decides as to the validity of a *de facto* board.

The charity hospital founded in 1784 by Don Andrès Almonastery Roxas was ceded to the public in 1811 and accepted by the Louisiana legislature and placed under the control of administrators, whose appointment was provided for and subsequently changed by statute. State v. Finley, 33 La. Ann. 114.

A state hospital for the insane in Illinois is a corporation founded by the state and supported by its funds. People v. Higgins, 15 Ill. 110.

Property appropriated by the state for the use of a state institution for the blind is held in St. Louis, J. & C. R. Co. v. Trustees of Illinois Inst. for Education of Blind, 43 Ill. 303, to be exempt from general provisions for the condemnation of property by a railroad company. This institution does not seem to have been incorporated, however, at this time, but was incorporated by the Illinois Act of 1887.

The Maryland Hospital for the insane incorporated by the Maryland Act of 1878, chapter 341, and declared to be a public agency of the state, holds its property free from liability for assessments for benefits on the opening of a public road contiguous to the property. Baltimore County Comrs. v. Managers of Maryland Hospital for Insane, 62 Md. 127. The court says: "It is not material whether the state's property may be taken from it by a tax in the nature of an assessment for benefits, or in some other way. The danger exists of taking that which belongs to and is essential to the state; and it cannot be exposed to this danger without its direct sanction."

For the expense of keeping a person in the asylum for the insane a claim was presented by the state of Michigan in the case of State v. Dunbar's Estate, 99 Mich. 99, and the estate was held liable therefor. But it does not appear that the asylum was a distinct corporation owned by the state. The board in charge of it seems to have been merely an unincorporated agency of the state, although it had power by statute to take title to property "in trust for the state."

In Peck v. State, 137 N. Y. 372, a judgment in a mandamus proceeding against the board of managers of the Buffalo state asylum for the insane was relied upon as the basis of a claim against the state; but it was held that such judgment against the board of managers was not binding upon and did not estop the state. This institution does not seem to be a corporation.

In Sherman v. Bellows, 24 Or. 553, where an injunction was sought against locating the Oregon Soldier's Home at a certain place, the court held that conceding without deciding that the home was a public institution of the state plaintiff did not show any right to the injunction.

II. *Liabilities of such institutions.*

That an incorporated state agricultural society which is one of the agencies of the state and not a corporation for pecuniary profit, cannot be held

the framers of the constitution meant to and did authorize the establishment of the university as a corporate body. We do not deem it necessary at this time to enter into a consideration of the question whether an action in the nature of quo warranto may be maintained against a quasi corporation, such as a county, township, or school district, for the purpose of ousting it from the exercise of powers it has unlawfully assumed. Section 6, chapter 258, Laws 1889, provides that "the board of regents shall be a body corporate under the name of 'The Regents of the University of Kansas,' and as such may sue, and be sued, make contracts, and hold and transfer property both real and personal for the university. They shall provide a seal with their corporate name, which shall be used to attest all contracts in writing obligating the university." It is only necessary for us to hold, and we do hold in this case, that this act makes the board of regents such a corporation as will be restrained and held within the bounds of its lawful authority by the exercise of the original jurisdiction of this court in quo warranto. We are unable to mention another corporation in whose keeping interests are confided which it is more appropriate to protect by the exercise of the powers of the court than those confided to the regents. The education of the youth by the public is, of all the powers exercised by the state, of the most certain and unalloyed benefit to the people. The university crowns the great public-school system.

A further objection is made to the prosecution of this action in the name of the state, on the ground that the imposition of a library fee on students in the university is in the nature of levying a tax; that it affects, not the state, but the individual students; that they have an adequate remedy, if the tax be unlawful, by injunction; and that the attorney-general may not use the name of the state merely for the purpose of protecting their private interests. The fee imposed is not a tax, within the ordinary meaning of the term. It cannot be collected in the ordinary manner of collecting taxes. It is not ex-

liable for the willful and illegal acts of its agents is the decision in A'Hern v. Iowa State Agr. Soc. (Iowa) 24 L. R. A. 655. This is decided on the ground that the institution is an agency of the state organized to promote the public good.

In Williamson v. Louisville Industrial School of Reform, 23 L. R. A. 200, 95 Ky. 251, it is held that a reform school under the control and oversight of the legislature which is an agency of the state and maintained by taxation and state aid, is not liable for negligent or malicious injuries to an inmate by its servants or employés. This decision, however, seems to be based chiefly on authorities which relate to the exemption of charitable institutions from such liability and is not expressly based on the fact that the institution was a public corporation.

The exemption from taxation of the property of the State University of Michigan is sustained in Auditor General v. Regents of University of Michigan, 10 L. R. A. 376, 83 Mich. 467, on the ground that the institution is a part of the state and that its property is public property and not by virtue of a statutory provision as to the exemption of property of literary and scientific institutions.

Likewise the property belonging to the Tulane Fund which had been exclusively devoted by the administrators of the fund to the benefit of the University of Louisiana under an arrangement by which the legislature gave them control of the university, is held to be devoted to a public use and therefore not taxable. Tulane Education Fund v. New Orleans Board of Assessors, 38 La. Ann. 292.

So the Agricultural College of Kansas being wholly a state institution, although it is an incorporated body, its property is not taxable. State Agricultural College Board of Regents v. Hamilton, 28 Kan. 376.

Likewise it is held in Illinois Industrial University Trustees v. Champaign County Supvrs. 76 Ill. 184, that the property of the Illinois Industrial University, which is a body corporate, in reality belongs to the state, although some of it was received by donations from the county, and therefore such property is exempt from taxation.

The property of the Bank of Tennessee, which is an institution owned by the state, is held to be exempt by implication from liability for taxes, Nashville v. Bank of Tennessee, 1 Swan, 269.

Lands owned by the state and occupied by a state hospital are held in Williams v. Little White Lick Gravel Road Co., Wils. (Ind.) 7, to be free from assessment for benefit on the construction of a gravel road. Here again it does not appear that the institution was incorporated but the property seems to be regarded as belonging directly to the state.

The exemption from assessment for water rents of hospitals and other institutions named in Ohio Rev. Stat., § 2417, is sustained in case of a charge by city waterworks for water furnished to the Ohio Hospital for epileptics. But it does not appear that this is an incorporated state institution. Gallipolis v. Gallipolis Waterworks, 2 Ohio N. P. 161.

The exemption from seizure and sale under execution of property of a state institution maintained and administered by state authority is sustained in the case of a state charity hospital, by State v. Finlay, 33 La. Ann. 114, and an injunction granted against such a sale.

The board of education of the city of New York which is given by statute "the powers and privileges of a corporation," is held not liable for negligence of its employés or others in leaving an uncovered excavation in a school building, since the corporation has no treasurer and receives no corporate benefit from the functions and powers conferred upon it. Donovan v. New York Board of Education, 85 N. Y. 117. This case is cited here as analogous to the corporations included in this note, but it may be questioned whether this corporation is not rather an incorporated agency of the city than the state, though with reference to the question decided in the case the same rule would seem to be applicable in either case. No attempt is made in this note to follow out the question of the liability of school districts or local boards of education, most of which we believe belong to the class of quasi corporations rather than corporations technically so called.

III. *Directors, trustees, and officers.*

a. *In general.*

The trustees of the State Agricultural Society appointed by the board of regents of education under S. Dak. Const., art. 14, § 4, are held not to be state officers within the constitutional provisions as to impeachment and removal of state officers. State v. Hewitt, 16 L. R. A. 413, 3 S. Dak. 187.

pressly provided for by any law of the state. It is at least doubtful whether the students are so united in interest that they could join in an action to restrain the collection of the fee. Whether they could do so or not, however, we are clearly of the opinion that the conduct of the university is a matter of state concern; that the public maintains the institution, not for the special advantages conferred by it on particular individuals, but for the great advantage accruing to the state by reason of the maintenance of a great institution of learning within its borders, and the diffusion of knowledge and advancement of the people in literature and art. All its people gain through the instrumentality of this great institution. It is to attain these public ends that the state lavishes money, raised by taxation, on the institution. It is because of the interest of the state in the education of its youth that the university was created at all. Having created a university, the state is directly concerned in its being conducted in accordance with the provisions of law. It is directly concerned in the education of the students. It is directly concerned when the youth of the state are, for any unwarranted cause, excluded from it. The legislature has undertaken to open the way to a higher education to the poorest of the youth of the state. Whenever the board of regents places any unwarranted obstacle in the way of the accomplishment of that end, they affect and oppose the public interest.

This disposes of the objections to the form of the action. But little need be said on the merits of the case. Section 11, chapter 258, Laws 1889, which was in force at the time the action was brought, reads: "Admission into the university shall be free to all the inhabitants of the state, but a sufficient fee shall be required from nonresident applicants, to be fixed by the board of regents, and no person shall be debarred on account of age, race, or sex." Notwithstanding the apparently plain provisions of this section,

The trustees of the Utah Agricultural College and members of the board of construction to supervise the erection of the college buildings are held to be officers of the territory within the provisions as to the appointment of officers. McCornick v. Pratt, 17 L. R. A. 243, 8 Utah, 224.

The constitutionality of the appointment of trustees by the legislature for the Institution for the Blind in Nebraska is denied on the ground that they are public officers, in State v. Holcomb (Neb.) 64 N. W. Rep. 437, but it does not appear that this institution is a corporation.

Directors of constitutional state institutions who are expressly called officers must be regarded as such with respect to the power of appointment. People v. McKee, 68 N. C. 429.

The action of trustees of the deaf and dumb institution constituting a *de facto* board in making the appointment of a steward under by-laws is sustained in Ellis v. North Carolina Inst. for Deaf, Dumb & Blind, 68 N. C. 425.

Trustees of the university and directors of the penitentiary and lunatic asylum and institution for the deaf, etc., are also declared to be public officers, in the case of People v. Bledsoe, 68 N. C. 457.

Trustees of the Illinois State Hospital, which is a corporation, are held to have the power to remove its superintendent. People v. Higgins, 15 Ill. 110.

In Dullam v. Willson, 53 Mich. 392, 51 Am. Rep. 128, it was decided that the governor could not arbitrarily and without hearing remove a trustee of the Michigan Institution for Educating the Deaf and Blind, which is an incorporated institution. The trustee is treated throughout the opinions in this case as a state officer and the case decided on the ground that as a state officer he was entitled to a hearing before removal.

The visitors appointed by the governor of Virginia for the medical colleges of the state are held to be public officers, but the power of the governor under the statute of the state to remove them is denied although the statute authorizes him to fill vacancies. This is held to mean such vacancies as occur otherwise than by removal. Lewis v. Whittle, 77 Va. 415.

A professor employed by the board of regents of a state university is not a public officer but an employé by contract. Butler v. Regents of the University, 32 Wis. 124.

But the election of a professor in the University of Missouri for six years "subject to law" was held to mean that it was subject to any law the legislature might pass and the court declined to pass on the question whether or not the professor was a public officer. Head v. Curators of University of Missouri, 86 U. S. 19 Wall. 526, 22 L. ed. 160, affirming 47 Mo. 220.

In State v. Wilson, 29 Ohio St. 347, it was held that a person must be eligible to hold office in order to be chosen as a medical superintendent of the insane in a hospital in Ohio, but it does not appear that this institution was a corporation.

b. *Personal liability.*

A question which seems to have arisen in but one case as to the personal liability of directors, trustees, regents, or other officers of such corporations, is decided in a California case. It holds that regents of the University of California, who constitute a corporation and were expressly declared by statute not to be deemed public officers, cannot be held individually liable for damages on account of negligence respecting poles and wires of a telegraph and telephone line maintained by the corporation. Lundy v. Delmas, 26 L. R. A. 651, 104 Cal. 655.

When such institutions are directly controlled and owned by the state, but are not incorporated, their officers clearly rank with other public officers and boards. But these boards which are not incorporated are often given powers which suggest the idea of an incorporated body and illustrate the gradations between such public officers as a governor or secretary of state, and those who are trustees of an incorporated state institution, such as a state university.

It will be seen from the review of the cases in this note that corporations of the class here treated of are to be regarded as in the strict sense public institutions, although, as in the case of some of the state universities, they may possess in their own name large amounts of property and be governed by corporate officers in almost all particulars like corporations of similar kind which are founded and sustained by private benefactions. The officers of these public corporations are also regarded as public officers and their personal liability regarded as within the general rule applicable to other public officers. Since these corporations form a distinct class which is becoming quite numerous it is certain that the branch of the law of corporations applicable to them, although ignored hitherto, is to be an important one.

L. A. R.

it is contended that the board of regents may yet collect a reasonable fee for the wear and tear of the books; that the word "free" must be taken with qualifications; that in the nature of things there must be rules and regulations; that each and every student cannot be permitted to occupy the chancellor's seat at his desk, or any other place in the university he may choose, at his own sweet will, but that the regents and the chancellor have a right to make proper regulations; and that the fee imposed is no more than is reasonable to preserve and protect the library. We fully agree with so much of the claim of the learned counsel as asserts the right of the regents and the chancellor to make all necessary and proper rules and regulations for the orderly management of the school, the preservation of discipline therein, and the protection of its property, but that it may require the payment of money as a condition precedent to the use of the property of the state is another and a different claim, with which we do not agree. If the regents may collect five dollars for the use of the library, why may they not collect also for the use of the rooms of the building and of its furniture? Why may they not impose fees for walking in the campus, or for the payment of instructors? All these things have cost money. There are expenses incurred by the state on behalf of the students in connection with every department of the school. If they may collect for one thing, it is not apparent why they may not collect for another. It is suggested that supplies are furnished in the laboratories for the use of students, which are destroyed, that vessels and implements may be broken, and that the students should certainly be required to pay for these things. No question of that kind, however, is now presented, and express provision therefor is made by chapter 226, Laws 1895. The library is provided for permanent use. Each volume with proper care may be used by a great number of students, and for a long term of years. The library as a whole is subjected to wear and tear, but only in the same manner as furniture and other properties furnished by the state. The buildings, furniture, library, and apparatus, as well as the services of the faculty, are furnished and paid for by the state. These, we hold, under the provisions of the statute quoted, are free to all residents of the state who are entitled to admission into the university. The regents have no power to raise a fund to be managed and disposed of at their discretion by charging fees for the use of the library, or under any other claim for any other purpose, unless expressly authorized to do so by law.

Judgment of ouster will be entered in accordance with the prayer of the petition.

All the Justices concur.

OHIO SUPREME COURT.

HOCKING VALLEY COAL CO., *Plff. in Err.*,
v.
Hiram ROSSER.

(52 Ohio St. —.)

***Section 6563a, Revised Statutes, providing: "If the plaintiff in any action for wages recover the sum claimed** by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of five dollars, for his attorney. But no such attorney fee shall be taxed in the costs unless said wages have been demanded in writing, and not paid within three days after such demand. If the defendant appeal from any such judgment, and the plaintiff on appeal recover a like sum exclusive of interest from the rendition of the judgment before the justice, there shall be included in his costs such additional fee not in excess of fifteen dollars, for his attorney, as the court may allow,"—is unconstitutional and void.

(1895.)

ERROR to the Circuit Court for Athens County to review a judgment affirming a judgment of the Court of Common Pleas which in turn affirmed a judgment of the Justice's Court in favor of plaintiff for wages and the statutory penalty for a failure to pay them when demanded. *Reversed.*

*Headnote by the COURT.

Statement by **Bradbury, J.:**

On August 22, 1893, the defendant in error commenced an action before a justice of the peace of Athens county, to recover against the plaintiff in error $6.82, upon a claim for work and labor, and also an attorney fee of five dollars, demanded by virtue of section 6563*a*, Revised Statutes, because the plaintiff in error failed to pay the sum claimed as wages within three days after payment thereof had been demanded in writing.

The defendant in error recovered judgment before the justice of the peace for the amount of his claim for wages, and also an attorney fee of $5, as he had demanded. The plaintiff in error appealed the cause to the court of common pleas, where the defendant in error again prevailed and was allowed by that court an additional attorney fee of $5.

This judgment was affirmed by the circuit court, whereupon the plaintiff in error instituted proceedings in this court to reverse the same.

Mr **L. D. Vickers,** for plaintiff in error:

This statute is unconstitutional:

1. Because it authorizes the taking of private property without just compensation.

2. Because it authorizes the taking of pri-

NOTE.—For conflict of decisions as to the constitutionality of statutes providing for attorney's fees in actions against one class of defendants only, see last division of note as to equal privileges and protection, found in Louisville Safety Vault & Trust Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 586.

See also 30 L. R. A. 491; 31 L. R. A. 553; 45 L. R. A. 201.

vate property for private purposes without the owner's consent, and authorizes the transfer of one person's property to another without the consent of the owner.

Private property cannot be taken from one person and transferred to another for private purposes, without the owner's consent, even upon the payment of just and full compensation.

McCoy v. *Grandy*, 8 Ohio St. 463; *Gilpin* v. *Williams*, 25 Ohio St. 283; *Reeves* v. *Wood County Treasurer*, 8 Ohio St. 333; *Shaver* v. *Starrett*, 4 Ohio St. 494; *Giesy* v. *Cincinnati, W. & Z. R. Co.* 4 Ohio St. 308; *Re Deansville Cemetery Asso.* 66 N. Y. 569, 23 Am. Rep. 86; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Bloodgood* v. *Mohawk & H. R. R. Co.* 18 Wend. 59, 31 Am. Dec. 313; *Embury* v. *Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Taylor* v. *Porter*, 4 Hill, 147, 40 Am. Dec. 274; *Re John and Cherry Streets in New York*, 19 Wend. 659; Ohio Const. Bill of Rights, § 19.

3. Because this statute authorizes the taking of private property without due process of law.

Private corporations are persons within the meaning of the constitutional provisions.

Charlotte, C. & A. R. Co. v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051.

"Due course of law" or "due process of law," is defined to be a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.

Cooley, Const. Lim. 353; *Clark* v. *Mitchell*, 64 Mo. 564; *Atchison & N. R. Co.* v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356; *Jones* v. *Perry*, 10 Yerg. 59, 30 Am. Dec. 43; *Salt Creek Valley Turnp. Co.* v. *Parks*, 50 Ohio St. 568; *Wilburn* v. *McCalley*, 63 Ala. 436; *Zeigler* v. *South & North Ala. R. Co.* 58 Ala. 594.

"Due course of law," or "due process of law," means "by the general law of the land," and these terms are interchangeable.

3 Am. & Eng. Encyclop. Law, p. 714, *note*; *Den* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 276, 15 L. ed. 374; *Ervine's App.* 16 Pa. 256, 55 Am. Dec. 499; *Parsons* v. *Russell*, 11 Mich. 129, 83 Am. Dec. 728; *Sears* v. *Cottrell*, 5 Mich. 251; *Banning* v. *Taylor*, 24 Pa. 292; *Wynehamer* v. *People*, 13 N. Y. 378; *Clark* v. *Mitchell*, and *Jones* v. *Perry*, *supra*.

4. This general law of the land must have a uniform operation throughout the state.

Ohio Const. art. 2, § 26; *Kelley* v. *State*, 6 Ohio St. 270.

5. It is in violation of the first section of the 14th Amendment to the Constitution of the United States, providing: "Nor shall any state deny to any person within its jurisdiction the equal protection of the laws."

It was not the purpose of the 14th Amendment of the United States Constitution to interfere with the police power of the state.

Barbier v. *Connolly*, 113 U. S. 27, 28 L. ed. 923.

The police power of the state is defined to be "the right of the state to prescribe regulations for the good order, peace, protection, convenience, and comfort of the community."

New Orleans Gas Light Co. v. *Hart*, 40 La. Ann. 474.

This police power should be carefully guarded and restricted.

Hannibal & St. J. R. Co. v. *Husen*, 95 U. S. 465, 24 L. ed. 527.

The coal mining business is not affected with a public use.

Millett v. *People*, 117 Ill. 394, 57 Am. Rep. 869.

Questions of power do not depend upon the degree to which it may be exercised. If exercised at all it must be exercised at the will of those in whose hands it is placed.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636.

The law will not allow the rights of property to be invaded under the guise of a police regulation.

Austin v. *Murray*, 16 Pick. 121; *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394; 1 Cooley's Bl. Com. 125; *Vanzant* v. *Waddel*, 2 Yerg. 260; *Com.* v. *Towles*, 5 Leigh, 748; *Chicago* v. *Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Norwich Gas Light Co.* v. *Norwich City Gas Co.* 25 Conn. 19; *Hudson* v. *Thorne*, 7 Paige, 261, 4 L. ed. 148; *Live Stock Dealers & Butchers Asso.* v. *Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 388; Cooley, Const. Lim. 6th ed. 485, 486; *State* v. *Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Warner* v. *Curran*, 75 Ind. 309; *Boyd* v. *Alabama*, 94 U. S. 645, 24 L. ed. 302.

Messrs. **Arnold & Morton**, also for plaintiff in error:

While the legislature may legislate as to classes under proper circumstances, yet this classification cannot be arbitrary.

Braceville Coal Co. v. *People*, 22 L. R. A. 340, 147 Ill. 66; *State* v. *Loomis*, 21 L. R. A. 789, 115 Mo. 313; *Nichols* v. *Walter*, 37 Minn. 264.

There is a conflict between the decisions as to the right to recover of railroads attorney fees and double damages, for failure to comply with some statutory duty, but in every case where these are qualified, it is put upon the ground of public necessity.

Peoria, D. & E. R. Co. v. *Duggan*, 109 Ill. 537, 50 Am. Rep. 619; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 193; *Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382.

The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist.

Durkee v. *Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *Calder* v. *Bull*, 3 U. S. 3 Dall. 388, 1 L. ed. 649.

The terms "law of the land" and "due process of law," mean the uniform operation of a law upon all individuals.

Story, Const. § 1395; *Dartmouth College Trustees* v. *Woodward*, 7 U. S. 4 Wheat. 519, 21 L. ed. 630.

The relation of employer and employé does not justify the legislature in interfering for the protection of the latter.

State v. *Fire Creek Coal & Coke Co.* 6 L. R. A. 359, 33 W. Va. 188; *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; Cooley, Const. Lim. 1st ed. p. 391; Potter's Dwarr Stat. 458; *Aus-*

tin v. *Murray*, 16 Pick. 121; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923; *Calder* v. *Bull*, *supra*; *San Antonio & A. P. R. Co.* v. *Wilson* (Tex.) 19 S. W. Rep. 910; *Durkee* v. *Janesville*, *supra*; *Wally* v. *Kennedy*, 2 Yerg. 554. 24 Am. Dec. 511.

Messrs. **L. M. Jewett, Asher Buckley,** and **J. C. Pettit,** for defendant in error:

"Due process of law," means a fair and impartial trial under the constitution and laws of our state.

Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; *Rison* v. *Farr*, 24 Ark. 161, 87 Am. Dec. 52; *Great West Min. Co.* v. *Woodmas of Alston Min. Co.* 12 Colo. 46.

Testing the act in question by that rule, it will be found unobjectionable.

Landon v. *Townshend*, 112 N. Y. 93; *Flint River S. B. Co.* v. *Foster*, 5 Ga. 194, 48 Am. Dec. 272.

Wages are money payable by the master to the servant in respect for services.

2 Rapalje, Law Dict. p. 1342.

If a master employs labor, he should at least, before entering into a contract of that character, by the plainest principles of common honesty, make provision for the payment of the labor he so employs.

Servants in a large degree are unable to resort to litigation and to fight the master, who is well armed and equipped financially to oppress, hinder, and delay the honest wage earner out of his just demands, and hence the necessity of this law.

Diehl v. *Friester*, 37 Ohio St. 477; *Head* v. *Hargrave*, 105 U. S. 45, 26 L. ed. 1028; *McBride* v. *Brucker*, 5 Ohio C. C. Rep. 12.

The public speaking through its law-makers is interested in the protection of unskilled labor and the legislation is in line with the reasoning of the Supreme Court of the United States in the cases of—

Minneapolis & St. L. R. Co. v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 394, 35 L. ed. 1054; *Knickerbocker L. Ins. Co.* v. *Pendleton*, 115 U. S. 339, 29 L. ed. 432.

The police power of the state extends in the direction of so regulating the use of private property, or of so restraining personal action, as manifestly to secure or tend to the comfort, prosperity, or protection of the community.

People v. *Ewer*, 25 L. R. A. 794, 141 N. Y. 129.

Courts will uphold statutes, unless they are so plainly and palpably in conflict with the constitution as to leave no doubt or hesitation in the judicial mind as to their invalidity.

Burlington, C. R. & N. R. Co. v. *Dey*, 12 L. R. A. 445, 82 Iowa, 312.

Bradbury, *J.*, delivered the opinion of the court:

The defendant in error on August 22, 1893, filed before R. R. Paterson, a justice of the peace in and for Athens county, Ohio, the following bill of particulars:

"Hiram Rosser, Plaintiff, *v.* The Hocking Valley Coal Company, Defendant.

"The defendant is a corporation, duly organized under the laws of Ohio, and doing business in Nelsonville, Ohio. Defendant is indebted to plaintiff in the sum of $6.82 for work and labor done and performed in and about the coal mines of said defendant during the months of July and August, 1893, and at the request of said defendant. Said sum is due and unpaid; frequent requests have been made for payment of the same. On the 18th day of August, 1893, plaintiff served upon defendant a notice in writing, demanding payment of said sum within three days thereafter. Said defendant has neglected and refused to pay said sum within three days thereafter in compliance with said demand.

"Therefore plaintiff prays judgment against said defendant for said sum of $6.82 and for his costs in this action, and for his attorney's fee of $5, and interest from August 10, 1893.

"Buckley & Pettit,
"Attorneys for Plaintiff."

The defendant below, plaintiff in error in this court, was duly served with summons, but did not appear before the justice at the time of trial nor make any defense against the claim of the plaintiff below.

Whereupon the justice of the peace, upon the testimony presented by the plaintiff below, rendered judgment for him and against the defendant below for $6.82, the exact amount claimed, together with costs of suit and an attorney fee of $5.

Plaintiff in error appealed the cause to the court of common pleas, where a petition was filed similar in all respects to the bill of particulars before quoted, except that an attorney fee of $15 was demanded instead of one of $5 as in the bill of particulars.

The plaintiff in error made no defense in the court of common pleas, and that court gave judgment against it for $7 and costs, including an attorney fee of $10, $5 of which was for services of an attorney in the court of common pleas, and $5 for such services rendered in the proceedings before the justice of the peace.

The plaintiff in error, objecting to that part of the judgment of the court of common pleas which required it to pay attorney fees for the benefit of its adversary, moved the court to retax costs by striking out the items relating to such fees. The court of common pleas overruled the motion, and exceptions were duly noted. This ruling of the court of common pleas having been sustained by the circuit court, the cause was brought to this court to reverse the action of those courts upon the ground that the statute upon the provisions of which rulings rest is unconstitutional and therefore void.

This Statute, 89 Ohio Laws, 59, § 6563*a* provides:

"If the plaintiff in any action for wages recover the sum claimed by him in his bill of particulars, there shall be included in his costs such fee as the court may allow, but not in excess of $5 for his attorney. But no such attorney fee shall be taxed unless said wages have been demanded in writing and not paid within three days after such demand. If the defendant appeal from any such judgment and the plaintiff on appeal recover a like sum exclusive of the interest from the rendition of the judgment before the justice, there shall be included in his costs such additional

fee not in excess of $15 for his attorney as the court may allow."

By virtue of the provisions of this statute any claimant of wages may, in the first instance, determine the amount due him for wages from his employer, make written demand for its payment, which, if not complied with within three days, subjects the employer to the penalty of an attorney fee, if an action is afterwards brought to enforce the demand and the amount claimed is recovered therein. The amount due may, and often does, depend upon a numerous train of facts and circumstances, many of which may be in dispute between the parties. The most obvious of which is the number of days, weeks, or months, during which the service had been continued, the rate of wages agreed upon, or, if no rate had been fixed, the reasonable value of the services rendered; whether payments had been made from time to time on account, or whether a set-off or counterclaim existed between the parties by which the amount otherwise due would be reduced or entirely extinguished. Mutual accounts may have run between the employé and employer for years, become complicated, and of doubtful and difficult solution. Whether this condition of things exist, or whether the claim is simply for the wages of a single day or week at a fixed price is immaterial in the purview of this statute. In either case by its terms the employé may in the first instance fix the amount of his demand, and if he does this, and serves the written notice prescribed, the employer contests the claim at his peril.

The language of the statute is imperative. "If the plaintiff . . . recover the sum claimed by him in his bill of particulars there shall be included in his costs such fee as the court may allow," not to exceed $5, in the court of the justice of the peace, or should the defendant appeal the case a total of $15 by the court of common pleas. The language requiring that the fee be allowed is mandatory; the court or justice has no discretion in this respect; it must allow an attorney fee, the amount only is discretionary, within the limit prescribed; and that means that, within such limits, the tribunal by which the judgment is rendered, is bound to allow the value of the services rendered. Under the statute, to entitle the plaintiff to have an attorney fee taxed against the defendant, he is not required to show that the debtor had funds, which he willfully or arbitrarily or even carelessly refused to apply to pay his debts, nor that a vexatious or dilatory defense had been made to defeat or delay the judgment. No other misconduct by the defendant is required than such as may be implied from a failure to comply with the peremptory written demand made upon him.

Whether the debtor interposes or shows a vexatious defense, whether he makes an honest though unsuccessful one, or whether he makes none at all, but instead suffers judgment to be taken against him by default, are all equally immaterial; in either case the statute denounces against him a penalty called an attorney fee, if an action is brought on the claim and judgment recovered for the sum demanded. The debtor may even acknowledge the debt and be solicitous for its payment, but, owing to straightened circumstances, fails to pay within the prescribed time, nevertheless the penalty is incurred.

In the case under consideration it appears by the bill of particulars that the written demand prescribed by the statute was made, and that it was not complied with within the three days. No other ground was alleged as the basis of the penalty. The record does not show any denial of the debt, by the debtor, at the time the demand was made or afterwards, or that it had funds with which it could have paid the sum demanded. Afterwards, when an action was brought in the justice's court on the claim, no defense was made, or obstacle whatever interposed to delay or embarrass the proceedings. Under these circumstances no intent to vex or harrass the claimant or delay the action can be imputed to the plaintiff in error. The questions submitted by it to the circuit court, and to this court, show that its object in taking an appeal from the judgment of the justice of the peace may be fairly attributed to its desire to be relieved from paying an attorney fee for the benefit of its antagonist, and thereby assert and vindicate an equal right to the protection of the courts of the state.

Upon what principle can a rule of law rest which permits one party, or class of people, to invoke the action of our tribunals of justice at will, while the other party, or another class of citizens, does so at the peril of being mulcted in an attorney fee, if an honest, but unsuccessful, defense should be interposed?

A statute that imposes this restriction upon one citizen, or class of citizens, only denies to him or them the equal protection of the law.

It is true that no provision of the Constitution of 1851 declares in direct and express terms that this may not be done, but, nevertheless, it violates the fundamental principles upon which our government rests as they are enunciated and declared by that instrument in the bill of rights. The first section of the Constitution declares that the right to acquire, possess, and protect property is inalienable, and the next section declares among other things that "government is instituted for the equal protection and benefit" of every person, while section 16 of article 1 provides that "all courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law, and justice shall be administered without denial or delay."

The right to protect property is declared, as well as that justice shall not be denied, and every one entitled to equal protection. Judicial tribunals are provided for the equal protection of every suitor. The right to retain property already in possession is as sacred as the right to recover it, when dispossessed. The right to defend against an action to recover money is as necessary as the right to defend one brought to recover specific real or personal property. An ad-

verse result in either case deprives the defeated party of property.

If the general assembly has power to enact the statute in question, it could also enact one providing that lawyers, doctors, and grocers, or any other class of citizens might make out their accounts, and demand in writing their payment within a short time, which, if not complied with, would entitle the plaintiff to an attorney fee in addition to his claim if he recovered the amount demanded. We do not think the general assembly has power to discriminate between persons or classes respecting the right to invoke the arbitrament of the courts in the adjustment of their respective right.

The legislative power to compel an unsuccessful party to an action—generally the defendant—to pay an attorney fee to his opponent has received the attention of a number of courts of last resort, as well as laws which impose as a penalty double damages or some similar penalty for some wrongful or negligent act injurious to another. Where the penalty has been imposed for some tortious or negligent act the statute has generally, though not always, been sustained, but, on the contrary, where no wrongful or negligent conduct was imputed to the defeated party, any attempt to charge him with a penalty has not prevailed. *Millett* v. *People*, 117 Ill. 294, 57 Am. Rep. 869; *State* v. *Fire Creek Coal & Coke Co.* 33 W. Va. 188, 6 L. R. A. 359; *Durkee* v. *Janesville*, 28 Wis. 464, 9 Am. Rep. 500; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 193; *Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382; *Braceville Coal Co.* v. *People*, 147 Ill. 66, 23 L. R. A. 340; *Wally* v. *Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *Van Zant* v. *Waddel*, 2 Yerg. 260; *Atchison & N. R. Co.* v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789; *San Antonio & A. P. R. Co.* v. *Wilson* (Tex.) 19 S. W. Rep. 910; *Peoria, D. & E. R. Co.* v. *Duggan*, 109 Ill. 537, 50 Am. Rep. 619.

Various phases of this subject have received attention in the foregoing cases, as well as in some others, to which we do not deem it necessary to refer. The general tendency of these authorities is towards the result which we have reached; but whether they do or do not support our conclusions, we are satisfied that the fundamental principles of government declared by our bill of rights clearly and unequivocally prohibit legislation of the character of that involved in this case.

Judgment allowing an attorney fee reversed.

IOWA SUPREME COURT.

STATE of Iowa, *Appt.*,
v.
G. H. HAUG.

(.....Iowa.....)

A body of water having well-defined shores and no current, lying entirely in the state of Iowa a quarter of a mile from the main channel of the Mississippi river and forming no part of that river for the purposes of navigation, is within the provisions of Acts, 23 Gen. Assem., chap. 34, against the use of seines in the waters of that state, and is not within the exception of boundary waters, over which the state has not exclusive jurisdiction.

(October 3, 1895.)

APPEAL by the State from a judgment of the District Court for Allamakee County acquitting defendants of the charge of unlawfully seining fish. *Reversed.*

The facts are stated in the opinion.

Messrs. **Milton Remley**, *Atty-Gen.*, **E. M. Woodward**, *Co-Atty.*, **J. H. Trewin**, and **J. P. Conway**, for appellant:

The burden is on the defendant to show that Big lake, where the fishing was done, is among the excluded waters.

Sayre v. *Wheeler*, 31 Iowa, 112; Wharton, Crim. Ev. 9th ed. § 331, and authorities cited; *State* v. *Stapp*, 29 Iowa, 551; *State* v. *Curley*, 38 Iowa, 359; *Worley* v. *Spurgeon*, 38 Iowa, 465; *State* v. *Harris*, 64 Iowa, 287.

Fresh-water lakes and ponds are bodies of standing waters, distinguishable from rivers chiefly by the fact that they have no current.

Gould, Waters, 2d ed. § 79.

A river is a running stream of water pent in on either side by banks, shores, or walls.

Gould, Waters, 2d ed. § 41.

The identity of a lake or river is not changed by flood or freshet or its banks less defined because sometimes overflowed.

Houghton v. *C. D. & M. R. Co.* 47 Iowa, 370; *Carpenter* v. *Hennepin County Comrs.* 56 Minn. 513.

The main river is always readily distinguished from the sloughs by its width and the volume of water found in it.

Dunlieth & D. Bridge Co. v. *Dubuque County*, 55 Iowa, 558; *Buttenuth* v. *St. Louis Bridge Co.* 123 Ill. 535; *Iowa* v. *Illinois*, 147 U. S. 1, 37 L. ed. 55; Wheaton, International Law, § 202.

The fact that Big lake may contain some Mississippi river water, and be affected by the rise and fall of the Mississippi as well as by the fluctuations of the Iowa river, does not change its distinctive and individual character as a lake, nor make it a part of the Mississippi river.

Rice v. *Ruddiman*, 10 Mich. 125; Gould, Waters, 2d ed. § 82*a*.

A stream necessarily involves the idea of a current, and a statute which provides for bridges over streams separating towns, confers no authority to construct bridges over lakes, bays, or marshes, in which the water has no regular or perceptible flow.

Gould, Waters, 2d ed. § 41, and authorities cited.

The intention of the legislature is the leading,

NOTE.—For rivers and lakes as state boundaries, see *note* to Buck v. Ellenbolt (Iowa) 15 L. R. A. 187. 29 L. R. A.

and indeed the only, object to be inquired into by the court in construing legislative enactments.

Noble v. *State*, 1 G. Greene, 330; *Tulley* v. *Beaubien*, 10 Iowa, 188; *Williams* v. *Poor*, 65 Iowa, 414; *State* v. *Cadwell*, 79 Iowa, 432.

The evil against which the penalties of the statute are directed nowhere stands out in such glaring proportions as here, where 25,000 to 50,000 pounds of fish are taken at a single haul. There can be no presumption that these important fisheries were to go unprotected and this wanton destruction unchecked, unless such intent is distinctly expressed.

There is good reason why the legislature should not seek to prohibit fishing in those streams which form the state boundaries, and should confine the law to waters over which the state has exclusive jurisdiction.

Gilbert v. *Moline Water Power & Mfg. Co.* 19 Iowa, 319.

The preservation of fish, even though they are not used as food for human beings, but as food for other fish which are so used, is for the common benefit.

Com. v. *Manchester*, 9 L. R. A. 236, 152 Mass. 230.

The courts of Iowa have confined the Mississippi river within its banks.

Gilbert v. *Moline Water Power & Mfg. Co. supra; Buck* v. *Ellenbolt*, 15 L. R. A. 187, 84 Iowa, 394.

Messrs. **L. E. Fellows and Park & Odell,** for appellee:

The words "middle of the main channel" described the bed over which the water flowed from bank to bank.

Dunlieth & D. Bridge Co. v. *Dubuque County*, 55 Iowa, 558.

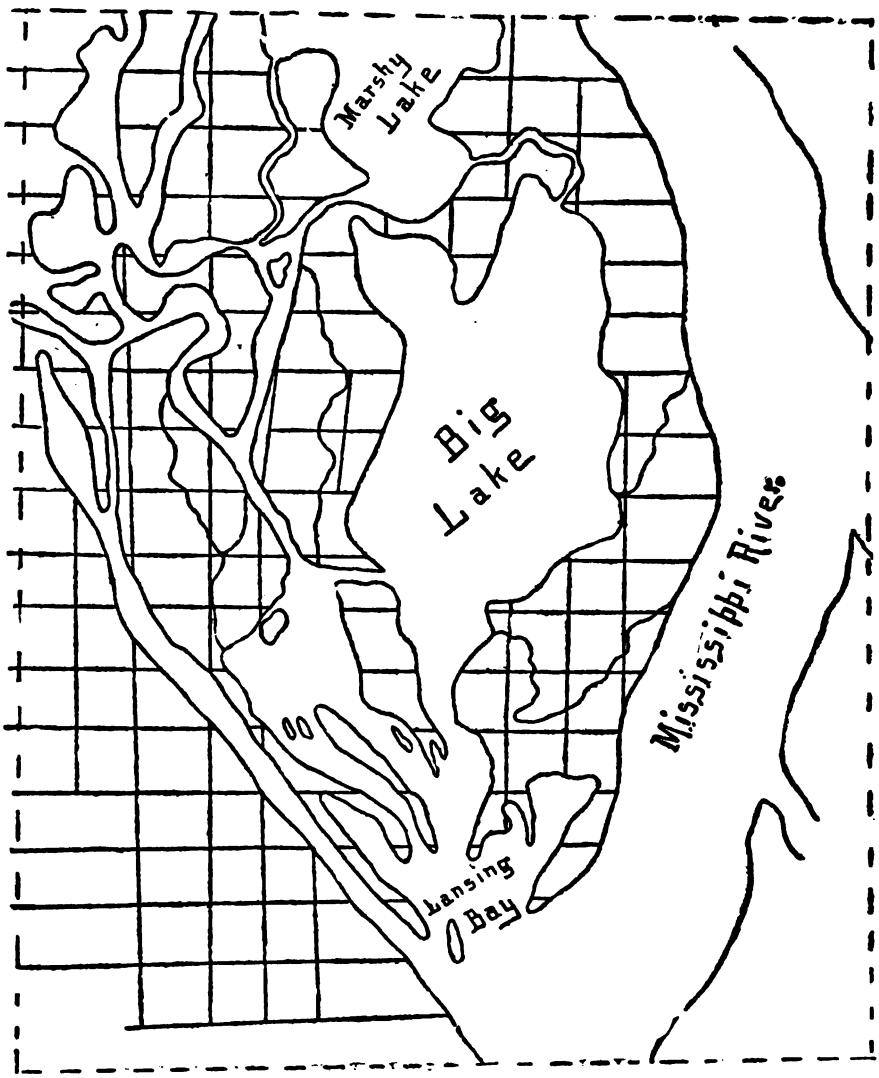
Kinne, J., delivered the opinion of the court:

1. It is not disputed that the defendant in December, 1893, caught several thousand pounds of fish—sunfish, pike, bass, and pickerel—with a seine about 400 feet long, which was drawn under the ice, in Big lake, in Allamakee county, Iowa. For this act he was arrested, and brought before the mayor of the city of Lansing, on information filed by the fish commissioner of the state, charging the defendant with illegally seining fish, contrary to the laws of this state. He was convicted, and appealed to the district court. There was a jury trial, and at the close of the evidence the court directed a verdict for the defendant, from which this appeal is prosecuted.

2. There are a number of assignments of error in this case growing out of the rulings of the court upon the introduction of testimony, the refusal to give instructions asked by the state, the action of the court in directing a verdict for the defendant, and in other respects. Nearly all of these, however, in one way or another, relate to, and all are dependent on, the solution of the real question in controversy, viz., whether or not Big lake is a part of the Mississippi river, within the meaning of the statute which exempts the waters of said river from the operation of the laws of this state prohibiting the seining of fish. To this question only shall we direct our attention.

The statute upon which the information against the defendant is based is found in the Acts of the 23d General Assembly (chap. 34), and is entitled "An act for the protection and preservation of fish," etc. It is provided by section 2 of the chapter that: "It shall be unlawful for any person to take from any of the waters of the state any fish in any manner except by hook and line; except that it shall be lawful for any person to take minnows for bait with a seine that does not exceed five yards in length. Also that it shall be lawful to take buffalo and suckers by spearing between the first day of November and the first day of March following. . . ." Section 6, under which the information was drawn, reads: "No person shall place, erect, or cause to be placed or erected, in or across any of the rivers, creeks, lakes, or ponds, or any outlets or inlets thereto, any trot line, seine, net, weir, trap, dam, or other obstruction in such manner as to hinder or obstruct the free passage of fish up, down, or through such watercourse for the purpose of taking or catching fish unless the same be done under the supervision of the fish commissioner, except minnows as provided in section 2 of this Act." Section 7 of the Act prohibits the placing of drugs, dynamite, powder, etc., "in any of the waters of the state," for the purpose of destroying or catching fish. In section 8 it is provided that any person found guilty of violating section 6 or 7 of the Act shall, upon conviction, be fined not less than $25, nor more than $100, and stand committed until such fine is paid. Section 11 of the Act provides that "nothing herein contained shall be held to apply to fishing in the Mississippi, the Missouri, or the Big Sioux rivers, nor so much of the Des Moines river as forms the boundary between the states of Missouri and Iowa." Defendant relies upon the provision of the section last quoted, and claims that Big lake constitutes a part of the Mississippi river, which is exempted from the operation of the act. It is not questioned that, if Big lake is not a part of the Mississippi river, within the meaning of the act, then defendant is guilty of having violated the law.

The plat below will aid in understanding the situation of Big lake, and its connection with the main channel of the Mississippi river. Big lake is about a mile and a half long, and three quarters of a mile wide. It rests in a shallow basin or depression, and has sloping banks. While there is a conflict in the testimony as to whether or not there is a current in this lake, we think the weight of the evidence is to the effect that at an ordinary stage of water there is no current. It appears that the water is clearer than that in the Mississippi river. The lake is from four to six feet deep. At an ordinary stage of water in the lake, the water in the outlet is about two feet deep, and from ten to twenty feet wide. The testimony tends to show that for two years prior to the trial of this case in the court below, viz. in 1892 and 1893, there had been no water running into this lake, though when the water is high there is



a water connection at the north end of the lake. There are several sloughs between the lake and the main shore on the Iowa side, west of the lake. From the hills on the Iowa side of the river to the lake, it is a mile and a half. The land lying east of Big lake, and between it and the main channel of the river, is used for grazing and hay land, and on it are trees ranging in size from an inch or two in diameter up to three or four feet. It is admitted that Big lake and the slough lying west of it have not been used for purposes of navigation. Big lake, then, is a body of water having well-defined shores, and no current. It is from a quarter to a half a mile west of the main channel of the Mississippi river at the nearest point. It appears that there are times when the high water overflows all, or nearly all, of the land between the mainland on each side of the river. From the evidence it is clear that Big lake is not a part of the Mississippi river, so far as navigation is concerned. It is not disputed that it lies wholly within the state of Iowa. It follows, then, that Big lake, lying as it does wholly within the state of Iowa, does not constitute a part of the Mississippi river, for boundary purposes. *Dunleith & D. Bridge Co.* v. *Dubuque County*, 55 Iowa, 558; *Buttenuth* v. *St. Louis Bridge Co.* 123 Ill. 535; *Iowa* v. *Illinois*, 147 U. S. 1, 37 L. ed. 55. We think it is quite clear that the intention of the law was to prohibit seining within water wholly within this state. Section 2 of the Act referred to uses the words, "from any of the waters of the state." In section 3 the words used are, "from any of the waters of the state." In section 7 the same words are used. These words very definitely cover all waters lying wholly within this

state, and there can be no doubt they include Big lake, unless it is exempted from their operation by virtue of the provision of section 11 of the Act. Now, it is apparent that section 11 excepts from the operation of the act only the boundary waters of the state, over which the state has not exclusive jurisdiction. There is nothing in the section which suggests that it was the intent of the legislature to exempt from the operation of the act waters which lie entirely in our own state. Big lake being wholly within the state, we can discover no reason for saying that it was not the intention of the legislature that the provision of the act prohibiting seining in "any of the waters of the state" should not apply to it, the same as to any other body of water entirely within the state. We think that the Mississippi river, which is excluded from the provision of the act, includes only that body or stream of water which is popularly known as such river; that the wording of section 11 of the Act indicates that it was the Mississippi river which constitutes the boundary line of the state which the legislature had in mind. Again, we may look to the evil sought to be remedied by this legislation. The purpose was to prevent the wanton and unnecessary destruction of fish in the waters over which the state has exclusive jurisdiction; to preserve the fish in said waters for the use of the people of the state. If it be true that these lakes and streams, which, though connected with the main body of water known as the "Mississippi River," yet form no part of the river proper, are not waters in which seining is prohibited, then the legislation falls far short of remedying the evil which existed, and these waters of the state, which, we are justified from the evidence in this case in saying, constitute the most valuable fishing grounds in the state, may be despoiled in this wholesale way of their wealth of fish without let or hindrance. To be justified in reaching such a conclusion, it should appear clearly that such waters were intended to be exempted from the operation of the law. We find nothing in the law to warrant defendant's contention. We do not deem it necessary to discuss what constitutes the middle of the main channel of the river. The "Mississippi River" spoken of in the state is the river as usually referred to. It means that body of water which forms the eastern boundary of the state, and, from the wording of certain sections of the act, it is manifest that it was not intended to embrace within the words "Mississippi River" waters entirely within the state, though having connection with said boundary stream. Appellee relies upon the case of *Dunlieth & D. Bridge Co.* v. *Dubuque County, supra*. It is claimed that that case is decisive of this controversy. We do not think so. The question in that case was as to what part of plaintiff's bridge was properly assessable in Iowa. It was held that the word "channel," as used in the act of congress admitting Iowa into the Union, and in our state constitution in defining our eastern boundary as the middle of the main channel of the river, referred to the bed in which the main stream of the river flowed, and not to the deep water of the stream, as followed in navigation. Big lake is in no sense a channel of the Mississippi river, and no question is made that it is wholly within the state of Iowa. It is a part of the river in the sense only that it is connected with it, and in every other respect it is as distinct a body of water as any which may be found in the interior of the state. On the one hand, the legislature prohibits seining in any of the waters of the state. On the other hand, it says, in effect, that this prohibition shall not extend to boundary waters over which the state has not exclusive jurisdiction. Such, we think, is the fair and proper construction of the law. The court below therefore erred in holding that Big lake was a part of the Mississippi river, and exempted from the operation of the law. The defendant having been acquitted, the only effect of this opinion will be to settle the law of the case.

Reversed.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.* HECKER-JONES-JEWELL MILLING CO., *Appt.*,

v.

Edward P. BARKER *et al.*, *Respts.*

(147 N. Y. 31.)

1. The New York court of appeals will not reverse a determination of a matter of fact which is supported by some evidence, in case of a certiorari to review an assessment for taxes.

2. The sum invested in the state on which a foreign corporation can be taxed under Laws 1855, chap. 37, when it has purchased property in the state and paid for it only in part, is the sum paid, and cannot include the indebtedness for the unpaid part of the purchase money.

3. Stock which a corporation issues in payment for property is not a debt incurred by it which can be deducted in determining the amount invested in such property, for the purpose of taxation.

(October 8, 1895.)

APPEAL by plaintiff from an order of the General Term of the Supreme Court, First Department, affirming an order of a Special Term for New York County quashing a writ of certiorari taken to review the action of the commissioners of taxes in assessing for taxa-

NOTE.—For denial (which the present case limits) of the right of a foreign corporation to have its debts deducted from the amount of its taxable investments, see People v. Barker (N. Y.) 23 L. R. A. 95.

tion the property of the relator corporation. *Affirmed in part; reversed in part.*

Messrs. **Bowers & Sands**, for appellant:

The sum invested in this state by the relator was the surplus of its assets in this state after deducting the indebtedness incurred by it in the acquisition of such assets.

Williams v. *Wayne County Supvrs.* 78 N. Y. 561; *People* v. *Barker*, 23 L. R. A. 95, 141 N. Y. 118; *People* v. *Barker*, 145 N. Y. 239.

The acquisition of property, and the payment therefor by a mortgage, are regarded as one and the same transaction, and all that the purchaser acquires is the equity or right of redemption.

Thomas, Mortg. p. 98; *Coman* v. *Lakey*, 80 N. Y. 345; *Hitchcock* v. *North Western Ins. Co.* 26 N. Y 68; *People* v. *New York Tax Comrs.* 23 N. Y. 243.

The courts below have decided in this case that the relator shall not only be assessed upon the sum invested in this state, but upon all property it has acquired therein, and shall not be allowed a deduction for the debts incurred in the purchase or acquisition of such property. This decision is a discrimination amounting to confiscation against the relator, and is in violation of three of the provisions of the Constitution of the United States: art. 1, § 8; art. 4, § 2; art. 14, § 1.

Duer v. *Small*, 4 Blatchf. 263; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257; *Wiley* v. *Parmer*, 14 Ala. 627; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Ward* v. *Maryland*, 79 U. S. 12 Wall. 419, 29 L. ed. 449; *Maguire* v. *Parker*, 32 La. Ann. 832; *State* v. *Wiggin*, 1 L. R. A. 56, 64 N. H. 508; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 341; *Guy* v. *Baltimore*, 100 U. S. 434, 25 L. ed. 743; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Higgins* v. *Three Hundred Casks of Lime*, 130 Mass. 1; *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 538; *State* v. *Furbush*, 72 Me. 493; *State* v. *North*, 27 Mo. 464; *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168, 19 L. ed. 357; *Pembina Consol. Silver Min. & Mill. Co.* v. *Pennsylvania*, 125 U. S. 181, 31 L. ed. 650, 2 Inters. Com. Rep. 24; *Santa Clara County* v. *Southern Pac. R. Co.* 14 Fed. Rep. 385, affirmed 118 U. S. 394, 30 L. ed. 118.

The court of appeals of this state seeks not to impose penalties upon foreign corporations not imposed by the legislature, and has expressly held that foreign corporations are not properly to be regarded with suspicion, nor should unnecessary restraints be imposed upon their doing business in our midst.

Demarest v. *Grant*, 18 L. R. A. 854, 128 N. Y. 205, 219; *Lancaster* v. *Amsterdam Imp. Co.* 24 L. R. A. 322, 140 N. Y. 576.

The bar to a foreign corporation availing of the constitutional prohibitions in question will be strictly limited to that class of questions where the restriction is placed upon them as a condition of doing business within the state, and will not be extended to that class of cases where they seek, being lawful in a state, redress against a tax imposing upon them conditions not imposed upon their competitors.

Howe Mach. Co. v. *Gage*, 100 U. S. 676, 25 L. ed. 764; *Southern S. S. Co. of New Orleans* v. *New Orleans Port Wardens*, 73 U. S. 6 Wall. 31, 18 L. ed. 749; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158; *Com.* v. *Standard Oil Co.* 101 Pa. 119.

Messrs. **David J. Dean** and **James M. Ward**, with *Mr.* **Francis M. Scott**, for appellee:

The relator is taxable for the sums invested by it in business in this state, even if it be in fact insolvent.

People v. *Barker*, 23 L. R. A. 95, 141 N. Y. 118.

There is no force in the contention made by the relator that the words, "sums invested in any manner in said business," used in the Statute of 1855, mean simply the sum of cash which the relator had on hand in this state at the time it commenced business.

People v. *New York Tax Comrs.* 23 N. Y. 242; *Hitt* v. *Crosby*, 26 How. Pr. 413; *Scott* v. *Depeyster*, 1 Edw. Ch. 513, 6 L. ed. 229.

The law denies any deduction from the available assets of the relator.

Buffalo Mut. Ins. Co. v. *Erie County Supvrs.* 4 N. Y. 442; *People* v. *New York City & County Supvrs.* 16 N. Y. 424; *People* v. *Coleman*, 12 L. R. A. 762, 126 N. Y. 433; *People* v. *Wemple*, 138 N. Y. 582; *People* v. *Barker*, 141 N. Y. 196; *People* v. *Barker*, 23 L. R. A. 95, 141 N. Y. 118; *People* v. *Barker*, 145 N. Y. 239.

Peckham, *J.*, delivered the opinion of the court:

The above relator obtained two writs of certiorari under chapter 269 of the Laws of 1880, for the purpose of reviewing the action of the above defendants in assessing the relator for all sums invested in its business in this state in the years 1893 and 1894, a separate writ having issued for each assessment. The defendants were commissioners of taxes and composed the board of taxes and assessments of the city and county of New York, and they made an assessment in each of the above years against the relator which is a foreign corporation having money invested in this state, such assessment being based upon the provisions of the Act, chapter 37 of the Laws of 1855, one section of which reads as follows: "All persons and associations doing business in the state of New York as merchants, bankers, or otherwise, either as principals or partners, whether special or otherwise, and not residents of this state, shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this state, and said taxes shall be collected from the property of the firms, persons, or associations to which they severally belong." The relator disputes the validity of each assessment. The defendants, in 1893, assessed the relator at a certain sum, after deducting that portion of its indebtedness which they decided had been incurred in this state in the purchase of property herein, and in 1894 they made an assessment without deducting any of the indebtedness of the relator whatever. The relator claims that the defendants, in 1893, did not deduct all

its indebtedness which had been incurred in the purchase of property within this state, and that if they had done so, there would have been no assessment made against it here. It also claims that the assessment of 1894 was void because of the refusal of the defendants to make any deduction whatever for any indebtedness. The reason for the difference in the two assessments is based by the defendants upon the decision of this court in *People* v. *Barker*, reported in 141 N. Y. 118, 23 L. R. A. 95.

That case was decided here subsequent to the assessment of 1893 and prior to that of 1894. The defendants were of opinion that the decision in question covered this case and obliged them to assess the relator without making any deduction for any indebtedness whatever, even though such indebtedness, or some portion thereof, were incurred in the purchase of the assets in this state, for which the assessment of 1894 was made.

Prior to the time for finally making the assessment for each of the two years 1893 and 1894 respectively, the relator rendered to the defendants a verified written statement of the condition of the company as of the second Monday of January in each of such years. The statement of 1893 shows that the total gross assets in all parts of the world then belonging to the relator amounted to $4,615,326.07, and from that sum it was claimed should be deducted the amount assessed against it for its real estate, being $451,300, and the sum of $2,500,000 for bonds issued by it, and also $2,567,000 for further indebtedness incurred by it in the course of its business, thus claiming a total deduction for indebtedness (including the assessment for real estate) of $5,518,300, or almost a million dollars of debts over assets, and reducing the assessment of course to nothing.

It does not appear that any receiver of the company has been appointed or applied for, or that any proceedings have been taken or were contemplated for the winding up of what by this statement would appear to be a hopelessly insolvent concern. The president of the company was examined in regard to the assessment of 1893, before the commissioners, and he testified that the company was organized August 27, 1892, less than seven months prior to the making of this statement. The president further testified that the nominal capital was five millions of dollars, two millions of preferred and three millions of common stock. That $2,000 in cash were paid into the treasury for twenty shares of its capital stock at par, and that sum was paid out for corporation expenses. He was unable to state whether in issuing the stock at the time the company was organized it acquired anything beyond the tangible assets of the firm or parties whose property was purchased. The first meeting of the directors was held August 27, 1892, and at that meeting its bonds secured by mortgage were issued, and eight hundred and twenty of them of one thousand dollars each were sold for cash at par, and the money brought into New York and deposited in the bank with which the company did business, and was subsequently used for the purchase of merchandise used by the company. The question was then asked of him: "And the rest of the capital stock and the balance of the bonds were issued in exchange for real and personal property?" and he answered "Yes."

From this statement of 1893, and from the examination of the president of the company, it appears that all but $2,000 of its capital stock of $5,000,000, and the $2,500,000 of its bonds had been issued in exchange for property, real and personal, between the 27th day of August, 1892, and the second Monday of January, 1894, the cash for the $820,000 of bonds issued having been used for the purchase of merchandise. Further than this it appears that $2,567,000 of further indebtedness had been incurred upon its notes for borrowed money, loans to it on collateral and on bills for merchandise. This would make about $10,000,000 invested by the relator within this short period and yet it makes a statement that its total gross assets existing on the second Monday of January, 1893, amounted to but $4,615,326.07. No explanation is vouchsafed for these seemingly most unfortunate investments. It might, perhaps, be thought there was a mistake in the record from which I have quoted, and that the stock had in fact never been issued to any such amount. The statement for 1894 would seem to show that there was no mistake of that nature, for it is there stated that the entire share capital, except the twenty shares already spoken of, and the entire issue of bonds, except the 820 sold for cash, were exchanged for property. Ten millions of investments in five months, and at the end thereof less than five millions left! In January, 1895, its relative condition was about the same; its gross assets had shrunk from $4,615,326.07 to $3,466,919, being considerably over a million of dollars, but its indebtedness was less by $1,046,500.

And yet this (seemingly) insolvent corporation is paying interest on its bonded indebtedness and dividends upon its stock. These facts call for explanation. There is no doubt that the astute and able counsel for the city would have made the effort to obtain it had not the defendants proceeded upon the theory as to the tax of 1894 that the amount of indebtedness was in any aspect immaterial and the amount of assets in this state was sufficient for an assessment for 1894, which would be fair if no deduction for indebtedness were allowed. As to the assessment for 1893, in which there was some allowance for indebtedness, the relator claims that the entire face value of three of the items entering into that assessment, viz., for machinery and tools, office furniture and horses and trucks, making a total of over $800,000, should have been deducted in addition to the amount already allowed by the defendants for indebtedness incurred for the purchase of assets in this state. The decision of the defendants in this regard as to what amount of indebtedness was actually incurred in the purchase of the assets in this state in 1893 was made upon a question of fact, in regard to which the evidence on the part of the relator was by no means of that clear and convincing character which could leave no doubt

as to the fact. The assessment itself depended also upon the different kinds of property making up the assets of the relator in this state, and it was not made at all plain as to what the real and true value of such assets was. We do not feel called upon to review and reverse the determination of the defendants as to the true amount for which the relator should be assessed for the year 1893. There was some evidence to support their determination, and that is sufficient for us. It is not plain that any erroneous theory of assessment was adopted.

The orders of the special and general terms will, therefore, as to that assessment, be affirmed.

We are now brought to the consideration of the assessment for 1894, founded upon *People* v. *Barker*, above referred to.

We think an erroneous use has been made of the decision of this court in that case, and that the assessment now before us for 1894 must be set aside. Upon another examination of the subject, carried on by the defendants' commissioners, a more thorough investigation may be made, so far as it shall appear necessary, for an accurate assessment against the relator for all sums invested by it in this state.

The question is as to the true construction to be given those words of the statute which provide that all persons nonresidents of the state and doing business herein "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents of this state," etc. What is meant by the words "sums invested in any manner in said business?" The inquiry must of course be confined to the meaning of the words as used in this statute and for the purpose of an assessment upon such sums for taxation.

The case of *People* v. *Barker* held that a foreign company having assets in a foreign state could not invest some of its capital here and rightfully claim a deduction from such sum invested of all its indebtedness. That company admitted an investment here of at least $750,000, and its total indebtedness was over $1,200,000, consisting of open accounts and of bills payable. There was no claim set up as to the right specially to deduct the specific indebtedness arising upon the purchase of the very assets in New York in regard to which the assessment had been made. Very possibly language was used in that case in the course of the opinion which might be capable of a construction broader than was called for by the facts appearing in that record. If so, it would be but another illustration of the truth and importance of the principle which makes it necessary to construe the language used in judicial opinions strictly with reference to the facts which exist in the case which is decided. It was stated in that case that the court was of opinion that the act did not contemplate the deduction of debts from the sum invested in this state by nonresidents. As then applied, the language was appropriate, although it might well have been more definite and precise. That company had assets at its home office enough to permit a deduction of all indebtedness asserted, and there was no claim that was argued that any of it had been incurred in the purchase of property in this state which formed the basis of the assessment. Under such circumstances we held, and, as we think, properly held, that the place for the deduction of general indebtedness was the residence of the person or corporation, and that the sum invested here should not be diminished by a deduction of any part of such general indebtedness. The question we are now to decide is, What is the sum invested in this state by a foreign corporation which purchases property here, and pays cash for a portion of it, and promises to pay the balance at some future day?

This relator is engaged in the business of milling in this state. Suppose it brought $100,000 into this state, and bought $200,000 worth of wheat to be manufactured into flour, and paid for it with the $100,000 in cash, and gave its notes for the balance. The ownership of the wheat passes to the relator by the purchase, and in that sense it can be said it owns wheat to the amount or value of $200,000. Has it, however, under this statute, invested in this state any sum beyond the $100,000 which it paid in cash for the wheat? Is its promise or liability to pay the other $100,000, a sum invested in this state by it, and is it the same as cash for the purpose of taxation? Is the fact that the company has in its possession as ostensible owner the $200,000 in value of wheat conclusive evidence that the company has invested that sum in its business in this state, when in truth it has paid a sum amounting to but half its value, and has promised to pay the balance at some future time? It seems to us there can be but one answer to these questions. The sum invested is the sum paid and not the sum which is promised to be paid on a future occasion. It is true the purchaser has in its possession as nominal owner, wheat to the value of $200,000, but it cannot be said to have invested within the meaning of this statute $200,000 in the purchase of the wheat as long as it has in fact paid but one half that sum and has simply promised to pay the other half at a future day.

No part of the value of the wheat is lost to taxation by this holding; neither is the sum so lost which was brought into the state by the relator and invested in the wheat. The vendor of the wheat is taxed for the $100,000 he has received as part payment for the same, and he is also taxed for the $100,000 of notes he has received from the purchaser of the wheat on account of the balance due for the purchase money, and the relator is taxed the $100,000 cash it has brought into the state and invested in this wheat, and there is thus an assessment of $300,000 made between these two, the vendor and the vendee of the wheat, and that is all the property that is then subject to taxation. To tax the full value of the wheat in the hands of the purchaser is in reality to tax the purchaser on its own indebtedness. Its promise to pay in the future the other $100,000 is not a sum invested by it here until it has

redeemed its promise and paid its notes. The transaction is in truth substantially the same whether the payment has been secured by a chattel mortgage on the wheat or not, although if the payment have been thus secured, the purchaser has not even obtained an unincumbered title to the wheat until the payment is made. And so long as the property purchased has not been paid for in full, then the amount still due upon it ought to be deducted as not representing any sum invested by the purchaser in this state. Otherwise it is to say that the relator has invested a sum in this state by merely promising to do so at some future day. If after the purchase the wheat should appreciate, the whole of such appreciation would of course go towards swelling the amount invested by the relator in this state, and the contrary would be the case if it should depreciate; the indebtedness being a fixed quantity in both cases it would not be altered or affected by either event.

The same thing would happen in case the relator purchased the wheat and paid nothing for it, but gave its notes even without a mortgage for the whole amount. In such case the relator could not be said to have invested any sum in its business, assuming of course that the wheat was worth no more than its purchase price. Instead of paying, it had simply promised to pay for it. The vendor in such case would be assessed on the notes he took for the price of the wheat instead of for the wheat itself and the relator would not be assessed at all. This would be right because no more property had been created by the sale than existed before its consummation, and there would be an assessment levied for the full amount that had been levied before or which would have been levied if no sale had been made. The relator would not have invested any sum in its business until it paid something on its notes or until the property purchased had appreciated beyond the purchase price thereof. A gift of the property would be different. In that case while the relator would not have actually taken money or brought it into the state for investment and invested it in the property, yet it would have received the property as absolute owner with no outstanding liabilities to pay for it, and being in such case the owner of the property it would answer the description of a sum invested in its business and thus be liable to assessment under the act.

This treatment of the question is not in fact to be regarded in the light of a strict deduction of debts from assets; it is construing the meaning of the statute and determining what in reality is the sum invested by a nonresident individual or corporation under these circumstances, in the business in which he or it is engaged in this state. It is not adjusting the equities as spoken of in *People* v. *Barker*, which we then held should be done at the place where the corporation was a resident. It is a different thing from ascertaining the general and gross assets of a nonresident to be found within the state, and from that sum deducting all its debts whenever and upon whatever cause incurred. The nonresident corporation investing a sum of money in this state is to be assessed for the full sum it invests here, although it may owe debts enough outside of such investment to render it insolvent. The indebtedness it has incurred in the transaction from which the purchase of the property is the result, is no part of the sum it has invested in such purchase and no assessment can be made which includes the amount of that indebtedness. But the stock which a corporation issues in payment for property is not a debt incurred by it. The scrip for the stock is merely a certificate to the holder to certify as to his interest in the property of the corporation, which interest is his share of the property that remains to it after the payment of all its debts.

Construing the statute as we do, it follows that the assessment of 1894 cannot stand. Upon a rehearing of the case by the assessors it will be most appropriate to endeavor to learn what kind of property was obtained in exchange for the stock, bonds, and notes of the company amounting to ten millions of dollars, where it is situated, how much it is in fact worth or what has become of it and how it has to the extent claimed disappeared or shrunk in value. It is a case which indeed calls for rigid examination and investigation to learn if possible how a corporation seemingly by its prepared statements insolvent, can go on and pay interest on its mortgage debt, dividends on its stock and keep clear of all hostile steps from its other creditors.

Our conclusion is that *the orders of the General and Special Terms in relation to the assessment of 1893 must be affirmed*, with costs, and *those in regard to the assessment of 1894 must be reversed* and the defendants directed to make a new assessment in conformity to the facts and to the views set forth in this opinion.

All concur.

Ordered accordingly.

KANSAS SUPREME COURT.

Re W. S. PRYOR.

(.....Kan.....)

*In 1886, Iola, a city of the third class, granted to the Iola Gas & Coal Company, its successors and assigns, the right to lay gas pipes and mains in the streets and public grounds for the purpose of supplying the city and its inhabitants with gas. No rates were prescribed, except that the company should not charge the city more than one dollar per 1,000 cubic feet of gas for lighting the public buildings. On September 12, 1889, the company, with the assent of the city, assigned all its rights and interests to W. S. Pryor and Joseph Paullin, their heirs and assigns, one of the conditions being that said assignees would furnish private families with gas at a price not exceeding $2.50 per stove per month and 40 cents per month per burner, for illuminating purposes; and for some years past said assignees have been furnishing natural gas to the city and its inhabitants. On May 10, 1895, the city enacted an ordinance providing, among other things, that it should be unlawful for any person, firm, or corporation furnishing gas in said city to charge anything in excess of the prices therein fixed, which were very much lower than those named in the assignment, and lower than those collected from consumers.

Held, that said ordinance is inoperative and void as to said Pryor & Paullin, their heirs and assigns, in so far as the same purports to establish prices for gas furnished by them to private consumers.

(October 5, 1895.)

APPLICATION for a writ of habeas corpus to obtain petitioner's release from the city prison to which he had been committed to compel payment of a fine for violation of an ordinance of the city of Iola. *Granted.*

Statement by **Martin**, *Ch. J.*:

Iola is, and at all times hereinafter mentioned was, a city of the third class in Allen county. On July 1, 1886, an ordinance of said city, being No. 268, went into effect, purporting to grant to the Iola Gas & Coal Company, its successors and assigns, the right and privilege of laying and maintaining gas pipes and mains in the streets, avenues, alleys, parks, and public grounds of the city, for the purpose of supplying and conveying gas or other volatile substances for manufacturing, heating, lighting, fuel, domestic, and other purposes. No rates were prescribed, except that the company should not charge the city more than one dollar per 1,000 cubic feet of gas for lighting the public buildings. It was provided that the gas and coal company should file its written acceptance with the clerk within ten days, after which said ordinance should become a contract between the city and said gas and coal company. Within the time limited the company duly filed its acceptance. It expended a considerable sum in sinking gas wells, laying pipes, etc., but with indifferent success, the supply of natural gas not being adequate. On September 12, 1889, the gas and coal company, with the assent of the city, assigned its rights and privileges under said ordinance to W. S. Pryor and Joseph Paullin upon certain terms and conditions, one of which was that said assignees should furnish private families with gas at a rate not exceeding $2.50 per stove per month and forty cents per month per burner for illuminating purposes. Pryor & Paullin proceeded to sink other wells, and improve and extend the plant, and at length obtained an adequate supply of natural gas, which they have been furnishing to the city and its inhabitants at contract rates. On May 10, 1895, Ordinance No. 328 took effect by publication, the same purporting to authorize corporations, firms, companies, or individuals to lay and maintain pipes in the streets, avenues, alleys, lanes, and public grounds for the purpose of supplying said city and its inhabitants with natural gas for heating and illuminating purposes, and regulating the manner of laying such pipes, the kind and quality of same, and fixing the maximum rates to be charged the consumers of gas therefor, and providing penalties for the violation of the provisions of the ordinance. It was declared unlawful for any person to make collections for gas furnished without filing a written acceptance of the conditions of the ordinance, and the rates fixed for gas for the use of families were very much lower than those named in said assignment to Pryor & Paullin, and lower than they had been collecting from consumers. Pryor & Paullin have never filed any written acceptance of the terms of the ordinance, and they have no competitor in the business as yet. Complaint was made before the police judge that W. S. Pryor had collected from S. Bevington $1.50 for each of the months of June and July, 1895, for supplying a No. 8 cook stove, in violation of said Ordinance No. 328, which allowed only $1 per month; and he was convicted, and fined in the sum of $30 and $18 costs, and was ordered to be committed to the city prison until the fine and costs should be paid. He claims that such imprisonment is unlawful, and asks to be discharged therefrom.

Messrs. **Campbell & Hankins**, with *Mr.* **C. E. Benton**, for petitioner:

A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation.

1 Dill. Mun. Corp. 4th ed. § 89; *Anderson* v. *Wellington*, 2 L. R. A. 110, 40 Kan. 176.

The statutes do not empower a city of the third class to pass the ordinance in question.

St. Louis v. *Bell Teleph. Co.* 2 L. R. A. 278, 96 Mo. 623; *Lewisville Natural Gas Co.* v. *State*, 21 L. R. A. 784, 135 Ind. 49; *State* v. *Newark* (N. J.) 8 Atl. Rep. 128; *Huesing* v. *Rock*

* Headnote by MARTIN, *Ch. J.*

NOTE.—For denial of validity of ordinance fixing price of gas to be charged by gas company, see also Lewisville Natural Gas Co. v. State (Ind.) 21 L. R. A. 784.

See also 36 L. R. A. 125.

Island, 128 Ill. 465; *Greensboro* v. *Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130; *Ravenna* v. *Pennsylvania Co.* 45 Ohio St. 118; *People* v. *Armstrong*, 2 L. R. A. 721, 73 Mich. 288; *State* v. *Jersey City*, 52 N. J. L. 65; *State* v. *Hammond*, 40 Minn. 43; 1 Dill. Mun. Corp. §§ 392, 397, 398, and authorities cited.

The city is expressly authorized to make contracts with any person, company, or association to erect gas works in the said city.

The power to make a contract carries with it the power to make a valid contract; to make one which cannot be rescinded or annulled by one of the parties without the consent of the other.

Quincy v. *Bull*, 106 Ill. 337.

The contract gave to said company and its assigns the right to sell natural gas in the city of Iola. This necessarily carries with it as an inevitable incident the right to fix the price of the gas sold.

State v. *Laclede Gas Light Co.* 102 Mo. 472.

When expensive works have been erected under and pursuant to a valid contract with the city, it has no power to take away the rights acquired under said contract or to impose onerous duties or conditions not required by the contract under which the works were constructed.

Indianapolis v. *Consumers Gas Trust Co.* (Ind.) 27 L. R. A. 514; *New Orleans* v. *Great Southern Teleph. & Teleg. Co.* 40 La. Ann. 41; *State* v. *Laclede Gas Light Co.* and *Quincy* v. *Bull*, *supra*; *Atlantic City Water Works Co.* v. *Atlantic City*, 39 N. J. Eq. 367; *Louisville* v. *Wible*, 84 Ky. 290; *Columbus Water Co.* v. *Columbus*, 15 L. R. A. 354, 48 Kan. 99; *New Orleans Gas Light Co.* v. *Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 674, 29 L. ed. 525; *Louisville Gas Co.* v. *Citizens Gas Light Co.* 115 U. S. 683, 29 L. ed. 510; *St. Tammany Water Works Co.* v. *New Orleans Water Works Co.* 120 U. S. 64, 30 L. ed. 563.

All ordinances passed in virtue of the implied power, or passed under the general authority to enact all such as will be necessary, must be reasonable or they will be void.

1 Dill. Mun. Corp. 4th ed. §§ 319, 320.

Whether an ordinance is reasonable and consistent with the law or not, is ordinarily a question for the court.

1 Dill. Mun. Corp. § 327; *Olason* v. *Milwaukee*, 30 Wis. 316.

Even if the city had the power to reduce the price of gas it would be unreasonable to permit it to do so at this time.

Columbus Water Co. v. *Columbus*, 15 L. R. A. 354, 48 Kan. 99.

In the following cases ordinances have been declared unreasonable and therefore void.

Anderson v. *Wellington*, 2 L. R. A. 110, 40 Kan. 173; *Meyers* v. *Chicago, R. I. & P. R. Co.* 57 Iowa, 555, 43 Am. Rep. 50; *Re Frazee*, 63 Mich. 396; *Hayes* v. *Appleton*, 24 Wis. 542; *State Center* v. *Barenstein*, 66 Iowa, 249; *Champer* v. *Greencastle*, 24 L. R. A. 768, 138 Ind. 339.

Mr. **H. A. Ewing**, for defendant:

Laws regulating gas companies and other corporations of like character to supply their customers at prices to be fixed by municipal authorities are within the scope of legislative power, unless prohibited by constitutional limitation or valid contract obligation.

Munn v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 28 L. ed. 173; *Chicago, B. & Q. R. Co.* v. *Cutts*, 94 U. S. 155, 24 L. ed. 94; *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 176, 24 L. ed. 98; *State* v. *Columbus Gas Light & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Easton* v. *Lehigh Water Co.* 97 Pa. 554.

The state and city alike are utterly without power to make a contract that would infringe upon or barter away their police power.

Stone v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Richmond, F. & P. R. Co.* v. *Richmond*, 96 U. S. 521, 24 L. ed. 734; *Butchers Union, S. H. & L. S. L. Co.* v. *Crescent City, L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 32, 24 L. ed. 991; *Columbus Water Co.* v. *Columbus*, 151 L. R. A. 354, 48 Kan. 99.

The fact that large expense has been incurred, and further large expense will be incurred, in conforming to a reasonable and just ordinance to protect life and property, does not render the ordinance invalid or unreasonable.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Boyd* v. *Alabama*, 94 U. S. 645, 24 L. ed. 302.

All rights are held subject to the police power of the state.

Boyd v. *Alabama*, *supra*; *Com.* v. *Certain Intoxicating Liquors*, 115 Mass. 153; *State* v. *Columbus Gas Light & Coke Co.* 34 Ohio St. 580, 32 Am. Rep. 390.

The rights of the public are never presumed to be surrendered to a corporation unless the intention to surrender clearly appears in the law.

Perrine v. *Chesapeake & D. Canal Co.* 50 U. S. 9 How. 172, 13 L. ed. 92.

The business in which the petitioner is engaged largely concerns the public.

Winona & St. P. R. Co. v. *Blake*, 94 U. S. 108, 24 L. ed. 99; 1 Beach, Priv. Corp. p. 57; *State* v. *Ironton Gas Co.* 37 Ohio St. 45.

The right to further regulate corporations and fix prices and compel large expenditures of money, and indeed to go out of business in the interest of the public after a franchise had been granted, is upheld directly or on principle in the following cases:

Boston Beer Co. v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Butchers Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 485; Hare's Am. Const. L. 615; *Bartemeyer* v. *Iowa*, 85 U. S. 18 Wall. 129, 21 L. ed. 929; *Spring Valley Water Works* v. *Schottler*, 110 U. S. 347, 28 L. ed. 173; *Boyd* v. *Alabama*, 94 U. S. 645, 24 L. ed. 302; *Easton* v. *Lehigh Water Works Co.* 97 Pa. 554; *Long's App.* 87 Pa. 114; *Richmond County Gas Light Co.* v. *Middletown*, 59 N. Y. 228; *Re Deering*, 93 N. Y. 361; *Buffalo East Side Street R. Co.* v. *Buffalo Street R. Co.* 2 L. R. A. 884, 111 N. Y. 132; *Com.* v. *Duane*, 98 Mass. 1; *Murray* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How.

272, 15 L. ed. 372; *State* v. *Ironton Gas Co.* 37 Ohio St. 45; *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 272, 6 L. ed. 626; *State* v. *Columbus Gas Light & Coke Co.* 34 Ohio St. 572, 32 Am. Rep. 390; *Gale* v. *Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80; *State* v. *Cincinnati Gas Light & Coke Co.* 18 Ohio St. 262; *Northern Liberties Comrs.* v. *Northern Liberties Gas Co.* 12 Pa. 318.

Martin, C. J., delivered the opinion of the court:

The only question arising upon the record is whether the city of Iola had authority to fix the rates to be charged for natural gas furnished to private consumers by Pryor & Paullin under the circumstances above stated. In this country, municipal corporations (except the city of Washington) are the creatures of the states in which they are located. They derive their powers from the constitution and the statutes. In *Anderson* v. *Wellington*, 40 Kan. 176, 2 L. R. A. 110, this court has said: "The power to pass a city ordinance must be vested in the governing body of the city by the legislature in express terms, or be necessarily or fairly implied in and incident to the powers expressly granted, and must be essential to the declared purposes of the corporation; not simply convenient, but indispensable. . . . Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporations, and the power is denied." See also 1 Dill. Mun. Corp. 4th ed. § 89. The act providing for the organization and government of cities of the third class contains no express grant or power to fix or regulate the prices of gas, water, or any other article of necessity or luxury. General authority is given to enact ordinances for the good government and welfare of the city (Gen. Stat. 1889, pars. 958, 991), and such cities may provide for and regulate the lighting of streets, and they have power to make contracts with any person, company, or association to erect gas works, with the privilege of furnishing gas to light the streets, lanes, and alleys of the city for any length of time not exceeding twenty-one years. Id. par. 984. The respondent relies principally upon a section of the Corporation Law of 1868 relating to gas and water corporations, and published as paragraph 1401, Gen. Stat. 1889, which reads as follows: "Any gas or water corporation shall have full power to manufacture and sell and to furnish such quantities of gas or water as may be required by the city, town, or village where located, for public or private buildings or for other purposes; and such coporations shall have power to lay pipes, mains, and conductors for conducting gas or water through the streets, lanes, alleys, and squares in such city, town, or village, with the consent of the municipal authorities thereof and under such regulations as they may prescribe." Certainly there is no express power conferred upon the municipal authorities by this section to regulate the price of gas or water. Whether they might, as a condition of their consent, provide that gas or water should be furnished to the city or to its inhabitants at not exceeding certain prescribed rates, we need not now inquire. Consent was granted by Ordinance No. 268 to the Iola Gas & Coal Company, its successors and assigns, without annexing any condition as to rates, except that no more than one dollar per 1,000 cubic feet of gas should be charged for lighting the public buildings. In certain cases the state may fix and regulate the prices of commodities and the compensation for services, but this is a sovereign power, which may not be delegated to cities or subordinate subdivisions of the state, except in express terms, or by necessary implication. No such power is expressly conferred upon cities of the third class, and we do not think the right can be implied from any express provision, unless possibly that in the grant of consent to any person or corporation to so use the streets and public grounds of the city a condition might be imposed as to the maximum rates to be charged.

In *Lewisville Natural Gas Co.* v. *State*, 135 Ind. 49, 21 L. R. A. 734, it was held that municipal corporations of Indiana have no power at common law to fix by ordinance the price at which natural gas shall be supplied to consumers, and that the Act of March 7, 1887, providing "that the boards of trustees of towns, and the common councils of cities, . . . shall have power to provide, by ordinance, reasonable regulations for the safe supply, distribution, and consumption of natural gas within the respective limits of such towns and cities," does not confer the power to regulate the price at which natural gas shall be furnished; overruling the case of *Rushville* v. *Rushville Natural Gas Co.*, 132 Ind. 575, 15 L. R. A. 821. In the opinion the court says: "To secure the safe supply and use of natural gas is one thing, and to fix the price at which gas shall be supplied is another and quite a different thing." In *St. Louis* v. *Bell Teleph. Co.*, 96 Mo. 623, 2 L. R. A. 278, it was held that neither under its authority to regulate the use of streets, nor the power to license, tax, and regulate various professions and businesses, nor the general welfare clause permitting the passage of all such ordinances not inconsistent with the provisions of the charter or the laws of the state as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company. In the opinion the court says: "We are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground."

Under the section of our statute hereinbefore fully quoted a gas or water company may lay its pipes and mains through the streets of a city only with the consent of the municipal authorities, and under such regulations as they may prescribe; but the regulations are only as to the laying of pipes and mains, and have nothing to do with the price of the gas or water passing through the pipes,

and supplied to consumers. Counsel for the respondent cite the leading case of *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, and others of like character, to the effect that, where the owner of property devotes it to a use in which the public have an interest, he must, to the extent of the interest thus acquired by the public, submit to the control of such property by the public for the common good. But in these cases the control was exercised by the legislature either directly or through municipalities or agencies clothed by it with the power.

In the present case the legislative authority is wanting. We must therefore hold that said Ordinance No. 868 is inoperative and void as to said Pryor & Paullin, their heirs and assigns, in so far as the same purports to establish the price for gas furnished by them to private consumers.

The petitioner will be discharged from custody.

All the Justices concur.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

BARBER ASPHALT PAVING CO., *Plff. in Err.*,
v.
City of HARRISBURG.

(64 Fed. Rep. 283.)

A city having the power to pave streets and pay therefor from its treasury is liable for the cost of paving under a contract providing that assessments shall be accepted by the contractor in payment, and that the city shall not be otherwise liable under the contract, whether the assessments are collectible or not, where the statute under which they are made is held invalid and the assessments are therefore without authority, as the contract contemplates valid charges on the property, and failure to make the required assessments renders the city in default upon the contract.

(November 13, 1894.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in favor of defendant in an action brought to compel payment of the contract price for paving a certain street in defendant city. *Reversed.*

The facts are stated in the opinion.

Before Acheson, *Circuit Judge*, and Butler and Wales, *District Judges*.

Messrs. **Charles H. Bergner, George Frederick Keene,** and **A. S. Worthington,** for plaintiff in error:

The true construction of the contract in question is that the city of Harrisburg was to make an assessment and assign the claims based thereon to the Barber Company, and that the contractor in stipulating that, upon receiving such claims, it would assume the risks of collecting the same, did not agree to bear the loss that might result from failure on the part of the city, from want of power to make any assessment at all.

Hussey v. *Sibley*, 66 Me. 192, 22 Am. Rep. 557; *White* v. *Snell*, 5 Pick. 425.

When this contract was made the city of Harrisburg was authorized by law to pave Market street at its own expense, and it is universally held that when in such a case a municipal corporation employs a contractor on public improvements, and he agrees to look solely to the proceeds of special assessments for his compensation, the city is liable if it turns out that it was without authority to make any valid assessment, unless it further appears that the city was required by law as a condition of its liability to comply with certain conditions precedent and has failed to do so.

Hitchcock v. *Galveston*, 96 U. S. 341, 24 L. ed. 659; *Louisiana* v. *Wood*, 102 U. S. 298, 26 L. ed. 155; *Marsh* v. *Fulton County Supvrs.* 77 U. S. 10 Wall. 676, 19 L. ed. 1040; *Chapman* v. *Douglas County Comrs.* 107 U. S. 348, 27 L. ed. 378; *Norton* v. *Shelby County*, 118 U. S. 425, 30 L. ed. 178; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Peake* v. *New Orleans*, 139 U. S. 342, 35 L. ed. 131; *Chicago* v. *People*, 56 Ill. 327; *Scofield* v. *Council Bluffs*, 68 Iowa, 695; *Polk County Sav. Bank* v. *State*, 69 Iowa, 24; *Miller* v. *Milwaukee*, 14 Wis. 700; *Maher* v. *Chicago*, 38 Ill. 272; *Chicago* v. *People*, 48 Ill. 416; *Louisville* v. *Hyatt*, 5 B. Mon. 200; *Fisher* v. *St. Louis*, 44 Mo. 482; *Kearney* v. *Covington*, 1 Met. (Ky.) 341; *Bill* v. *Denver*, 29 Fed. Rep. 344.

The question involved here is one of general law, as to which the decisions of the state court are not binding upon the federal courts.

Swift v. *Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 865; *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 10 L. ed. 1044; *Foxcroft* v. *Mallett*, 45 U. S. 4 How. 353, 11 L. ed. 1008; *Russell* v. *Southard*, 53 U. S. 12 How. 139, 13 L. ed. 927.

Where private rights are to be determined by an application of common-law rules alone, this court, although entertaining for state tribunals the highest respect, does not feel bound by their decision.

Chicago v. *Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298.

This court construes all contracts brought before it for construction, and in doing so its action is independent of that of the state courts

NOTE.—The effect of contract to take assessments as the mode of compensation for performance of a contract for a public improvement has become an important question, but the above case seems to be the first on the exact point there decided.

For some cases on the general subject of municipal liability on contracts, see Schipper v. Aurora (Ind.) 6 L. R. A. 313, and *note*.

On the question, What contracts are within constitutional or statutory limit of indebtedness? see Beard v. Hopkinsville (Ky.) 23 L. R. A. 402.

See also 38 L. R. A. 259; 43 L. R. A. 678; 48 L. R. A. 326.

which may have exercised their judgment upon the same subject.

United States v. *Muscatine*, 75 U. S. 8 Wall. 575, 19 L. ed. 490; *New York Cent. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Venice* v. *Murdock*, 92 U. S. 494, 23 L. ed. 583; *Brooklyn City & N. R. Co.* v. *National Bank of New York*, 102 U. S. 14, 26 L. ed. 61; *Myrick* v. *Michigan Cent. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Liverpool & G. W. Steam Co., Limited* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788.

Mr. **William H. Middleton** for defendant in error.

Butler, *District Judge*, delivered the opinion of the court:

The plaintiff, a citizen of West Virginia, and the defendant, of Pennsylvania, entered into a contract on August 13, 1887, which contained the following provisions:

"The said The Barber Asphalt Paving Company to furnish all tools, implements, materials, and labor, and complete to the satisfaction of the city engineer of the city of Harrisburg all such work as may be requisite to pave and curb Market street from the eastern curb line of Front street to the Pennsylvania Railroad; to begin the work under this contract upon five days' notice from the city engineer and complete the same within ninety days from the commencement of said work. The pavement to be laid as aforesaid under this contract to consist of a cement concrete base at least six inches thick, covered with a wearing surface of asphaltum at least two and a half inches thick; the curbing to be of granite; the materials to be of the very best kind obtainable, and the pavement to be laid and all the work to be done thereon in accordance with the plans and specifications prepared by the city engineer, and hereto attached, which plans and specifications are hereby made part of this contract.

"And the city of Harrisburg, on its part, will pay to the said the Barber Asphalt Paving Company in accordance with the specifications and out of the assessments made and levied for the purpose, the following prices: For each and every square yard of pavement laid under this contract, the sum of two dollars and seventy-five cents ($2.75), for each and every lineal foot of granite curbing the sum of one dollar and fifty cents ($1.50), but only upon the measurements of the city engineer, and at such intervals and in such installments as he may determine.

"It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property owners, and when that fund is exhausted, then the city of Harrisburg will assign to the said the Barber Asphalt Paving Company, the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments.

"It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract whether the said assessments are collectible or not."

The plaintiff performed its part of the contract, and received on account $13,470.59, paid from assessments, leaving $21,729.92 of the contract price unsatisfied.

At the date of the contract the defendant had authority to pave its streets, and pay for the same from its treasury. It believed it had authority also to assess the cost of such paving on abutting properties, and transfer the obligations thus created in payment for the work. The plaintiff had no reason to doubt the correctness of this belief. The legislature by an Act of May 24, 1887, had provided for such assessments. The supreme court of the state, however, after the work had been completed, declared the act invalid. *Shoemaker* v. *Harrisburg*, 122 Pa. 285; *Berghaus* v. *Harrisburg*, 122 Pa. 289; *Ayars' App.* 122 Pa. 266, 2 L. R. A. 577.

The defendant went through the form of making assessments; and the property holders paid $13,470.59, before the invalidity of the statute was discovered. They refused, however, to pay more; and, the defendant denying liability for the balance due under the contract, this suit was commenced to recover it.

On demurrer filed to the plaintiff's statement the circuit court rendered judgment for the defendant; whereupon the plaintiff appealed, and assigned this action of the court as error.

Is the defendant liable? The suit is on the contract, and the liability must be found in it, if at all.

As we have seen the defendant had power to contract for paving its streets, at the cost of its treasury. It did not, however, so contract in terms. Is it liable to pay from this source in consequence of the terms used and the facts stated? It undertook to pay the price specified by assessments, and the plaintiff agreed to accept these in discharge of its claim, adding that "the city shall not be otherwise liable whether the assessments be collectible or not." Omitting the language just quoted, there could be no doubt of the defendant's liability. The case would be identical, in all respects, with *Hitchcock* v. *Galveston*, 96 U. S. 341, 24 L. ed. 659. The language quoted does not however, we think, add anything to the force or effect of that which precedes it. It simply expresses what would be implied in its absence. The agreement to accept the assessments in payment relieved the city from liability to pay otherwise. By it the plaintiff assumed the risk of collecting. If the defendant, in such case, had made and transferred the contemplated assessments, it would have discharged its entire obligation; just as it would in the present case. This, however, it has not done. Its attempt to do it failed; its acts in this respect were a nullity. It is immaterial that the failure resulted from want of authority—as it would be if it resulted from any other cause beyond its control. It undertook, unconditionally, to make and transfer assess-

ments, and its failure is a breach of the contract. To say its obligation is discharged by a vain attempt to make them; that the plaintiff is bound to accept useless forms of assessments, is unreasonable. The parties contemplated valid charges on the property. The term "*assessment*" clearly implies this; nothing short of a lawful assessment—one capable of enforcement, satisfies it. It was such assessments the plaintiff agreed to accept, and assumed the risk of collecting. The parties were mutually mistaken respecting the authority to pay in the special manner designated; but this does not relieve the defendant from its obligation to pay.

If anything is wanting to render this construction clearer, it may be found in the fact that the language involved is taken, word for word, from the statute, and must necessarily signify here what it does there. There the term "assessment" signifies, and can only signify, a proceeding which creates a charge on the property specified. The statute first provides for this proceeding and charge, and then for its transfer to the contractor. It is *this charge* which is to be transferred, and which the contractor is to assume the risk of collecting. There is always some risk attending such collections. Prior liens, or other causes, may render the property insufficient to pay. And this only is the risk the statute, and the contract made under it, contemplated.

The defendant having failed to make the required assessments is in default upon its contract, and must make reparation by paying the consequent loss. There is no hardship in it, and if there was it would afford no justification or excuse for shifting it to the plaintiff. The defendant has received full value for what he is required to pay; and if the contract admitted of another construction we would strongly incline to the one adopted, because it is not only consistent with the intention of the parties, but avoids the great injustice of allowing the defendant to hold and enjoy the plaintiff's property without paying for it.

There is abundant authority for this construction. *Hitchcock* v. *Galveston*, 96 U. S. 341, 24 L. ed. 659, is in point. The city contracted with Hitchcock to do certain work upon its streets, for which he was to accept its bonds in payment. It had, however, no authority to issue the bonds, and, discovering this while the work was in progress, stopped it and declined to pay for what was done, on the ground that the contractor had bound himself to depend upon this source of payment alone. The court, deciding that the contract contemplated and required valid bonds, and that the city had failed to furnish such, held the contract broken, and the city liable to pay from its treasury. In principle this case is not distinguishable from the one before us. The court says: "It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay, and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is *ultra vires*, it would be sanctioning rank injustice to hold that payment need not be made at all."

White v. *Snell*, 5 Pick. 425; *Hussey* v. *Sibley*, 66 Me. 192. 22 Am. Rep. 557; *Miller* v. *Milwaukee*, 14 Wis. 700; *Bill* v. *Denver*, 29 Fed. Rep. 344,—involved the same question, and were similarly decided. In *Chicago* v. *People*, 56 Ill. 327; *Maher* v. *Chicago*, 38 Ill. 272; *Louisville* v. *Hyatt*, 5 B. Mon. 200; *Fisher* v. *St. Louis*, 44 Mo. 482, and *Scofield* v. *Council Bluffs*, 68 Iowa, 695,—the contractor distinctly agreed to look to assessments alone for payment; and yet the municipalities, having no authority to make them, were held liable to pay otherwise.

The numerous authorities cited by the defendant are not inconsistent with this construction. *Peake* v. *New Orleans*, 139 U. S. 342, 35 L. ed. 131, is based upon an essentially different state of facts. The city was not a party to the contract sued on, and in no wise responsible for it. The work was done under a scheme devised by the state legislature, and under a contract with officers designated by it, for the drainage of swamp lands, (a part only of which was within the city limits) for the benefit, primarily, of its owners. A careful examination of this case will show that it rests exclusively on these facts—though the last paragraph of the syllabus, read alone, would justify a different conclusion.

Horter v. *Philadelphia*, 13 W. N. C. 40, and *Dickinson* v. *Philadelphia*, 14 W. N. C. 367, as we understand them, rest on the same principle. In the first the improvement was made under the State Statute of 1855, which provides that the cost of such work shall be borne by adjoining property holders. There was no authority, as it seems, to put it on the city. While the opinion of the court, and report of the case, are very brief, the decision appears to rest on this ground. If it were otherwise the case would be in direct conflict with *Chicago* v. *People*, 56 Ill. 327. In *Dickinson* v. *Philadelphia*, 14 W. N. C. 367, the city appears to have had no connection whatever with the work. The statute under which it was done designated an officer to do it, empowering him to make contracts and collect money to pay the cost. That he held the office of city commissioner of highways is immaterial; he was the agent of the state in discharging his duties under the statute. Here again the opinion of the court is very brief, and the report of the case so meager, that it was necessary to examine the records to understand what was decided—which we found to be no more than just stated.

The numerous other cases cited are equally inapplicable. In *Belleview Trustees* v. *Hohn*, 82 Ky. 1, the municipality was without authority to pay except by assessments on adjoining properties. *Saxton* v. *St. Joseph*,

60 Mo. 153, rests on the city's want of power to contract as it did. *Casey* v. *Leavenworth*, 17 Kan. 189, was decided on the fact that the city had kept its contract, by collecting and applying the assessments named, with reasonable vigilance. *Newman* v. *Sylvester*, 42 Ind. 106, was a suit against individuals, and is inapplicable to the facts involved here. Other cases cited may be distinguished as easily.

The judgment is therefore reversed, and the case remanded to the circuit court for further proceedings.

MARYLAND COURT OF APPEALS.

John H. SHORT, *Appt.*,
v.
STATE of Maryland.

(80 Md. 392.)

A constitutional provision against a "levying of taxes by the poll" is not violated by a statute which was substantially in force when the constitution was adopted compelling able-bodied male residents between twenty and fifty years of age to labor two days at least annually in repairing the roads, with the privilege of furnishing a substitute or paying seventy-five cents per day instead.

(February 27, 1895.)

NOTE.—*Poll taxes.*

I. *What are poll taxes.*
II. *Power to impose.*
III. *Restrictions and limitations.*
IV. *The restriction and equation of the North Carolina constitution.*
V. *Upon whom imposed.*
VI. *Place of taxation.*
VII. *The levy and collection.*
VIII. *Disposition.*
IX. *Payment of poll taxes as a qualification of electors.*

I. *What are poll taxes.*

A capitation or poll tax is defined to be a tax on the poll without regard to property, business, or other circumstances, in Hylton v. United States (1796) 3 U. S. 3 Dall. 171, 1 L. ed. 556; Head Money Cases (1883) 18 Fed. Rep. 135; Leedy v. Bourbon (1895) (Ind.) 40 N. E. Rep. 640.

So in State v. Gazlay (1831) 5 Ohio, 14, poll or capitation taxes are defined to be taxes imposed numerically upon citizens without reference to their capacity of sustaining the burden.

And in Gardner v. Hall (1866) 61 N. C. 21, a capitation tax is defined to be one upon the person simply, without any reference to his property, real or personal, or to any business in which he may be engaged, or to any employment which he may follow.

A tax paid by a person in consequence of his ownership of property, of a license to follow a trade or profession, or of making profits by the use of money or other thing granted to him either in writing or orally by the state, or by the permission of the state, either expressed or implied, is not a capitation or poll tax. *Dictum* in Gardner v. Hall, *supra*.

There is a clear distinction between a tax on certain specified classes of business where the skill of the operator is a source of profit, or where the public is appealed to for patronage and protection of a fixed and regular business, and a tax covering all persons whatever may be their occupation. *Dictum* in Burch v. Savannah (1871) 42 Ga. 596.

Thus, in Williams' Case (1840) 2 Bland, Ch. 186, it was said that a tax of so much a head on every slave is properly a tax upon the profits of a certain species of stock employed in agriculture and not a capitation tax, and as a greater part of the slave owners are both cultivators and owners of land, the final payment of the tax would fall upon them in their quality of land owners without any retribution.

So a succession tax is not a capitation exaction. Scholey v. Rew (1874) 90 U. S. 23 Wall. 331, 23 L. ed. 99.

And the tax on "dead heads" applied to persons other than the president, directors, officers, agents, or employés of a railroad company who are permitted to travel on the road without paying fare, imposed by North Carolina Act of 1860, chap. 31, § 12, is not a poll tax within the provisions of N. C. Const. 1836, art 4, § 3, providing for their imposition, but a mere tax upon the privilege of a free ride. Gardner v. Hall (1866) 61 N. C. 21.

So a tax of a fixed sum upon all passengers leaving or carried out of the state is not a poll tax within the provision of Nevada Const., art. 2, § 7, limiting the right of the legislature to levy poll taxes as to amount and as to the persons upon whom imposed. *Ex parte* Crandall (1865) 1 Nev. 294.

And the duty of fifty cents for each passenger, not a citizen of the United States, who comes by steam or sail vessel from a foreign port to a port within the United States, required to be paid by the master, owner, agent, or consignee of every such vessel by the Act of Congress of August 3, 1882, is not a capitation tax, required by article 1, section 9, of the Federal Constitution to be laid in proportion to the census, but a tax upon the business of the carrier measured by the number of such passengers, though the presumption may be that he will make the passenger pay the tax. Head Money Cases (1883) 18 Fed. Rep. 135.

Nor does Ohio Act of March 31, 1864, providing that all persons subject to military duty, and who are not members of some volunteer organization, shall either become such or pay into the county treasury annually the sum of $4, which payment shall be a commutation for fines and penalties for neglect to perform military service, conflict with Ohio Const., art. 12, § 1, prohibiting the levying of poll taxes, as such commutation is not a tax but a mere instrumentality for the enforcement of military duty. Houston v. Wright (1864) 15 Ohio St. 318.

Neither are taxes upon professions and occupations of skill as taxes upon lawyers, doctors, photographers, auctioneers, bank agents, wholesale and retail dealers, peddlers, etc., poll taxes. *Dictum* in Burch v. Savannah (1871) 42 Ga. 596.

And taxes of a fixed amount imposed upon lawyers are designed to operate upon the profits of a lucrative profession, and are not poll or capitation taxes within the provision of the Ohio Constitution prohibiting their levy. State v. Gazlay (1831) 5 Ohio, 14.

So in State v. Hibbard (1827) 3 Ohio, 68, the action was for debt to recover a tax assessed upon a practicing attorney and counsellor at law, but as no

See also 34 L. R. A. 472; 35 L. R. A. 747.

APPEAL by defendant from a judgment of the Circuit Court for Dorchester County imposing upon him a fine for refusal to comply with a notification of the supervisors of public roads to labor upon the roads in Fork district for the time required by statute. *Affirmed.*

The facts are stated in the opinion.

Messrs. **George M. Russum** and **S. T. Milbourne** for appellant.

Messrs. **John Prentiss Poe,** *Atty-Gen.*, and **P. L. Goldsborough,** for respondent:

Every parish is bound of common right to keep the highroads that go through it in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy; this being part of the *trinoda necessitas*, to which every man's estate was subject.

1 Bl. Com. 358, 359.

The obligation to repair the public roads in Maryland rests upon the county commissioners.

Anne Arundel County Comrs. v. *Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Gilbert County Comrs.* v. *Gibson*, 36 Md. 229; *Baltimore County Comrs.* v. *Baker*, 44 Md. 1.

The burden of improving and repairing the common highways of the country, except in the urban districts, is generally laid upon the people in the form of an assessment of labor.

Cooley, Const. Lim. 6th ed. *629, 630; Cooley, Taxn. p. 14; Dill. Mun. Corp. 676, 760–

argument was adduced on either side judgment was given for the recovery of the tax *sub silentio*.

But State v. Hibbard, *supra*, is referred to in State v. Gazlay, *supra*, as having been decided upon the same principle as that upon which the latter case turned.

So an assessment of road labor which may be commuted by payment of a specified rate per day is not a capitation tax, from the imposition of which persons over sixty years of age are exempted by Illinois Const., art. 1, § 9. Fox v. Rockford (1865) 33 Ill. 451.

And the highway labor required of men between twenty-one and fifty years of age, by Burns' Ind. Rev. Stat. 1894, § 6819, is not in the nature of a poll tax so that an exemption from poll taxes will apply thereto, but rather in the nature of a military or jury service. Leedy v. Bourbon (1895) (Ind.) 40 N. E. Rep. 640.

And road labor is not a tax so that a statute exempting a director of public schools from working on the roads will operate to exempt him from a road tax assessed upon his property. McDonald v. Madison County (1867) 43 Ill. 22.

Neither is the imposition of labor for road purposes on individuals irrespective of property a tax within the provision of Ill. Const., art. 9, § 5, that taxes levied for corporate purposes shall be uniform as to persons and property within the corporate limits. Pleasant v. Kost (1863) 29 Ill. 490.

And an assessment of a designated fixed number of days' road labor, which may be satisfied by the payment of a fixed sum in lieu thereof, is not a capitation tax within Ill. Const. 1848, art. 9, § 1, providing for the imposition of a capitation tax upon all able-bodied, free white male inhabitants of the state between the ages of twenty-one and sixty years of age who are entitled to the right of suffrage. Macomb v. Twaddle (1879) 4 Ill. App. 254.

Nor is the burden imposed on land owners by the Louisiana parochial road laws requiring them to repair at their own expense the roads in front of their property a tax within the meaning of a constitutional limitation upon municipal power to impose taxes. Barrow v. Hepler (1882) 34 La. Ann. 362.

And Ohio Rev. Stat., § 4717, providing that designated persons shall be liable annually to perform two days' labor on the highways under the direction of the road supervisor of the road district in which he resides, does not conflict with the provision of the Ohio constitution by which the general assembly is forbidden to levy a poll tax for county or state purposes. Dennis v. Simon (1894) 51 Ohio St. 233.

And the performance of labor on the highways by the person against whom it is assessed is not the payment of a tax within the meaning of the New York Act of 1801, chapter 184, providing that persons coming to inhabit a town or city, who shall have paid their share toward the public taxes thereof for two years, shall be adjudged to have obtained a legal settlement therein, the word "taxes" meaning contributions in money, not labor or personal services. Amenia Overseers of Poor v. Stanford Overseers (1810) 6 Johns. 92.

So in Starksborough v. Hinesburgh (1841) 13 Vt. 215, the question whether the assessment and payment of a highway tax in labor would be sufficient to give a settlement to the person taxed under Vermont Act of 1797 was raised but not decided. But the court said that had it been necessary to decide it perhaps the same construction would have been given the statute as that given in Amenia Overseers of Poor v. Stanford Overseers, *supra*.

And a commutation street tax of $3 in lieu of working on the streets is not a poll tax and is not obnoxious to a constitutional prohibition against levying poll taxes. Johnston v. Macon (1879) 63 Ga. 645.

And in Pleasant v. Kost (1863) 29 Ill. 490, it was said that an assessment for street and highway purposes is not a capitation tax.

And in *Re* Daseler (1886) 35 Kan. 678, it was said that a commutation of road labor in money, while in the nature of a tax, is not in common speech, or in customary revenue legislation, understood as embraced in the term.

In Faribault v. Misener (1874) 20 Minn. 396, however, it was said that the poll tax which is levied and collected in most of the cities of the state is closely analogous to, and seems to be to some extent a substitute for, the highway labor tax, or the highway poll tax as it may be called, which from the earliest times has been levied and assessed upon the inhabitants of townships under general laws.

And in Hassett v. Walls (1874) 9 Nev. 387, it was held that the annual road tax of $4 imposed upon designated persons by Nevada Highway Act of 1873 (Comp. Laws, § 3927), providing also that two days' labor shall be received in full satisfaction of such tax, is a capitation or poll tax within the meaning of the provision of the Nevada Constitution, art. 2, § 7, designating what poll taxes may be levied, whether regarded as a levy of money or services.

The court in Hassett v. Walls, *supra*, flatly refused to follow Sawyer v. Alton, *infra*; Pleasant v. Kost, *supra*, and Fox v. Rockford, *supra*, saying that were the law of Nevada like that of Illinois, which requires labor and allows it to be commuted into money, while Nevada levies a money tax but allows commutation in labor, the conclusion would be the same. Either is and both are capitation or poll taxes; one in money; the other in service.

See also 37 L. R. A. 246.

762; Elliott, Roads & Streets, 7; Burroughs, Taxn. §§ 5, 9; 1 Minor, Inst. 2d ed. p. 115; *State* v. *Halifax Comrs.* 15 N. C. 347; *Sawyer* v. *Alton*, 4 Ill. 130; *Pleasant* v. *Kost*, 29 Ill. 494; *Cooper* v. *Ash*, 76 Ill. 11; *Tipton* v. *Norman*, 72 Mo. 380; *Johnston* v. *Macon*, 62 Ga. 645; *Miller* v. *Gorman*, 38 Pa. 311; *Starksborough* v. *Hinesburgh*, 13 Vt. 215; *Amenia Overseers of Poor* v. *Stanford Overseers*, 6 Johns. 92; *Baltimore* v. *Green Mount Cemetery Props.* 7 Md. 531.

Neither is taxation for a public purpose, however great, the taking of private property for public use in the sense of the constitution.

Mobile County v. *Kimball*, 102 U. S. 703, 26 L. ed. 241; *Moale* v. *Baltimore*, 5 Md. 320, 61 Am. Dec. 276; *Groff* v. *Frederick City*, 44 Md. 77.

Nor can it be justly treated as a poll tax within the meaning of the 15th article of the Bill of Rights.

Williams' Case, 3 Bland, Ch. 254; *State* v. *Cumberland & P. R. Co.* 40 Md. 51; *Wells* v. *Hyattsville Comrs.* 20 L. R. A. 89, 77 Md. 141; McMahon's Maryland, 397–401; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 705, 28 L. ed. 571; *Daly* v. *Morgan*, 1 L. R. A. 757, 69 Md. 490.

Robinson, *Ch. J.*, delivered the opinion of the court:

By the Public Local Laws for Dorchester county, all able-bodied male residents of the county, above twenty and under fifty years of age, are compelled to labor two days at least in every year in repairing the roads of

II. *Power to impose.*

In Gardner v. Hall (1866) 61 N. C. 21, it was said that poll taxes are rightfully imposed because of the protection which the government affords to the person, independently of the connection in relation of the person to anything else.

And statutes imposing them are usually upheld in the absence of direct constitutional prohibition.

Thus Mass. Stat. 1852, chap. 301, making persons having their domicil in Boston on the first day of January subject to taxation therein including poll taxes on the first day of May, although they may have removed therefrom before that time, is within the constitutional power of the legislature. Lee v. Boston (1854) 2 Gray, 484.

So Minn. Const., art. 9, § 1, providing that all taxes to be raised shall be as nearly equal as may be, does not prohibit taxation by the poll as it had always been practiced in that state. Faribault v. Misener (1874) 20 Minn. 396.

And a city charter exempting firemen from the payment of poll taxes and an ordinance directing the levy and assessment of a poll tax upon all qualified voters except such as are exempt by the provisions of the charter, are not repugnant to that provision of the Minnesota constitution. *Ibid.*

This ruling was placed in part upon the ground that the long-continued acquiescence of the people in the laws under which poll taxes have been collected throughout the states has established a legislative and popular construction of the constitutional provision in favor of their validity. *Ibid.*

So in East Portland v. Multnomah County (1876) 6 Or. 63, it was held that a city charter which exempts the inhabitants of the city from road taxes and assessment for road work, and vests authority in the trustees to assess and collect the annual sum of $4 from each male inhabitant of a designated age, does not violate Or. Const., art. 9, § 1, providing that the legislative assembly shall provide a uniform and equal rate of assessment and taxation; but nothing was said as to whether or not the impositions were poll taxes.

And this ruling was followed in Astoria v. Clatsop County (1877), cited in note to 6 Or. 66, and Multnomah County v. Sliker (1881) 10 Or. 65, both involving the same facts.

And in Ottawa County Comrs. v. Nelson (1877) 19 Kan. 234, 27 Am. Rep. 101, it was said that capitation taxes or poll taxes or requirements to work on the roads do not come within the constitutional provisions requiring a uniform and equal rate of assessment and taxation.

In Taylor v. Chandler (1872) 9 Heisk. 349, however, involving the question of the rights to impose local assessments for paving a street under the provision of the Tennessee constitution requiring taxes to be imposed on the principle of uniformity and equality, it was said that the constitution does not include the exaction of services from an individual in the power to tax, and that the principle of uniformity and equality excludes the power to tax on any other principle either for general or local purposes.

So in Nance, a Girl of Color, v. Howard (1828) 1 Ill. 183, it was said that the provision of Ill. Const., art. 8, § 20, that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property in his possession, would seem to inhibit poll taxes.

But a different rule seems to have been adopted by the subsequent decisions.

Thus in Sawyer v. Alton (1841) 4 Ill. 127, it was held that the imposition of a poll or capitation tax is not prevented by that provision the requirement applying to property taxes and not preventing the imposition of other kinds.

And a charter provision that the common council shall have the exclusive right to call on all male persons between the ages of twenty-one and fifty years, residents of the city, to perform three days' labor on the roads and bridges annually or pay $1 for each day he shall refuse to labor, does not contravene that provision. Sawyer v. Alton, *supra*.

Nor does a similar charter provision conflict with article 9, section 2, of the Constitution of 1848, requiring the general assembly to provide for the levying taxes by valuation so that every person shall pay a tax in proportion to the value of his property. Macomb v. Twaddle (1879) 4 Ill. App. 254.

So the provision of the Missouri constitution that taxation upon property shall be in proportion to its value, does not prohibit the imposition of poll taxes. *Dictum* in Glasgow v. Rowse (1869) 43 Mo. 480.

And New Jersey Law of 1883, providing that there shall not be assessed upon any inhabitant of this state any poll tax for any of the purposes provided for in any special or local law in excess of $1, is not a special or local law which cannot be passed without notice of the intention to apply for it under the provisions of the New Jersey constitution, where there had previously existed local laws authorizing counties, cities, and townships to assess special poll taxes in amounts ranging from $1 to $25 per head. State v. Essex County Board of Chosen Freeholders (1884) 45 N. J. L. 504.

So the performance of labor for the repair of highways and streets upon an assessment or levy payable in labor is not involuntary servitude within the prohibition against its imposition in the federal and state constitutions. *Re* Dassler (1866) 35 Kan. 678.

And road assessments or levies are not debts within the meaning of the constitutional provision abolishing imprisonment for debt. *Ibid.*

said county, with the privilege, however, of furnishing a substitute, or of paying to the road supervisor seventy-five cents for each day such person may be summoned to labor, the money thus paid to be expended in repairing the roads. And it further provides that any one neglecting or refusing to perform such labor, or to provide a substitute, or to pay seventy-five cents per day for each and every day he may be summoned to work, shall be guilty of a misdemeanor, and, upon trial and conviction before a justice of the peace, shall be fined seventy-five cents for each day's delinquency and costs, and shall stand committed until the fine and costs are paid. Pub. Local Laws, art. 10, §§ 268–270, title '*Dorchester County.*' And the act further provides that any one aggrieved by the judgment of the justice of the peace may appeal to the circuit court. The main question, and the only one it seems to us about which there can be any real contention, is whether this local law is in conflict with the constitution, which declares "that the levying of taxes by the poll is grievous and oppressive and ought to be prohibited." Const. 1867, Declaration of Rights, art. 15. And, in construing the meaning of this article, we must bear in mind that the same declaration is to be found in the Constitution of 1776, and in every constitution adopted in this state down to the Constitution of 1867. So the question comes to this: Is compulsory labor imposed upon persons residing in the several election districts of a county, for the purpose of keeping the roads in repair,

And the assessment payable in road labor on the highways and streets provided for by Kan. Stat. 1881, chap. 37, is not a tax or an embargo upon the right to vote, though the list of registration is used in ascertaining who are liable to work upon the streets. *Ibid.*

So in Loughborough v. Blake (1820) 18 U. S. 5 Wheat. 317, 5 L. ed. 98, it was said that the power to levy and collect taxes, which includes direct taxes, is co-extensive with the power to levy and collect duties, imposts, and excises which extends throughout the United States including the District of Columbia and the territories. But there was nothing in this case to show whether the tax was or was not a poll tax.

The power of congress to levy direct taxes upon the District of Columbia does not depend solely upon the grant of exclusive legislation, and is not confined to district purposes only in like manner as the legislature of a state may tax the people of the state for state purposes. Loughborough v. Blake, *supra*.

And the principle of American jurisprudence that representation is inseparable from taxation does not prevent the imposition by congress of direct taxes upon the District of Columbia and the territories. *Ibid.*

III. *Restrictions and limitations.*

Poll taxes have not always been regarded with favor and the power to impose them has been frequently limited and restrained by constitutional provisions.

Thus a constitutional provision in Arkansas inhibits poll taxes except for county purposes. *Dictum* in Washington v. State (1853) 13 Ark. 752.

And Ga. Const., art. 1, § 29, prohibits poll taxes except for educational purposes, and limits them even for that purpose to $1 per poll. Burch v. Savannah (1871) 42 Ga. 596.

So Maryland Declaration of Rights, art. 13, declares that the levying taxes by the poll is grievous and oppressive and ought to be abolished. Williams' Case (1840) 3 Bland, Ch. 186.

And the bill of rights of Ohio provides that the levying taxes by the poll is grievous and oppressive; therefore the legislature shall never levy a poll tax for county or state purposes. *Dictum* in Faribault v. Misener (1874) 20 Minn. 396.

And Nev. Const., art. 2, § 7, directing the legislature to provide by law for the payment of an annual poll tax of not less than $2, nor exceeding $4, by each male person resident in the state between the ages of twenty-one and sixty years, one half to be applied for state and one half for county purposes, limits the power of the legislature to the imposition of the poll tax therein provided and precludes the imposition of any other. Hassett v. Walls (1874) 9 Nev. 387.

So the Federal Constitution provides that no capitation or other direct tax shall be laid unless in proportion to the census therein directed to be taken. Hylton v. United States (1796) 3 U. S. 3 Dall. 171, 1 L. ed. 556; Loughborough v. Blake (1820) 18 U. S. 5 Wheat. 317, 5 L. ed. 98; Springer v. United States (1880) 102 U. S. 587, 26 L. ed. 253.

And that a capitation or poll tax is a direct tax within the Federal Constitution has been repeatedly asserted. Hylton v. United States, *supra*; Pacific Ins. Co. v. Soule (1868) 74 U. S. 7 Wall. 433, 19 L. ed. 95; Veazie Bank v. Fenno (1869) 75 U. S. 8 Wall. 533, 19 L. ed. 482; Springer v. United States, *supra*.

Indeed by the express words of the constitution they are direct taxes required to be laid according to the census therein required to be taken. *Dictum* in Scholey v. Rew (1874) 90 U. S. 23 Wall. 331, 23 L. ed. 99.

The census referred to in the provision of the Federal Constitution that no capitation or other direct tax shall be laid unless in proportion to the census therein provided for, is the one required in the provision of the constitution making numbers the standard by which both representatives and direct taxes shall be apportioned among the states. Loughborough v. Blake, *supra*.

The Federal Constitution, art. 1, § 20, providing that representatives and direct taxes shall be apportioned among the several states which may be included in the union according to their number, does not prevent the imposition of a direct tax according to such apportionment upon the District of Columbia or upon the territories. *Ibid.*

And though that provision makes it obligatory upon congress to lay a direct tax upon all of the states conformably with the rule thus provided, it creates no necessity for extending the tax to the District of Columbia or the territories. *Ibid.*

IV. *The restriction and equation of the North Carolina constitution.*

The North Carolina Constitution, arts. 5, 6, limit the right to impose capitation taxes for ordinary purposes, state and county, to $2 on the poll, and provide that counties cannot exceed the double of the state tax except for special purposes and with the special approval of the general assembly. Bladen County Board of Education v. Bladen County Comrs. (1892) 18 L. R. A. 850, 111 N. C. 578.

And section 1, article 5, thereof, providing that the capitation tax shall be equal to the tax on $300 worth of property, and that the state and county capitation taxes combined shall never exceed $2 on the head, creates a proportion which the capitation tax must bear to the tax on the value of property and makes the tax on the poll the standard by which the tax on property is to be levied. University R. Co. v. Holden (1869) 63 N. C. 410.

with the privilege of providing a substitute or the payment of a stipulated sum in lieu of such personal service, a "levying of taxes by the poll," within the meaning of the constitution? Such compulsory labor is, beyond question, a burden on the persons upon whom it is imposed, and though it assumes the form of labor, it may be fairly considered, we agree, in the nature of a tax. At the same time, when this article in the bill of rights is construed in the light of the legislation in regard to levying taxes by the poll in force when the Constitution of 1776 was adopted, and in the light of the legislation in regard to compulsory labor on the public roads, also in force at that time, and which has continued in force down to the present, it is clear, we think, that compulsory labor for the purpose of keeping the roads in repair has never been considered as a poll tax prohibited by the constitution. A brief reference to the legislation in force when the Constitution of 1776 was adopted will clearly show, we think, the nature and character of

This equation and limitation would seem to apply to all taxes other than for special purposes expressly excepted in the constitutional provision, except those imposed for some particular purpose the accomplishment of which is absolutely and imperatively required by the constitution.

Thus the equation of taxes between county and poll and limitation of the county taxes to double the state tax applies to taxes levied to meet the ordinary expenses of county government. Clifton v. Wynne (1879) 80 N. C. 145; Trull v. Madison County Comrs. (1875) 72 N. C. 388.

And both the equation between poll and property taxes and the limitation as to the amount provided by N. C. Const., art. 5, § 6, must be observed in levying taxes for the payment of new debts. Trull v. Madison County Comrs. *supra;* Mauney v. Montgomery County Comrs. (1874) 71 N. C. 486.

And taxation for state and county purposes combined, for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. French v. New Hanover County Comrs. (1876) 74 N. C. 602.

And a tax levied by county commissioners more than double the state tax "for a special purpose with the approval of the general assembly," as provided in N. C. Const., art. 5, § 6, is a tax for an ordinary purpose which must be accompanied by a capitation tax within the equation required by art. 5, section 1, thereof, providing that the general assembly shall lay a capitation tax on every male of a designated age which shall be equal on each to the tax on property valued at $300 in cash, where it is to build a court-house, a public jail, or an important bridge as to which it may be deemed necessary to create a special fund. Jones v. Person County Comrs. (1890) 107 N. C. 248.

But this equation between poll and property taxes required by N. C. Const., art. 5, § 1, does not apply to taxes levied for the payment of a public debt existing at the time of the adoption of the constitution. Street v. Craven County Comrs. (1874) 70 N. C. 644; Clifton v. Wynne (1879) 80 N. C. 145; Trull v. Madison County Comrs. (1875) 72 N. C. 388.

Or for special county purposes. Street v. Craven County Comrs. *supra.*

And the limitation as to the amount of taxes that may be levied including poll taxes, fixed by N. C. Const., art. 5, § 6, does not apply to taxes levied for the payment of debts existing at the time of the adoption of the constitution. Haughton v. Jones County Comrs. (1874) 70 N. C. 466; Street v. Craven County Comrs., Clifton v. Wynne, French v. New Haven County Comrs., Trull v. Madison County Comrs., and Mauney v. Montgomery County Comrs., *supra;* Simmons v. Wilson (1872) 66 N. C. 336.

And the auditing and allowance by county commissioners of a debt contracted before the adoption of the constitution do not change its character so as to subject it to the restrictions therein contained with reference to the equation between poll and property taxes and as to the amount of tax which can be levied. Mauney v. Montgomery County Comrs. *supra.*

Nor will the procurement and rendition of a judgment upon an indebtedness of a county incurred before the adoption of the constitution place it upon the same footing as a new indebtedness so that the restrictions therein contained as to the equation and as to the amount would apply to taxation for its payment. *Ibid.*

And the equation of taxation required by N. C. Const., art. 5, § 1, and art. 7, § 9, applies to taxation for the purpose of raising revenue for ordinary purposes of state and municipal government only, and does not invalidate a law authorizing a township to vote railroad aid bonds to be paid by a tax on property without requiring a capitation tax. Jones v. Person County Comrs. (1890) 107 N. C. 248.

And in French v. Wilmington (1876) 75 N. C. 478, it was said that the constitution, while it requires taxation to be uniform on all property within the city, and requires the observance of a certain proportion between the tax on polls and on property, contains no limitation upon the amount of tax which cities and towns may impose.

The imposition of a tax according to the equation between poll and property taxes, required by N. C. Const., art. 5, § 1, however, for the payment of an indebtedness incurred before the adoption of the constitution, is illegal as previous to its adoption all subjects of taxation were liable for the debt. Brothers v. Currituck County Comrs. (1874) 70 N. C. 726.

So in University R. Co. v. Holden (1869) 63 N. C. 410, the cause was disposed of by the decision of a majority of the court that no corporation was created by the act in question designed to create a railroad company and authorize it to construct a railroad and require the issue of bonds to be paid by taxation to provide means for such construction, but owing to its importance the court considered the question raised as to the constitutionality of the act and the constitutional limit as to the power of the state to tax, and the several judges delivered their opinions thereon.

They were unanimous in the opinion that the equation of taxation required by N. C. Const., art. 5, § 1, providing that the capitation tax shall be equal to the tax on $300 worth of property, and that the state and county capitation taxes combined shall never exceed $2 on the head, does not apply to taxes laid for the purpose of paying either the interest or the principal of the public debt as it existed at the time of the adoption thereof for the payment of which the general assembly is absolutely required to make provision by article 1, section 4, thereof.

And the equation and limitation were held by Settle, Reade, and Dick, JJ., to apply only to the ordinary expenses of state government and not to the public debt whether incurred before or after the adoption of that provision placing the ruling upon the ground that article 1, section 6, thereof, absolutely requires the general assembly to make provision for the payment of the public debt.

And Rodman, J., held that except as to the public debt existing at the time of the adoption of the constitution for the payment of which the general

poll taxes the levying of which was declared to be grievous and oppressive and ought to be abolished. If we turn to Act 1715, chapter 15, we find that all persons, males and females, free and slave, above the age of sixteen years, are declared to be "taxables," and upon each person thus declared to be a taxable the commissioners of the several county courts were directed to levy a specific sum, to be paid in money or tobacco, for the support of the government; and this act providing for the levying of taxes by the poll continued in force down to the Revolution. And, in addition to the poll taxes thus levied for public purposes, Act 1702, chap. 1, declaring the Church of England to be the established church of the colony, also provided that a tax of forty pounds of tobacco per poll should be levied each and every year for the support of the clergy, and this act continued in force down to the Revolution; and, strange as it may seem nowadays, the poll taxes to which we have referred were the only direct taxes levied for public purposes during the

assembly is imperatively required to make provision, by N. C. Const., art. 1, § 4, the equation applies to all state taxes whatever, being imperative as to all matters except taxation to supply casual deficits and suppress invasions and insurrections, for the ordinary and legitimate purposes of government and to and in the completion of railroads which were begun but unfinished at the time of the adoption of the constitution for which article 1, section 5, thereof, permits the legislature to contract new debts, as to which it is directory only, leaving the legislature a discretion to act in premises which cannot be reviewed by the judiciary.

And it was held by Pearson, *Ch. J.*, that it applies to all cases of state or county taxation except provisions for the public debt as it existed at the time of the adoption of the constitution, for casual deficits, insurrection, or invasion, for which new debts are permitted to be contracted, by N. C. Const., art. 1, § 5, and for county taxation for special purposes, which under article 1, § 7, thereof may be imposed with the special approval of the general assembly.

So in the dissenting opinion by Merrimon, *J.*, in Barksdale v. Sampson County Comrs. (1889) 93 N. C. 472, it is argued that N. C. Const., art. 5, § 1, providing that the state and county capitation tax combined shall never exceed $2 on the head, applies to taxes levied for the ordinary and current expenditures of the state, and not to such special purposes as the constitution designated specially and required to be accomplished at all events, and that as it is provided by article 9, section 3, thereof that one or more public schools shall be maintained in each district at least four months in each year, the limitation does not apply to taxation for that purpose.

But it was held in this case that North Carolina Act of 1885, chap. 174, § 23, providing that if the tax levied by the state for the support of public schools shall be insufficient to maintain one or more schools in each school district for the period of four months then the board of commissioners of each county shall levy annually a special tax to supply the deficiency, is in conflict with N. C. Const., art. 5, § 1, providing that the general assembly shall levy a capitation tax on every male inhabitant over twenty-one and under fifty years of age which shall be equal on each to the tax on property valued at $300 in cash, but that the state and county capitation tax combined shall never exceed $2 on the head, and cannot be carried into effect where the additional sum required to maintain the public schools for the prescribed period, added to the state tax for that purpose, would make the aggregate capitation tax estimated according to the equation thereby required more than $2, so far as the excess is concerned. *Ibid.*

And that a special tax levied by county commissioners to supply a deficiency when the tax levied by the state for the support of the public schools is insufficient as authorized by that act, is not a tax for a special purpose which may be levied with the special approval of the general assembly within the provisions of N. C. Const., art. 5, § 6. *Ibid.*

The courts have no power to enforce the equation provided for by N. C. Const., art. 5, §§ 1, 6, or to correct and enforce in part an act providing for taxation in disregard of such equation or the limitation therein prescribed, but must declare it void *in toto*. Discussion by Rodman, *J.* (1872) 66 N. C. 659.

But when a tax is levied for the payment of debts contracted both before and after the adoption of the constitution, the court on application for an injunction against its collection on the ground that it does not conform to the equation and is not within the limit prescribed by N. C. Const., art. 5, §§ 1, 6, should ascertain how much of the tax levied on property is necessary to pay old debts and allow that to be collected and then allow one third of the poll tax on the hundred dollars worth of property to be collected for county purposes and restrain the excess. Trull v. Madison County Comrs. (1875) 72 N. C. 388.

V. *Upon whom imposed.*

The question as to who are subject to poll taxes depends upon the statutes authorizing their imposition, such statutes usually providing for their levy upon male residents between the ages of twenty-one and sixty years. See generally cases in this note setting forth statutory provisions, and particularly those set forth in this and the next subdivisions.

It is within legislative power in the absence of constitutional prohibition to make the polls of aliens ratable, where no political rights are thereby conferred to the diminution of the rights of citizens. Opinion of the Justices (1811) 7 Mass. 523.

And where the polls of male aliens over sixteen years of age are by law made liable to be rated for public taxes they are ratable polls within the intent and meaning of the Massachusetts constitutional provision making the number of representatives which each town may have, depend upon the number of ratable polls in the town, and may be included in estimating the number of ratable polls for the purpose of determining the number of representatives to which a town is entitled. *Ibid.*

So the provisions of the constitution of Tennessee, that all male citizens with certain exceptions shall be liable to a poll tax and requiring each voter to give judges of election satisfactory evidence that he has paid his poll taxes when he offers his vote, do not restrict the power of the legislature over inhabitants of the state who are not citizens or prevent it from laying poll taxes on aliens. Kuntz v. Davidson County (1880) 6 Lea, 65.

And a man who is ordinarily physically able to perform the labor usually performed by able-bodied men on the public roads is an "able-bodied man" within section 60 of the Illinois Road & Bridge Law of 1887, and not exempt from the poll tax provided thereby. Sherrick v. Houston (1888) 29 Ill. App. 381.

Nor does a city charter providing that all persons who shall perform the road labor therein authorized, or shall commute the same by paying $1 for each day required, shall be exempt from any other taxation by the county authorities under the general road law, commute county taxes for road

colonial period. Such taxes thus levied, without reference to the ability or the means of the "taxable" to pay, must necessarily have been in many cases burdensome and oppressive, and it was such levying of taxes by the poll that the Constitution of 1776 denounced as being "grievous and oppressive," and which ought to be "abolished." And, while poll taxes were levied for public purposes, the public roads were made and kept in repair by compulsory road labor, and with this article in the Constitution of 1776, prohibiting poll taxes, statutes compelling persons to labor on the roads for the purpose of keeping them in repair have been in force down to the present time, and this is the first time the constitutionality of such laws has been questioned. As early as Act 1704, chapter 21, all laborers and servants were required to work on the public roads; and upon the refusal of such laborers to perform the services thus required, or the master to furnish his servants, the master and laborers were liable to indictment and punishment.

and bridge purposes within the city. Cooper v. Ash (1875) 76 Ill. 11.

An ordinance imposing a capitation tax upon free male negroes or free persons of color, whether a descendant of an indian or otherwise, applies to slave Indians, and does not include an East Indian, though a person of color. *Ex parte* Ferret (1817) 1 Mill, Const. 194.

Previous to Maryland declaration of rights a poll tax for forty pounds of tobacco was laid on male residents and female slaves, and free female negroes and, mulattoes above sixteen years of age, except slaves adjudged to be past labor for the support of the clergy of the established church, and a poll tax was imposed upon all the same description of inhabitants and at times upon bachelors to raise a revenue for the state. *Dictum* in Williams' Case (1840) Bland, Ch. 186.

VI. *Place of taxation.*

The place of the imposition of poll taxes is universally held to depend upon the domicil of the person upon whom they are imposed.

Thus, Chinese laborers coming into the state to engage in labor on public works who on the first day of April were in a certain road district at work on the construction of a railway where they remained a few months passing through and beyond the district as the road was completed without any purpose to remain or intent to return were not residing in such district on April 15 of that year, within the meaning of a statute making designated persons residing in a road district on that date liable to perform two days' work on the roads therein, or in default thereof, after being duly warned, for the payment of $2 for each day's work. On Yuen Hai Co. v. Ross (1882) 8 Sawy. 384.

And where after the inhabitants of a school district have voted to raise money for building a schoolhouse, and before it is assessed the town sets off certain of the inhabitants and forms them into a separate district, the persons so set off are not liable to be assessed upon their polls and estate for the money so voted. Richards v. Dagget (1808) 4 Mass. 534.

And residence upon lands purchased by or ceded to the United States for navy yards, forts, and arsenals, over which there is no reservation of jurisdiction to the state other than the right to serve civil and criminal process thereon, for any length of time, does not render the persons residing thereon liable to be assessed for their polls and estate for state, county, and town taxes, in the towns in which such lands are situated. Opinion of the Justices (1841) 1 Met. 580.

So one's place of domicil for the purpose of the imposition of poll taxes is that of his permanent residence and not that at which he happens to be at the time of the levy of the tax.

Thus the term "inhabitant" as used in the New Jersey statute providing that a poll tax of fifty cents shall be assessed upon every white male inhabitant of the state of the age of twenty-one years and upwards imports citizenship and municipal relations, and requires the domicil to be within the state, and does not apply to mere temporary residence. State v. Ross (1852) 23 N. J. L. 517.

And a person who has a fixed domicil in one state does not, by going into another state for part of the year with his family and servants to reside at a house owned by him therein, thereby change his domicil and become an inhabitant of the latter state so as to be subject to a poll tax therein under a statute providing that a poll tax shall be assessed upon every white male inhabitant thereof of a designated age. *Ibid.*

And Mass. Stat. 1852, chap. 30, making any one having his residence in Boston on the first of January subject to taxation including poll taxes on the first of May following, though he may have removed therefrom before that time, applies to persons having their domicil in Boston on the first of January only, and not to one in that place at that time and who habitually spent five months of the year there including the winter months, but who spent seven months of the year in his own house in another place where for twenty years he had been taxed for his poll and personal property and exercised the rights of citizenship. Lee v. Boston (1854) 2 Gray, 484.

Nor can one who, having a house in Brookline and another in Boston, usually residing in Brookline from some time in April to November of each year, when he closed the house and removed to Boston till the following April, after making preparation to return to Brookline was prevented from going personally until some time in May by illness, be rightfully taxed on his poll and personalty in Boston for that year though actually in that place on May 1, where he notified the assessors that he desired to continue a citizen of Brookline and taxable there where for many years he had been taxed and exercised all municipal rights and privileges. Cabot v. Boston (1853) 12 Cush. 52.

So the question as to whether a removal from one place to another will effect a change of domicil for the purpose of the imposition of the tax depends upon the intent with which the removal was made.

Thus an inhabitant of Boston who departs therefrom and goes to France where he is followed by his family about three months afterward, leaving his dwelling and furniture in Boston for a year and hiring one in Paris for that period, intending at the time of his departure to return and resume his residence in Boston, but not having fixed upon the time of return, but who actually does return in about sixteen months followed by his family about nine months afterwards, is subject to taxation in Boston upon his poll and personalty during such absence. Sears v. Boston (1840) 1 Met. 250.

But a citizen of Boston who removes with his family to Edinburgh declaring at the time that he intended to reside abroad and that if he should return it would not be to Boston, and takes a lease in Edinburgh for a term of years and tries to engage an American instructor for his children for two years, changes his domicil and is not liable to taxation in Boston upon his poll and personalty for the year following that of his departure, though

This law was substantially in force when the Constitution of 1776 was adopted, and continued in force for years afer its adoption. And instead of being repealed, or being considered as repugnant to the article in the Bill of Rights of 1776, Act 1795, chapter 87, recites "that whereas doubts have arisen, what description of persons are intended to work on the public roads under the existing laws to which this is a supplement, therefore be it enacted, that every able-bodied male person shall be and is hereby made subject to like personal service." And this act further provides for the payment of money in commutation of such personal service. And though this act has been amended from time to time, and most of the counties have been exempted from its operation, the main features of the act—the compulsory service, with the privilege of furnishing a substitute or paying a stipulated sum in lieu thereof—have been part of the local law of Dorchester, Somerset, and other counties down to the present time. In construing this article in the Bill

he annulled a contract for the sale of his dwelling and retained it in the hands of a tenant, giving as a reason that if he should die his wife might wish to return to Boston. Thorndike v. Boston (1840) 1 Met. 242.

And a ship master who, intending to abandon his house in one place and to make his home in another, starts upon a voyage intending to return to the latter place, which he does about six months later and marries a resident of the latter place remaining there three days, when he again goes to sea taking his wife with him but leaving her at the latter place after that voyage, acoquires a domicil at the latter place upon his return from the first voyage so as to be no longer taxable on his poll and estate at the former place. Stockton v. Staples (1877) 66 Me. 197.

So one who, having previously disposed of most of his furniture and personal property, settles his board bill at the place where he had been boarding with his wife for some time and leaves the city on the 30th of March, arriving at a city in another state on the first of April, where it was arranged that his wife was to subsequently follow him, engaging a boarding place there and going into business pursuant to an arrangement previously made, is not domiciled in the former city on April 1, so as to be liable to taxation therein upon his poll and estate on that day. Parsons v. Banger (1878) 61 Me. 457.

And one who moves with his family from his own farm in one school district to the town farm in an adjoining district under a contract to carry on the latter farm for one year intending to make it his home for that time, but remaining there for two years under a renewal of the contract, thereby becomes a resident of and subject to taxation upon his poll in the latter district. Woodward v. Isham (1870) 43 Vt. 123.

And a letter written by a person formerly residing in Boston but who had gone abroad, to his agent at that place, expressing an intention to reside abroad permanently, is admissible in evidence upon the question of his liability to be taxed for his poll and personalty at the place of his former residence after his departure though written after the assessment, where the writer did not know it had been made. Thorndike v. Boston (1840) 1 Met. 242.

A mere election by a taxpayer to be taxed on his poll and estate in one town, rather than another, however, is only one circumstance bearing upon the question of actual habitancy, and is to be taken in connection with the other circumstances of the case in determining his liability to such taxation. Lyman v. Fiske (1835) 17 Pick. 231, 28 Am. Dec. 293.

Neither can a person have two domicils and be taxed upon his poll and estate in two towns or districts. Richards v. Dagget (1808) 4 Mass. 534.

Nor can one legally liable to taxation upon his poll and personalty in one town be assessed thereon in another town, and he cannot be compelled to pay a tax assessed thereon in the latter town even though the assessment was thus made with his consent. Preston v. Boston (1831) 12 Pick. 7.

And a domicil cannot be abandoned, surrendered, or lost for the purpose of taxation either upon the poll or the estate until another is acquired. Borland v. Boston (1883) 132 Mass. 89, 42 Am. Rep. 424.

Thus one who leaves his domicil and goes to Europe to reside there for an indefinite period with his family with the intent never to return to his former home but to make his home at some other place when he did return, subsequently fixing upon a place of residence in another state but remaining in Europe some time longer, retains his original domicil for the purposes of a tax imposed upon his poll and estate after his place of residence was fixed upon but before his return from Europe. *Ibid.*

And one who gave up his business and removed to another town on account of his health, intending to remain during the summer and return in autumn, but not finding satisfactory business in his native town upon the recovery of his health in autumn, remained until the following March when he entered into business elsewhere, intending, as soon as he could make arrangements, to remove to a third town to reside, contracting for and taking steps toward the removal of his furniture, which on the first day of May was placed on board a vessel for that purpose, is subject to a poll tax imposed on that day at the place where he then remained though he personally removed to such place within a few days afterwards. Carnoe v. Freetown (1857) 9 Gray, 357.

In Colton v. Longmeadow (1866) 12 Allen, 598, however, it was held that one who determines to abandon his domicil in one state and take up a permanent residence in another, and actually leaves the state before the first of May, and proceeds to the state where he intends to reside a few days after that date, is not taxable on his poll and estate in the state of his former residence on the first of May.

But Borland v. Boston, *supra*, distinguishes Colton v. Longmeadow, *supra*, upon the ground that in that case the plaintiff had lost his domicil in Massachusetts because he had actually left the commonwealth and was actually *in itinere* to his new domicil which he had left the commonwealth for the purpose of obtaining and which in fact he did obtain; but it was said that if that case is to be deemed authority it should be limited to its exact facts and that the wiser rule would be to make taxation to depend upon domicil.

The question of the liability of a person to taxation upon his poll and estate in one place rather than another is one of fact for the jury to be determined from all the circumstances of the case. Lyman v. Fiske (1835) 17 Pick. 231, 28 Am. Dec. 293.

And the fact that students in college paid a road tax in labor while in attendance has no weight in determining the question of their residence for the purpose of voting where the statute did not require residence as a ground of liability to road labor, but simple inhabitancy. Dale v. Irwin (1875) 78 Ill. 170.

In State v. Grizzard (1883) 89 N. C. 115, however, the payment of poll taxes was treated as evidence

of Rights of the Constitution of 1867, being identical with the article in the Constitution of 1776, it is but fair to presume that the framers of the Constitution of 1867, and the people who adopted it, understood this limitation on the power to levy taxes by the poll in the sense in which it had been construed and acquiesced in for nearly one hundred years. Similar statutes in other states have been in operation for years, and their validity, when questioned, has been fully sustained; and, referring to these statutes, *Judge* Cooley says: "Though the public burden assumes the form of labor, it is still taxation, and must therefore be levied on some principle of uniformity. But it is a peculiar species of taxation, and the general terms 'tax' or 'taxation,' as employed in the state constitutions, would not generally be understood to include it." Cooley, Const. Lim. 6th ed. 629; Cooley, Taxn. 14.

And then, as to the objection that this local law is repugnant to that clause in the 14th Amendment of the Federal Constitution

of residence, giving the taxpayer a right to vote and hold office under the North Carolina constitution, but its admissibility for that purpose was not questioned.

The remedy of a person owning real estate in a town in which he does not reside, who is assessed therein upon his poll and personalty as well as upon his realty, is not confined to an appeal as for overtaxation, but if he is compelled to pay such poll and personalty tax he may recover the amount paid in an action of assumpsit against the town. Preston v. Boston (1831) 12 Pick. 7.

VII. *The levy and collection.*

Poll taxes are of statutory creation and their levy and collection depend entirely upon the statutes providing therefor. This note is confined to poll tax cases and the decisions with reference to this subject are too meagre to permit the formulation of any general rules therefrom, but it is thought that rules with relation to taxes in general would apply in the absence of special provision though the peculiar nature of poll taxes would sometimes require their modification or their modified application.

Poll taxes may be directly imposed by constitutional provision and sometimes the statute itself constitutes the levy, but as a general rule they are imposed under legislative authority by officers (usually those of municipal subdivisions) upon whom the power is expressly conferred.

Thus S. C. Const., art. 9, § 8, limiting the payment of a deficiency in the estimated expenses of any year to a deficiency tax levied under that section on the following year, does not apply to poll taxes provided for by article 10, section 5, thereof directing the imposition thereof and providing for its use for educational purposes, as they are imposed by the constitution itself, thus making it the duty of the officers making the assessment to insert therein the sum charged against each who thereupon becomes liable therefor, without further legislation, the former section applying only to taxes imposed by the general assembly. State v. Cobb (1877) 8 S. C. N. S. 123.

So where a county poll tax is levied by the legislature there is no necessity for a levy of the tax by the county court even if it had authority to make it. Labadie v. Dean (1877) 47 Tex. 90.

And a statute requiring that a poll tax shall be assessed upon designated persons without saying in terms for what purposes, and an ordinance enacted by a council authorized to direct the manner of the assessment and collection of a tax, directing the assessor to make a true account and lists of the persons, articles, and things made ratable by the laws of the state and assess the tax upon all persons and property, etc., requires the separate assessment of two poll taxes, one for the city and one for the county where the tax assessed is both for county and township and for city purposes. State v. Branin (1862) 23 N. J. L. 484.

The city council of a city, authorized to levy poll taxes for the improvement of streets, has power by ordinance to require the keepers of boarding houses, restaurants, and hotels, to furnish the street commissioner with the names of persons liable to poll tax boarding or lodging in their houses, and to impose a fine for refusal to do so. Topeka v. Boutwell (1894) 27 L. R. A. 598, 53 Kan. 20.

In Hagar v. Reclamation Dist. No. 108 (1883) 111 U. S. 708, 28 L. ed. 571, involving the question of the right of the taxpayer to notice of the imposition of an assessment for a local improvement, it was said that there is a vast number of different kinds of taxes which the state may impose, of which from their nature no notice can be given to the taxpayer, nor would notice be of any possible advantage to him, such as poll taxes.

So as to collection, an action cannot be maintained for the recovery of a poll tax when the statute providing for its levy provides a remedy, though such remedy may be impracticable or insufficient. Faribault v. Misener (1874) 20 Minn. 396.

And the exclusion of a pension certificate offered in evidence in an action for the recovery of a poll tax to establish that the defendant was not physically able to perform the labor usually performed by able-bodied men on the public roads, if erroneous, is a harmless error where proof of the wound for which the pension had been given had been introduced and was not disputed. Sherrick v. Houston (1888) 29 Ill. App. 381.

So the amount of a poll tax assessed against a taxpayer and the penalty thereon is properly included in a treasurer's warrant directing a seizure and sale under 19 S. C. Stat. at L., p. 884, § 10, providing that if delinquent taxes, assessments, and penalties charged against any property or party shall not be paid at a designated time they shall be treated as delinquent and shall be collected by sale according to law, and the deed of a purchaser at a sale thereunder is not thereby rendered void though the statute providing for the tax sale does not specifically mention poll taxes, and it is made a misdemeanor to fail to pay them. Wilson v. Cantrell (1893) 40 S. C. 114.

And a demand for a delinquent tax imposed in default of performance of road labor authorized by Oregon Laws, pp. 726, 737, §§ 21, 22, pp. 769, 770, §§ 101, 102, made of a third person, is not valid under the provisions thereof that in case of failure to perform such labor the supervisor may deliver a statement of the delinquency with the amount necessary to discharge it to the sheriff, who shall thereupon collect it by seizure and sale of the personal property of the delinquent, and if such property cannot be found he shall demand the same from any person indebted to the delinquent and collect the same out of his estate, unless he makes oath that he is not thus indebted and that he is entitled for his services, beside his lawful fees, a sum equal to one fourth the delinquent tax, to be collected with the tax, unless the inability to collect out of the delinquent's personalty, and a statement of the statutory requirement as to collection unless oath is made, and that the whole sum demanded is not greater than that authorized by the statute, appears in the demand. On Yuen Hai Co. v. Ross (1883) 8 Sawy. 384.

And payment of an illegal tax upon the poll and personalty of the taxpayer to prevent the issuing

which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," it is sufficient to say that the interpretation of that clause by the Supreme Court in the *Slaughter-House Cases*, 83 U. S. 16 Wall. 36, 21 L. ed. 394, is a complete answer to this objection. There is a distinction, says *Mr. Justice* Miller, between citizenship of the United States and citizenship of a state. To become a citizen of the United States, it is only necessary that one should be born or naturalized in the United States; but to be a citizen of a state, he must reside within the state. Further he says: "It is a little remarkable, if this clause was intended as a protection to the citizen of a state against the legislative power of his own state, that the words 'citizen of the state' should be left out where it is so carefully used, and used in contradiction to 'citizens of the United States,' in the very sentence which precedes it;" and the Supreme Court held that this clause merely protected the

of a warrant of distress, which would issue of course unless the tax was paid, is a compulsory and not a voluntary payment, which would preclude the taxpayer from reclaiming the sum paid. Preston v. Boston (1831) 12 Pick. 7.

The provision of Ala. Const. 1868, 1875, that the general assembly may levy a poll tax not to exceed $1.50 on each poll, which shall be applied exclusively in aid of the public school fund, does not contemplate that the poll-tax fund shall be relieved of the expense of its own assessment and collection or render it incompetent for the legislature to charge such expenses thereon. Shaver v. Robinson (1877) 59 Ala. 196.

But an auditor authorized to settle with the tax assessor and collector and decide as to the amount of commissions due him for the assessment and collection of poll taxes embraced in the settlement has no power, in the absence of a statute authorizing it, to authorize the collector to retain out of the poll-tax fund to be collected for one year the commissions due him and the assessor for assessing and collecting the poll taxes of preceding years. *Ibid.*

The auditor has authority, under Ala. Code 1876, § 424, providing that the tax collector shall be allowed by the auditor five per cent for collecting the poll tax, to decide upon the amount of commissions due the collector, though by section 1112 thereof the money does not pass through the hands of the auditor but is required to be paid directly to the county superintendent of education. *Ibid.*

VIII. *Disposition.*

It would appear to be within legislative power to apply poll taxes to any of the purposes to which ordinary taxes may be applied; but their application is frequently restricted to particular purposes.

Thus N. C. Const., art. 5, § 2, providing that the proceeds of the state and county capitation tax shall be applied to the purposes of education and the support of the poor, but in no one year shall more than twenty-five per cent thereof be appropriated to the latter purpose, requires that three fourths of the entire sum derived from such a tax must at all events be paid over to the educational board, and that whatever portion thereof not to exceed one fourth is directly appropriated by the legislature to any given class of the poor to be distributed by some other agency than the various boards of county commissioners must be deducted by the county authorities from the twenty-five per cent thereof, subject to appropriation by them for the support of the indigent. Bladen County Board of Education v. Bladen Comrs. (1898) 118 N. C. 379.

And an appropriation of nine cents of the proceeds of a capitation tax from the amount levied upon each poll for the payment of pensions, and of one fourth of the remainder thereof to the support of the county poor, is improper and erroneous under that provision of the constitution. The amount appropriated for pensions should have been deducted from the twenty-five per cent of the whole tax authorized to be appropriated to the support of the poor. *Ibid.*

But N. C. Laws 1891, chap. 223, § 2, imposing a capitation tax of seventy-five cents on every male person, devoting nine cents thereof to the support of the poor, is valid within that constitutional provision. *Ibid.*

And old confederate soldiers who are poor as well as disabled, and their indigent and unmarried widows, are included in the term "poor" as used therein. *Ibid.*

But no recovery can be had by a board of education against the county commissioners either as individuals or as a corporation for the misappropriation of a sum in excess of one fourth of the capitation tax to be applied to the support of the poor in violation of N. C. Const., art. 5, § 2, requiring the appropriation of three fourths of such tax to the purposes of education, where the commissioners acted in good faith and mistook the law, as in ordering the division thereof they acted judicially under the general power delegated to them, and the only remedy of the board of education is by mandamus to the county treasurer to compel proper application of the unexpended portion of the fund required to be appropriated for the purpose of education. *Ibid.*

So a board of supervisors has no authority, under the California County Government Act, § 25, subsec. 20, authorizing it to transfer moneys from one fund to another as the public interest may require, to order the transfer of a surplus remaining in the general county fund for the purpose of paying the claim of a road overseer for labor done and money expended by him for his district, when it is not alleged that any part of the claim is for the construction of bridges, as all the money which can be used for road purposes must, under Cal. Pol. Code, § 2652, providing for levying an annual poll tax part of which shall be apportioned to the general road fund, and section 2659 thereof providing for the levy of a property tax for highway purposes not to exceed a certain per cent, come from such poll tax and such property tax, except in case of the construction of bridges provided by section 2712 thereof. Potter v. Fowzer (1889) 78 Cal. 403.

And New Mexico Act of 1872 (Prince's Stat. p. 513, §§ 6, 7), providing for the assessment of an annual poll tax of $1 each upon certain citizens of the territory, which shall be applied to school purposes exclusively, is not repealed so as to render a poll tax subsequently collected payable into the public treasury, by the Act of 1883 (Prince's Stat. pp. 698, 698, 707, 712, 713), making a similar provision for the assessment of a poll tax, and supplying other sources of revenue for the public schools, and prescribing the duties of the collector in paying over tax moneys collected, and repealing all acts inconsistent therewith, but making no provision as to the disposition of moneys collected as a poll tax. Territory v. Luna (1884) 3 N. M. 146.

But N. C. Const., art. 9, § 3, providing that the general assembly shall provide for an annual tax sufficient to defray the estimated expenses of the state for each year, and providing for the levying of a deficiency tax on the succeeding year where the ordinary expenses exceed the income, does not confine the payment of past-due school claims to

"privileges and immunities" of citizens of the United States, and was not intended to control the power of the state governments over the rights of their own citizens; and, as to the privileges and immunities belonging to the citizens of a state, "the latter must rest for their security and protection where they have heretofore rested,"—that is, with the state in which the citizen resides. And again, in *Bradwell* v. *Illinois*, 83 U. S. 16 Wall. 130, 21 L. ed. 442, referring to the same clause in the Fourteenth Amendment, *Mr. Justice* Miller, speaking for the court, says: "The protection designed by that clause, as has been repeatedly held, has no application to a citizen of the state whose laws are complained of." The appellant is a citizen of this state, and the law of which he complained as having abridged and interfered with his privileges and immunities is a law of his own state, and, this being so, the clause in the Fourteenth Amendment on

a deficiency tax levied under that section, or prevent the legislature from providing for their payment by the application of the current poll-tax fund thereto. State v. Cobb (1877) 8 S. C. N. S. 123.

And South Carolina Act of March 3, 1874, providing for the payment of past-due school claims authorizing their payment in part from the poll tax fund and preferring in the order of payment out of that fund such claims as matured before a certain date, is not in conflict with the provision of S. C. Const., art. 9, § 2, that poll taxes shall be applied exclusively to the public school fund, as payment of past claims is no less an application to educational purposes than of current demands. *Ibid.*

Nor does Pennsylvania Act of April 15, 1878, § 9, which is not retrospective in its operation, repealing the Militia Act of April 7, 1870, and its supplements, providing for the payment of a *per capita* tax by designated persons to the collector of taxes to be paid by him to the county treasurer to be disbursed as a military fund upon the order of the commanding and other officers of the brigade, affect orders drawn before the date of such repealing act. Wyoming County v. Bardwell (1877) 84 Pa. 104.

And the Militia Act of April 7, 1870, and its supplements create no liability on the part of the county in its corporate capacity to holders of such orders, whose only remedy is against the treasurer to compel payment. *Ibid.*

So a teacher, who contracts with respect to the fund established by the Alabama statutes providing that certain taxes shall be apportioned among the school districts, and that the poll tax shall be apportioned upon that of the previous year, does so knowing that the fund may fall short of the amount for the previous year and that he may have to suffer his *pro rata* share of the loss; as to such deficiency there is no personal or official liability upon the part of the county superintendent, who is required to make such apportionment. Gay v. Bankston (1893) 100 Ala. 280.

IX. *Payment of poll taxes as a qualification of electors.*

Some of the states have made the payment or the assessment and payment of poll or capitation taxes a condition precedent to the right to exercise the elective franchise.

And such provisions have been held not to contravene constitutional provisions.

Thus the legislature has power under Fla. Const., art. 9, § 5, and art. 8, § 6, authorizing capitation taxes not to exceed $1 each year, and empowering it to make the payment of the capitation tax a prerequisite for voting, to require the payment of all annual capitation taxes remaining unpaid not exceeding $1 for each year as a qualification to vote. State v. Dillon (1893) 22 L. R. A. 124, 32 Fla. 545.

And Fla. Laws of 1893, chap. 4301, § 3, requiring as a qualification to vote the payment by the elector of the poll taxes of previous years, where he was entitled to qualify himself as an elector at the last state election by registration and the payment of such taxes, but failed to do so, is not in contravention of those provisions of the Florida Constitution as requiring the payment of more than one capitation tax as a qualification, where payment of not more than $1 for each year is required. *Ibid.*

And the requirement of that act of payment of delinquent poll taxes more than two weeks before an election as a qualification to vote thereat is not void as being unreasonable, unnecessary, and tending to impair and subvert the right to vote, there being no constitutional limitation upon the right of the legislature applicable thereto. *Ibid.*

So the exclusion of a person from the assessment list for twelve months, for failure to pay his county poll tax, in consequence of which he may be precluded from being qualified to vote during that year, is not a violation of Del. Const., art. 4, § 1, providing that a citizen otherwise qualified, who has within two years next before the election paid a county tax which shall have been assessed at least six months before the election, shall enjoy the right of an elector, or of article 1, section 3, thereof, providing that all elections shall be free and equal. Frieziebon v. Shallcross (1890) (Del.) 8 L. R. A. 337.

And Kentucky Act of 1840, making the payment of poll taxes of the preceding year a qualification for voting for certain municipal officers, does not contravene Ky. Const., art. 2, § 8, providing that every free white male citizen of the age of twenty-one years, etc., shall be a voter, as article 6, section 6, thereof, providing that officers of towns and cities shall be elected in such manner and with such qualifications as may be prescribed by law, shows the intention of the framers of the constitution that their former provision should not apply to municipal offices, but that they should be left to the legislative will. Buckner v. Gordon (1864) 81 Ky. 665.

Such provisions, being in derogation of common right, have usually been strictly construed.

Thus the payment of the poll or capitation tax authorized by Fla. Const., art. 6, § 8, and required by Florida Act of May 23, 1889, chap. 3350, as a qualification of electors at any general, special, or municipal election, is not a qualification for voting at an election as to issuing county bonds for the improvement of the navigation of St. John's river, under Florida Act of June 11, 1891, §§ 1, 5, authorizing registered voters to vote for or against the issue of such bonds, and providing that every person whose name shall appear on the registration books, and every person holding a certificate of registration showing that he is a registered voter, and who has not lost the right to vote for any cause as provided by law, shall have the right to vote at such election. Stockton v. Powell (1892) 15 L. R. A. 42, 29 Fla. 1.

And Fla. Laws 1893, chap. 4301, § 3, prescribing the qualification of voters at certain city elections, providing that there shall be given to each person who was entitled to qualify himself as an elector at the last state election by registration and the payment of his poll taxes for the years 1890 and 1891, and failed to do so, an opportunity to qualify by registering and paying his own poll taxes for such years, has reference to the poll taxes due under the general revenue law for those years, and if no

which he relies has no application. The law of which he complains merely imposes upon him the same duty and obligation which it requires of all other persons within the ages designated by the statute, without making any distinction whatever on account of color or race. And there is no ground on which it can be assailed as being repugnant to any of the provisions of the state or Federal Constitutions. For a breach of the duty imposed on the appellant and all others, it provides for a fair and impartial trial according to the law of the land, and upon conviction it provides that the offender shall be fined, and stand committed until fine and costs are paid. No one can question the power of the state thus to provide for the enforcement of its law and the punishment of all who violate it. As to the policy and wisdom of the law in question, it is quite sufficient to say that that is a matter resting with the legislature, and not with the courts. Cooley, Taxn. 487; *Appleton* v. *Hopkins*, 5 Gray, 530.

Rulings affirmed.

poll taxes were due under the requirement of that law, none could be insisted upon. State v. Dillon (1893) 22 L. R. A. 124, 32 Fla. 545.

And that provision is not void as requiring a person seeking to qualify himself to vote, to pay such poll taxes in person, and does not deprive him of the right to pay them through an authorized agent, such a payment being a payment by the voter himself. *Ibid.*

Nor is it material, under Florida Act of June 12, 1892, providing that no person shall be permitted to vote at an election who shall have failed to pay his poll taxes for two years next preceding such election, whether or not the collector withholds the tax receipts upon the payment of poll taxes by unauthorized third persons, as under Fla. Rev. Stat., § 342, collectors are required, at least thirty days before any election, to furnish the supervisors of registration with a list of all persons who have paid their capitation taxes for two years next preceding the year of the election which renders the receipt immaterial to the voter. State v. Johnson (1892) 30 Fla. 499.

And an elector has the right to pay his poll taxes on Saturday, the third day of September, to qualify him to vote at an election held on October 4 of the same year, under Fla. Rev. Stat., § 154, subsec. 6, providing that no one shall be permitted to vote at an election who shall have failed to pay, at least thirty days before the day of such election, his poll taxes for two years next preceding such election. *Ibid.*

So a person from whom a poll tax is due may under that act adopt and ratify the act of another in paying such taxes though he had not been authorized to make such payment. *Ibid.*

And application for a tax receipt by a person against whom poll taxes were assessed, as well as voting, constitutes a ratification of the payment thereof by an unauthorized third person. *Ibid.*

And a tax collector has no right under that act to refuse to receive such taxes when tendered by some party in behalf of others from whom they are due, though the person making the tender is not authorized by the person from whom they are due to pay them. *Ibid.*

And the governor has power under Fla. Const., art. 4, § 15, authorizing him, to suspend all officers not liable to impeachment who shall have been appointed or elected, for neglect of duty in office, to suspend a tax collector for refusal to receive poll taxes assessed under Fla. Rev. Stat., § 341, because tendered by some party in behalf of others from whom they were due where the party making the tender was not authorized by the persons from whom they were due to pay them. State v. Johnson (1892) 30 Fla. 499.

In Catlin v. Smith (1816) 2 Serg. & R. 267, however, it was held that a tax must have been not only laid, but also assessed individually upon a taxpayer, at least six months before the election, in order to entitle him to vote under the provision of the Pennsylvania constitution making the payment of a tax which had been assessed at least six months before the election a qualification of an elector.

And persons over seventy years of age having the requisite qualifications of residence, but who had been exempted from taxation on account of their poverty for two successive years before arriving at that age, though not liable to be taxed for their polls under the Massachusetts statute, are not thereby exempted from taxation so as to be entitled to vote, under the third article of the amendments to the constitution conferring the right as to certain designated elections upon those who have paid a state or county tax assessed upon them within two years preceding only, unless they shall have been exempted from taxation. Opinion of the Justices (1844) 5 Met. 591.

It is a question for the governor's decision, under Fla. Const., art 4, § 15, authorizing him to suspend all officers not liable to impeachment who shall have been appointed or elected, for neglect of duty in office, whether or not a collector was guilty of neglect of duty in not receiving poll taxes tendered Saturday, September 3, where an election occurred October 4, of that year, the statute providing that no one shall be permitted to vote at an election who shall have failed to pay, at least thirty days before the day of such election, his poll taxes for two years next preceding such election. State v. Johnson (1892) 18 L. R. A. 410, 30 Fla. 433.

As to payment of poll taxes as evidence of the right to vote, see *supra* under heading *Place of taxation.*

F. H. B.

FLORIDA SUPREME COURT.

DUVAL COUNTY COMMISSIONERS,
Plffs. in Err.,
v.
City of JACKSONVILLE.

(.....Fla.....)

*1. **Under section 5 of article 9 of the Constitution,** the legislature cannot authorize counties to levy taxes for any other than county purposes; nor can counties be authorized to devote money so raised to any other than such purposes.

2. **The authorities have formulated no generally accepted definition** of a county purpose, but leave each case involving the question to be decided as it may arise.

3. **The legislature exercises plenary control over public highways,** whether they be public country roads or streets in cities and towns.

4. **If the courts entertain a well-founded or reasonable doubt** as to the constitutionality of an act, it should, in deference to the legislative judgment, be upheld.

5. **The proviso to section 17 of chapter 4014, Laws of 1891,** directing that one half of the amount of the special road tax authorized by the act to be levied by the county commissioners and realized from the taxable property in incorporated cities and towns, be turned over to the municipal authorities, to be used in repairing, working, improving, and laying out the streets thereof, as may be prescribed by the ordinances of said cities and towns, is not in conflict with section 5, article 9, of the Constitution, as being a diversion of county revenues to other than county purposes.

6. **Neither is said proviso in conflict with section 16, article 3,** of the Constitution, as not being expressed in the title of said chapter 4014, Laws of 1891.

7. **When a matter is so closely connected with the subject of the act** as to create a doubt whether it is not included within it, the courts will not consider the question whether the legislative action upon it violates the constitutional prohibition relating to the titles of laws.

8. **A street is a public road** or way in a city, town, or village. All streets are highways, but all highways are not necessarily streets.

9. **It is not required that the title of an act should give a synopsis of all the means** by which the object of a law is to be accomplished in the provisions in its body. The title may be general, and so long as the generality of the subject expressed therein is not employed as a guise to conceal the real object of the law, or some provision therein, it will not be objectionable.

10. **The turning over of one half of the money** raised from the taxable property in incorporated cities and towns, under section 17, chapter 4014, Laws of 1891, does not destroy the equality or uniformity of the county assessment made by the county commissioners.

11. **By the 17th section of chapter 4014** the public road tax when collected is required to be paid into the county treasury as a special fund to be expended under the direction of the county commissioners solely for the purpose mentioned in the act; and under sections 564 and 585, Rev. Stat., no money can be drawn from the county treasury except upon warrant drawn by order of the county commissioners. Under the statutory provisions mentioned it is clearly the duty of the county commissioners to turn over to municipalities their proportional part of the road tax when collected and paid into the county treasury, by issuing a warrant for the payment of the same.

12. **Mandamus is a remedy resting in the judicial discretion** of the court, and the peremptory writ will not ordinarily be awarded commanding an officer to do what is not within his power to do; and although he may have put it out of his power to perform his duty, and may be liable in damages therefor, still where he cannot perform the act, and this is clear to the court, the peremptory writ will not ordinarily be issued against him.

*Headnotes by MABRY, *Ch. J.*

(October 11, 1895.)

ERROR to the Circuit Court for Duval County to review a judgment in favor of plaintiff in a mandamus proceeding brought to compel defendants to turn over to plaintiff the proportion of the amount realized from a special tax for road purposes which was designated by the terms of a statute. *Reversed.*

Statement by **Mabry,** *Ch. J.*:

This is a proceeding by mandamus, instituted by the city of Jacksonville against the county commissioners of Duval county, to require them to turn over to the municipal authorities of said city one half of the amount realized from a special tax for public roads and bridges levied and collected on the property within the corporate limits of said city, under section 17, chapter 4014, Laws of 1891.

It is alleged in the alternative writ that the board of county commissioners of Duval county deemed it advisable and for the public good, and at the times for levying taxes, for county purposes for the years 1891, 1892, 1893, and 1894, respectively, levied, by virtue of section 17, chapter 4014, Laws of Florida, a special tax for public roads and bridges on all the real and personal property in Duval county subject to taxation, and which was assessed and collected as other taxes of the county and paid into the county treasury as a special fund as required by the law. That a large amount of said special tax levied for

NOTE.—While a division between a county and township of the expense of maintaining certain roads and bridges has been somewhat frequently made on the ground that such roads and bridges were maintained in part for the benefit of a larger portion of the public than was represented by the town, the above case seems to be the first to present the constitutional question therein involved of the power of a county under statutory direction to turn over to the highway or street authorities of a municipal corporation situated in the county a part of the funds raised by taxation "for county purposes."

For many authorities on the general subject of highway taxes, see Brannon v. Kanawha County Ct. (W. Va.) 8 L. R. A. 304.

See also 30 L. R. A. 171; 32 L. R. A. 476.

the years mentioned, and collected and paid into the county treasury, amounting to more than $19,000, was assessed, levied, and collected on property in the city of Jacksonville, exactly how much was so realized the city was not able to say, because of the fact that all books and papers containing such information were in the custody and control of the county officials of said county, but the city shows that there had been realized from such source for the years mentioned the sum of $18,050.76, as appeared by a sworn abstract made from the tax collector's books by the tax collector, and attached as an exhibit. It is further averred that the exact amount realized from such special tax on the property in the city of Jacksonville and required by the act mentioned to be turned over to her municipal authorities was, or should be, known by the county commissioners, and they could ascertain correctly from books and papers in their possession the exact amount so realized. That of the amount of money realized from said special tax on property in the city of Jacksonville, the sum of $2,709.05 was, by warrant dated June 1, 1892, turned over to the city by order of the board of county commissioners of said county, and no other of said moneys so realized had been turned over to said city as required by law. That the municipal authorities had caused the matter to be called to the attention of the said county commissioners, and had demanded that the money due the city from the said taxes be turned over to the municipal authorities, and that the commissioners account to the city for one half of the amount so realized from property in the city, but that they had refused to do so. It was also alleged that the city was in urgent need of the moneys so due, to be used in the repairing, working, improving and laying out the streets of the city, as prescribed by ordinances.

A motion was made to quash the alternative writ on the ground, among others, that it was not the duty of respondents to turn over to relator any portion of the taxes collected for public roads and bridges. Relator's claim was an unliquidated demand. That it did not appear that respondents had ever been furnished with, or were in possession of, information as to the amount of alleged taxes collected for roads and bridges, so as to enable them to turn over any amount to relator. The writ was otherwise uncertain, evasive, and insufficient. That section 17 of chapter 4014 is in violation of section 5 of article 9 of the Constitution. That section 17 of chapter 4014 is in violation of the Constitution. That the proviso to section 17 of chapter 4014 was inoperative and void under the constitution.

The motion was overruled, and respondents answered, admitting that the board of county commissioners for said county levied a tax for the years mentioned for public roads and bridges on the property of the county subject to taxation, under section 17 of chapter 4014, Laws of Florida, but it is denied that the statement in the alternative writ as to the amount of the taxes collected on the property within the city was correct, and the amount collected for the years 1891, 1892, and 1893 is stated to be $16,911.58, and deducting from this amount what had been paid left $5,746.74. Respondents had made every effort to get the amount collected for the year 1894, but had been unable to do so, on account of the usurpation of the office of tax collector by a party named, and the delay in paying taxes, and the confusion in reference to the same in consequence of the usurpation of said office. Respondents further aver that no demand was made upon them for any proportion of the taxes collected for public roads and bridges, except that at a meeting of the board in January, 1895, the city recorder sent to the board a statement claiming the amount of the levy for roads and bridges on property within the city limits for the years 1891, 1892, and 1893, and requested payment of one half of such sum to the city; that such statement failed to show the amount of such taxes collected, and was returned to the recorder for correction, and no demand except as stated having been made upon respondents, and the whole amount collected for roads and bridges being required for the purpose of keeping the roads and bridges of the county in good repair, especially by reason of the damage done to them by the severe storms of 1893 and 1894, said funds were used by the county for that purpose, except $758.91 then in the hands of the treasurer to the credit of the road and bridge fund of the county.

As a plea to so much of the writ as involves the taxes for 1892, it is alleged that the claim was not presented to the board of county commissioners within one year from the time the same became due. It is also alleged that the provision for the payment of any portion of the tax collected for roads and bridges to the city is unconstitutional and void.

On motion of relator for peremptory writ, the same was awarded, and respondents commanded to turn over to the municipal authorities of the city of Jacksonville the sum of $5,746.74, being one half of the amount admitted by the return to have been realized from the special tax for public roads and bridges, levied by virtue of section 17 of chapter 4014, Laws of Florida, on property in the city of Jacksonville, after deducting the sum of $2,709.05, the amount paid in June, 1892. Respondents were also commanded to render an account and pay over to the city authorities the balance of one half the exact amount realized and paid into the county treasury of Duval county from said special tax for the years 1891, 1892, 1893, and 1894.

The errors assigned are the overruling the motion to quash, and in granting the peremptory writ.

Messrs. **Fleming & Fleming,** for plaintiffs in error:

The proviso in section 17 of chapter 4014 under which the claim of the city is made is inoperative and void and in violation of section 16 of article 8 of the Constitution of the state of Florida, which directs that "each law enacted in the legislature shall embrace but one subject and matter properly connected there-

with, which subject shall be briefly expressed in the title."

Carr v. *Thomas*, 18 Fla. 736; *State* v. *Palmes*, 23 Fla. 620; Cooley, Const. Lim. 5th ed. pp. 170-181; *Knoxville* v. *Lewis*, 12 Lea, 180; *Bugher* v. *Prescott*, 23 Fed. Rep. 20.

The provisions for the payment to the city of one half of the amount of the taxes collected by levy of the county commissioners for roads and bridges on property within the city are in violation of section 5 of article 9 of the Constitution of Florida, which authorizes counties and cities to assess and impose taxes respectively for county and municipal purposes.

A county can only levy taxes for a county purpose or county purposes.

Skinner v. *Henderson*, 8 L. R. A. 55, 26 Fla. 121; *Stockton* v. *Powell*, 15 L. R. A. 42, 29 Fla. 1.

It cannot be successfully urged that the repairing, working, improving, and laying out of the streets of a city under its ordinances and by its officials, are in any sense county purposes.

There may be a county road within the limits of a city or town.

State v. *Putnam County Comrs.* 23 Fla. 632.

In the taxing authority given the city of Jacksonville, the legislature has unequivocally defined expenses for streets as embraced within purposes strictly municipal.

Acts 1893, p. 310.

County purposes and municipal purposes cannot be one and the same.

Knoxville v. *Lewis*, 12 Lea, 186.

The county authorities can have no control, direction, or any voice whatever in the expenditure of a single dollar which they raise by taxation and are directed to turn over to the city for streets.

Atty-Gen. v. *Bay County Supvrs.* 84 Mich. 46; *Harward* v. *St. Clair & M. Levee & Drainage Co.* 51 Ill. 130; *Nashville* v. *Towns*, 5 Sneed, 186; *State* v. *De Soto Parish Police Jury*, 47 La. Ann. 1244; *Allen* v. *Taunton*, 19 Pick. 487; *Parsons* v. *Goshen*, 11 Pick. 396.

The said provision of the law is also in violation of section 1 of article 9 of the Constitution, providing for a uniform and equal rate of taxation.

Primm v. *Belleville*, 59 Ill. 142.

When a statute is relied upon as a declaration of duty to do a thing, it should clearly appear by its terms or necessary implication that the performance of the act devolved upon the defendant for the benefit of the petitioner.

2 Spelling, Extraordinary Relief, 1370.

The claim of the relator is an unliquidated demand.

Black, Law Dict. p. 724.

A writ of mandamus will not issue to pay an unliquidated demand.

Cox v. *Whitfield County Comrs.* 65 Ga. 741; *Com.* v. *Allegheny County Comrs.* 16 Serg. & R. 317.

County commissioners will not be compelled to act upon claims while there are no funds in the county treasury for their payment.

4 Am. & Eng. Encyclop. Law, p. 401; *McDonald* v. *Maddux*, 11 Cal. 187.

Messrs. **Walker & L'Engle**, for defendant in error:

As to who shall "turn over" the "one half" of this fund as required by the proviso, nothing can be clearer than that it must be done by the county commissioners.

The claim insisted upon is emphatically a liquidated one, fixed and settled by the terms of the proviso, at "one half of the amount realized from said special tax on property in incorporated cities or towns."

State v. *Shearer*, 29 Neb. 477.

You will not blot out the proviso unless you shall upon fair discussion and careful consideration feel no doubt, but an abiding conviction, that it is clearly repugnant to some provision of the constitution of our state.

Cooley, Const. Lim. 6th ed. pp. 192, 196-202, 204-206, 209.

Streets are public highways under the control of cities and towns, subject to the paramount authority of the commonwealth.

Southwark R. Co. v. *Philadelphia*, 47 Pa. 314; *Branson* v. *Philadelphia*, Id. 329; 24 Am. & Eng. Encyclop. Law, p. 2, *note 1.*

The legislature recognizing that a street was none the less a public road of the county for being inside the corporate limits of a city, as a matter of convenience to the county commissioners, made a provision allowing them to delegate their duty as to such parts of such public roads to those in authority in the city and necessarily commanded the turning over of a proper proportion of the special fund in question to enable the city officers to discharge their duty.

The provision for keeping up such parts of public roads as might be streets in a city is germane to, and properly connected with, the subject of "establishing, etc., the public roads of the counties.

The proviso to section 17, chapter 4014, does not violate article 3, section 16, of our Constitution.

Fahey v. *State*, 27 Tex. App. 146; 23 Am. & Eng. Encyclop. Law, pp. 229-275; *Schehr* v. *Detroit*, 45 Mich. 626.

There is no imperative requirement that taxation shall be equal. If there were, the operations of government must come to a stop, from the absolute impossibility of fulfilling it.

Cooley, Taxn. 2d ed. pp. 164, 167; *Com.* v. *People's Five Cents Sav. Bank*, 5 Allen, 428.

Neither the absence of demand, nor the expenditure of well nigh all of this special fund, can place the circuit in error upon the record sent here in the matter of issuing this peremptory writ.

2 Spelling, Extraordinary Relief, § 1458.

Mabry, *Ch. J.*, delivered the opinion of the court:

It is contended for plaintiffs in error that the proviso of section 17 of the Act of 1891, chapter 4014, the basis for this suit, is in conflict with the constitution in two particulars. The first one is, that the subject-matter of the proviso is not expressed in the title of the act, as required by section 16 of article 3 of the Constitution; and the second is, that it is an attempt to divert money raised by taxation for county purposes to other and unauthorized uses, in violation of section 5 of article 9 of the Constitution. The title of the act in question is: "An act to provide for establishing, working, repairing, and

maintaining the public roads and bridges of the several counties of this state, and to provide penalties for failure thereof." Provision is made in the act for working, repairing, and maintaining the public roads of the counties of the state by means of manual labor by the residents of the several counties subject to road duty, aided for building and repairing bridges by a one mill tax on the dollar, in case such roads and bridges are not worked, repaired, and maintained by a special tax as provided in the 17th section of the Act. After defining the powers and duties of the county commissioners of the county over and in reference to the public roads and bridges, directing the division of the counties into road districts and providing the manner of compelling those subject to road duty to work the roads, it is provided in the 16th section that "no person residing in and paying municipal taxes to any incorporated town or city shall be required to work on the public roads under this law." The 17th section authorizes the county commissioners of any county, whenever deemed advisable and for the public good, to levy a special tax for public roads and bridges, not to exceed three mills on the dollar, and on all the real and personal property in the county subject to taxation, which tax shall be assessed and collected as other taxes of the county, and the money arising therefrom to be paid into the county treasury as a special fund to be expended under the direction of the county commissioners solely for the purpose of maintaining, working, and keeping in good condition the public roads and bridges of the county and in purchasing tools and materials for that purpose. The proviso to this section reads: "Provided, however, that one half of the amount realized from said special tax on property in incorporated cities or towns shall be turned over to the municipal authorities of said cities or towns, to be used in the repairing, working, and improving and laying out the streets thereof, as may be prescribed by the ordinances of said cities or towns." When the special tax for working and maintaining the public roads and bridges is levied, no person residing in the county shall be required to work on the public roads of the county.

We will first consider the contention that the provision for turning over one half of the money raised for the public roads and bridges of the county to the municipal authorities to be used by them in laying out and maintaining the streets thereof is a devotion of it to other than county purposes. It is beyond question that, under section 5 of article 9 of the Constitution, the legislature cannot authorize counties to levy taxes for any other than county purposes, nor can counties be authorized to devote money so raised to any other than such purposes. *Skinner* v. *Henderson*, 26 Fla. 121, 8 L. R. A. 55; *Stockton* v. *Powell*, 29 Fla. 1, 15 L. R. A. 42; *Nashville* v. *Towns*, 5 Sneed, 186. In the case of *State* v. *Putnam County Comrs.*, 28 Fla. 632, the question presented was whether the county commissioners had been deprived of jurisdiction over that part of a public road of the county included within the corporate limits of a town subsequently incorporated under the general law for the incorporation of cities and towns. The court said, in effect, that whether the county commissioners had been deprived of the jurisdiction of such road within the new town organization depended upon the legislation on the subject of public roads and of municipal corporations, and that the intent of the legislature, as manifested by the statutes, would control. The conclusion was that the county commissioners had not been so deprived of jurisdiction over the road. As shown in the case of *Skinner* v. *Henderson*, *supra*, the city of Tampa had entered into a contract for the construction of a bridge over a river within the corporate limits of the city, and the county commissioners, on petition for that purpose, ordered that a portion of the cost of the bridge be paid by the county. The payment of the money by the county was enjoined and the bill filed for this purpose, among other things, alleged that the bridge was wholly within the corporate limits, entirely a municipal improvement, and not a county purpose within the meaning of the constitution. Such allegation being admitted to be true on demurrer, it was held that the county commissioners had no authority to appropriate the money. Anticipating the questions that might arise in the case, the court further said that the statute authorizing the city to build bridges within its limits did not necessarily revoke the authority given to the county by general statute without restriction as to locality, to build a bridge within the city limits. As there may be bridges serving only a city purpose, so there may be others demanded in the same territory for county purposes, and where the circumstances create this demand, and the bridge is for the use and benefit of the people of the county at large, or of some considerable portion of them, and intended and needed as well for those outside as for those inside the city, the authority of the county to build it is not annulled by the local city statute. Some courts hold that statutes conferring, in general terms, authority upon counties to establish and maintain public roads and bridges in the counties without restriction as to locality will not be construed so as to authorize its exercise within the territorial limits of incorporated towns or cities situated therein, when legislative authority has been given such towns and cities to establish and maintain municipal streets and highways. We need not go into a discussion of such decisions, as this court has admitted their existence and refused to follow them.

In *State* v. *Putnam County Comrs.*, *supra*, it is said: "Though all public roads and all streets are public highways, yet neither all public highways nor all public roads are streets, or city or town highways. . . . Public roads are established by the county authorities with reference to the convenience of the people of the county or of neighborhoods therein; streets and other municipal highways are located in obedience to the dictation of the welfare and convenience of the town or city. The road may be so located in the town that no interest of the munici-

pality would dictate its maintenance at municipal expense; it may touch no municipal highway of any kind." The case of *Skinner* v. *Henderson* clearly recognizes a distinctly municipal county purpose in respect to a bridge within the corporate limits, and also a mixed or double municipal and county purpose in respect to the same bridge, dependent upon the circumstances of each particular case. In both of the decisions just referred to the legislative intent, as manifested by the legislation on the subject of public roads and bridges, and in reference to the municipalities in question, was recognized as controlling. The question we are to deal with is not so much one of legislative intent as one of legislative power. The 17th section of the Act before us expressly authorizes the county commissioners of any county in the state, when deemed advisable and for the public good, to levy a special tax not exceeding three mills for working and maintaining the public roads of the county, and directs that one half of the amount realized from said tax on property in incorporated cities and towns shall be turned over to the municipal authorities thereof to be used in repairing, working, and improving and laying out the streets thereof as may be prescribed by ordinances. There is no doubt about the legislative intent here, and if there is no constitutional inhibition against carrying it out, it is the duty of the court to enforce it. The act must be clearly unconstitutional before we are authorized to set it aside on such ground. If we entertain any well-founded or reasonable doubt about the constitutionality of the act, we must, in deference to the legislative department, uphold it. This rule of constitutional construction is well settled. *State* v. *Hocker*, 36 Fla. ——. If the establishment and maintenance of streets in incorporated towns and cities cannot be declared by the legislature, or regarded to any extent a county purpose within the meaning of the provision of the constitution on the subject, then the proviso to the act in question directing that a portion of the money raised by taxation for the public roads and bridges of the county be turned over to the municipal authorities for the purpose mentioned, is unauthorized and void. That locality alone within the corporate limits cannot determine the character of the purpose, is clearly pointed out by the decisions in this court already referred to, and even under statutes giving general authority over public roads and bridges to county commissioners, taken in connection with statutory authority in municipal bodies over streets, lanes, and alleys within their limits, it may be that a street will subserve both a county and municipal purpose. If such should be the case there would be no difficulty, according to the reasoning in the decision in *Skinner* v. *Henderson*, in appropriating road money raised by county taxation to all such streets that exist in incorporated towns and cities. So long as the money is devoted to such streets, even though expended under the agency of the municipal corporation, it would not be a diversion of it under such statutes from strictly county purposes. We have no information in the record as to the character of the streets in the city of Jacksonville for the establishment and maintenance of which the funds in question are demanded, and even under statutes similar to those existing when the decisions to which we have referred were made, it would be difficult to affirm that the devotion of part of the money raised by taxation on the property in the town or city to maintaining the streets therein would be a diversion of it from county purposes. *Halsey* v. *People*, 84 Ill. 89. But, as before stated, there is a specific statutory direction that one half of the road money raised by county taxation from the taxable property in incorporated towns and cities shall be turned over to their municipal authorities for the specific purpose of laying out and maintaining the streets therein, and, conceding this to be a direction to turn the money over to the municipal authorities to be applied by them on any or all of the streets of the municipality, without distinction, the question is, Is such an object so far foreign to a county organization, or a county purpose as to be forbidden by the constitution under county taxation for public roads or highways? The authorities have formulated no generally accepted definition of county purposes, but leave each case involving the question to be decided as it may arise. *Cotten* v. *Leon County Comrs.* 6 Fla. 610; *Stockton* v. *Powell*, *supra*. In the first-mentioned case it is said: "The constitution does not attempt to give a definition of county purposes, and to obtain a correct interpretation of that phrase we must look to the contemporaneous legislation upon that subject and the uniform action of the county courts under the territorial government. By this reference it will be abundantly demonstrated that at that day county purposes were taken to embrace principally the erection and repair of court-houses and jails, the opening and maintaining public thoroughfares within the limits of their respective counties, by opening roads, building bridges and causeways and keeping the same in repair, licensing and regulating ferries and toll-bridges, etc. It is thus seen that the entire subject of highways was, at the time of the constitution, an object peculiarly within the jurisdiction of the county authorities, and we are hence warranted in the assumption that it was so understood by the convention when they used the phrase 'county purposes.'"

In *Hamilton County Comrs.* v. *Mighels*, 7 Ohio St. 109, the court says: "A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are in fact but a branch of the general administration of that policy." The legislature has always under our system of government had plenary control of all public highways

whether they be public county roads or streets in cities and towns. *State* v. *Jacksonville Street R. Co.* 29 Fla. 590. Cooley on Taxation, page 130, says: "One of the most important functions of government is the making provision for public roads for the use of the people. The variety of these is great, and the modes of construction and operation are different. No question is made of the competency of the legislature to levy taxes for the common highway, the improved turnpike and macadamized road, the planked or paved street, the canal, the tramway or the railway. Any or all of them may be constructed by the state, or under state authority, by the municipal subdivisions of the state within whose limits they may be needed." The decision in the case of *Will County Suprs.* v. *People*, 110 Ill. 511, makes a distinction between raising money by taxation for the purpose of building bridges and maintaining public highways, and for the purpose of carrying on other more private concerns of a municipality. It was there held that the raising of money by taxation in towns or counties in pursuance of a general law of the state, for the purpose of building bridges, maintaining public highways, and for other objects of a similar character, in which the people of the state at large are directly interested, is not the levying of a tax for a strictly local corporate purpose within the meaning of the Illinois Constitution. In that case a mandamus was sustained against the board of county commissioners of the county to compel the levy and collection of a tax upon the property of the county to aid the commissioners of highways of the town of Wilmington to build a bridge across a river within the limits of said town. It is true that there may be a distinctively municipal purpose, as distinguished from county purposes, and, in our judgment, the constitution of the state recognizes such distinction, but in reference to the laying out and maintenance of public streets, or municipal highways, over which not only the people of the municipality, but of the entire county, can travel, it cannot be said, we think, that they are so distinctively and exclusively a municipal purpose as to render it impossible for the legislature to authorize the counties to devote revenue raised by county taxation for public roads on the property situated within the municipalities to the maintenance of the public streets therein. The result of this conclusion is, that the proviso in question is not in conflict with section 5 of article 9 of the Constitution.

The objection that the subject-matter of the proviso to section 17 is not expressed in the title of the act cannot, in our judgment, be sustained. It is not questioned that it was not competent for the legislature under the title of the act to authorize the county commissioners, when deemed advisable and for the public good, to levy a special tax not exceeding three mills on the dollar on the entire taxable property of the county for the purpose of maintaining, working, and repairing the public roads therein. What matter is properly connected with the expenditure of the money raised by such a levy? It was held in *State* v. *Montgomery County Comrs.*, 26 Ind. 522, that "when a matter is so closely connected with the subject of the act as to create a doubt whether it is not included within it, the court will not consider the question whether the legislative action upon it violates the constitutional prohibition relating to the title of laws." "A street is a public road or way in the city, town, or village. All streets are highways, but all highways are not necessarily streets." 24 Am. & Eng. Encyclop. Law, p. 2. All highways, whether public roads or streets, are subject to the control of the legislature. Our constitutional requirement in reference to the subject-matter and titles of laws is, that each law shall embrace but one subject and matter properly connected therewith, and that the subject shall be briefly expressed in the title. It is not essential that the title should give a synopsis of all the means by which the object of the law is to be accomplished by the provisions in its body. *State* v. *Green*, 36 Fla. ——. The title of an act may be general, and so long as the generality of the subject therein expressed is not employed as a guise to conceal the real object of the law, or some provision therein, it will not be objectionable. It is also true that the title to an act may be so restrictive in reference to a subject expressed therein as to confine the body of the act to such phase of the subject as is indicated by the title. *State* v. *Palmes*, 28 Fla. 620; Cooley, Const. Lim. 6th ed. p. 172. The general subject of the title of the act we are considering is the laying out and maintaining the public roads of the counties, and streets are public roads or highways within the limited space of the municipalities within the counties. We deem the provision as to applying a part of the road tax to the streets in incorporated cities and towns in a county as matter properly connected with the maintenance of public roads in the county; at least it is so closely connected therewith as to create a doubt whether it is not included in the general subject of the roads of the county.

In the case of *Knoxville* v. *Lewis*, 12 Lea, 180, cited by counsel for plaintiffs in error, the title of the act considered was to provide more just and equitable laws for the assessment and collection of revenue for state and county purposes, and to repeal all laws then in force whereby revenue was collected for the assessment of real estate, personal property, privileges, and polls. The act contained many sections, and after making provisions on the subject of assessing and collecting state and county revenue, it enacted, in the 50th section, that the county clerk should collect the municipal revenues. Under the law previously existing the municipal recorder collected the town taxes. Under a constitution similar to ours as to the subject-matter and title of an act it was held that the 50th section introduced a new subject not expressed in the title, and the entire act was void. In reaching this conclusion the court said there was a distinction between state and county revenue, and municipal revenue, recognized by the constitution itself, and as a result the legislature

had undertaken to introduce into the act on the subject of state and county revenue provisions in reference to a different subject not expressed in the title. Our constitution recognizes a difference between taxation for distinctively county or municipal purposes, but in reference to public highways, whether public roads or urban highways, in the county, it is competent for the legislature to authorize the counties to raise money by taxation for their maintenance.

The turning over of one half of the money raised from the property in the towns and cities does not destroy the equality and uniformity of the tax itself. The levy is made upon all the taxable property of the county just as any other tax is assessed and levied, and all property in the county bears an equal portion of the burden of such tax in proportion to its value. *Sangamon County Supvrs.* v. *Springfield*, 68 Ill. 66.

It is further objected that the statute does not require the county commissioners to turn over the money to the municipal authorities, or that it is left in doubt as to whose duty it was to turn over the money, and that the relief by mandamus will be refused when the right is doubtful. It will be seen that the 17th section directs the money when collected to be paid into the county treasury as a special fund to be expended under the direction of the county commissioners solely for the purpose of maintaining, working, repairing, and keeping in good condition the public roads and bridges of the county, and for purchasing suitable tools, implements, and material for that purpose, "provided, however, that one half of the amount realized from said special tax on property in incorporated cities or towns shall be turned over to the municipal authorities of said cities or towns to be used in the repairing, working, and improving and laying out of the streets thereof as may be prescribed by the ordinances of said cities or towns." No money can be drawn from the county treasury except upon warrant drawn by the order of the county commissioners, and the warrant shall specify the particular fund upon which it is drawn. Rev. Stat. §§ 584, 585. The county treasurer is required to keep the various county funds separate (sec. 586), and he is forbidden to pay out any money in his hands as county treasurer except upon warrant drawn as provided under an order of the county commissioners. If the municipal authorities are entitled to any portion of the special fund raised for the maintenance of the public roads of the county and required to be paid into the county treasury, it is evident that it is the clear duty of the county commissioners, under the statutes mentioned, to draw the warrant for the money. The municipal authorities are compelled to obtain such warrant before they can call upon the county treasurer for the money, and the plain duty in such a case rests upon the county commissioners to issue the warrant.

The only other contention demanding any discussion is, that the peremptory writ commands the county commissioners to forthwith turn over to the municipal authorities of Jacksonville $5,746.74, when, as shown by the return, only $758.91 remained in the treasury to the credit of the public road fund. The case was disposed of on the alternative writ and return thereto, and as shown by the return one half of the amount collected and paid into the county treasury on property in the city of Jacksonville as a road fund for the years 1891, 1892, and 1893 was $8,455.79. The sum of $2,709.05, it is conceded, had been paid, and the balance amounted to $5,746.74. This last sum is the amount ordered by the court in the peremptory writ to be immediately turned over to the city authorities. The return distinctly alleges that the whole amount had been required and used for the purpose of keeping the county roads and bridges in good repair, except the sum of $758.91, the balance remaining in the hands of the county treasurer. According to the return of the county commissioners, it is clearly shown that the county had expended all the road and bridge fund except the amount stated, and that the only sum received by the city authorities was $2,746.05. The county had expended largely the city's part of the road money, but the money, as is clearly shown, is not in the county treasury to be turned over, and the question arises, To what extent will the remedy of mandamus apply? The writ of mandamus is a discretionary remedy, and while the courts will apply it in proper cases, they often refuse it when it would be attended by no beneficial results. *State* v. *Marion County Comrs.* 27 Fla. 438. A peremptory writ of mandamus will not usually issue commanding an officer to do what is not within his power to do, and though by putting it out of his power to perform a duty he may become liable in damages, still where he cannot perform the act, and this is clear to the court, mandamus will not be issued against him. This rule has been applied to public officers who have improperly diverted funds in their hands or under their control so that they are unable to comply with some duty in reference to their disposal. *Rice* v. *Walker*, 44 Iowa, 458; *Bates* v. *Porter*, 74 Cal. 224; *Universal Church* v. *Columbia Twp. Section 29, Trustees*, 6 Ohio, 446. 27 Am. Dec. 267; *State* v. *Vanaredale*, 42 N. J. L. 586; *People* v. *Tremain*, 29 Barb. 96; *State* v. *New Orleans*, 34 La. Ann. 469; *Township 36, Range 2 East, Board of Education* v. *Boyd*, 58 Mo. 276.

Under the showing made, we think the court should not have undertaken to compel the county commissioners to turn over money that was not under their control, and which it was not in their power to do as officials of the county. The judgment should have commanded the county commissioners to turn over the road funds in the county treasury by issuing a warrant on the treasurer for that purpose. To this extent only should the remedy by mandamus be applied in this case.

The judgment is reversed with directions that the circuit court enter judgment in accordance with this opinion.

PENNSYLVANIA SUPREME COURT.

BALD EAGLE VALLEY R. CO. *et al.*, *Appts.*,
v.
NITTANY VALLEY R. CO. *et al.*

(.....Pa.....)

1. **The intention of the parties** to a covenant respecting real property is the controlling element in determining, at least on a bill of equity, whether or not the covenant shall bind subsequent owners of the property.

2. **Consideration for an agreement** by a railroad company and other parties about to construct a railroad from a mine to a furnace and from the furnace to an established railroad, that they will ship all their products at reasonable rates over the latter railroad, may be found in the purchase by the owner of the old road of a certain quantity of the bonds of the new company at par in order to supply funds for the enterprise.

3. **A contract to give all the traffic o certain mines and furnaces and of a railroad therefrom,** at reasonable rates, to another and connecting railroad which furnishes aid to develop the business, is not *ultra vires* or in violation of Const., art. 17, §§ 1, 3, and 4, requiring railroads to carry each other's traffic without discrimination, and prohibiting discrimination in transportation for individuals, and prohibiting the consolidation of parallel and competing roads.

(October 7, 1895.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas for Centre County sustaining a demurrer to the complaint in an action brought to enjoin defendants from violating an alleged contract to give plaintiffs the traffic from certain iron works. *Reversed.*

The facts are stated in the opinion.

Messrs. **John Blanchard** and **David W. Sellers,** for appellants:

The court erred in holding that the Valentine Iron Company does not sustain either privity of contract or estate with the covenantors or covenantees in the agreement of March 22, 1887, and that the plaintiffs are strangers in title to the land owned by the Valentine Iron Company.

In the English *note* to *Spencer's Case,* in 1 Smith, Lead. Cas. 9th Am. ed. pp. 186–188, it is pointed out that in the English case of *Minshull* v. *Oakes,* 2 Hurlst. & N. 793, the court of exchequer has not only expressed an opinion that the rule announced by Coke as having been decided in *Spencer's Case* is unreasonable, but has also suggested that that case itself decided the contrary.

At page 208, in the American *note,* it is said: "It may be observed that the question of whether it is necessary to covenant for 'assigns,' as to anything not *in esse* at the time of the covenant, discussed in the first and second resolutions of the leading case, has generally been passed over lightly in this country, and the use of the word "assigns," considered of little importance if an intention that the covenant run can be gathered from the whole instrument."

Masury v. *Southworth,* 9 Ohio St. 340; *Bradford Oil Co.* v. *Blair,* 113 Pa. 83, 57 Am. Rep. 442.

The "privity of estate," held to be essential in courts of common-law jurisdiction to sustain a covenant running with the land against a subsequent grantee of the land, is understood, in the best-considered authorities of the present day, in a sense very much modified from that defined and exemplified in the earlier cases.

Bronson v. *Coffin,* 108 Mass. 175, 11 Am. Rep. 335, 118 Mass. 156; *Savage* v. *Mason,* 3 Cush. 500; *Horn* v. *Miller,* 9 L. R. A. 810, 136 Pa. 640; *Webb* v. *Bennett's Branch Imp. Co.* 161 Pa. 623.

While in the courts of common-law jurisdiction privity of estate in this modified and modern sense is held to be essential in order to cause an otherwise proper covenant to run with the land, in equity jurisprudence the rule is different.

English *note* to *Spencers' Case,* 1 Smith, Lead. Cas. 9th Am. ed. p. 198; *Tulk* v. *Moxhay,* 2 Phil. Ch. 774; *Luker* v. *Dennis,* L. R. 7 Ch. Div. 227, 47 L. J. 174; *Pollard* v. *Shaaffer,* 1 U. S. 1 Dall. 210, 1 L. ed. 104; *Church* v. *Ruland,* 64 Pa. 432; *Com.* v. *Bala & Bryn Mawr Turnp. Co.* 153 Pa. 47.

It may be well said in regard to this case, in the language of the Pennsylvania case of *Horn* v. *Miller, supra,* that "the benefit and the burden are so inseparably connected that each is necessary to the existence of the other," that "both must go together," that "the liability to the burden will be a necessary incident to the right to the benefit."

Coleman v. *Coleman,* 19 Pa. 101, 57 Am. Dec. 641.

As to the principles involved where a lease by the mortgagor is prior and where it is subsequent to the mortgage, see—

Moss v. *Gallimore,* 1 Smith, Lead. Cas. 6th Am. ed. p. 843; 2 Smith, Lead. Cas. 9th Am. ed. p. 883.

As regards the application of these principles to covenants running with the land, made by the mortgagor, it may be noted that the English decisions have so far adhered to the old common-law ideas above adverted to as to hold that an equity of redemption will neither carry the benefit nor burden of covenants running with land to an assignee from the mortgagor.

American *note* to *Spencer's Case,* 1 Smith, Lead. Cas. 6th Am. ed. p. 186; *Pargeter* v.

NOTE.—For a few cases on the general subject of covenants running with the land, see *notes* to Pittsburg, C. & St. L. R. Co. v. Bosworth (Ohio) 2 L. R. A. 199, and Aiken v. Franklin (Minn.) 6 L. R. A. 380, also Crawford v. Witherbee (Wis.) 9 L. R. A. 561; Mygatt v. Coe (N. Y.) 11 L. R. A. 648; Thomas v. Bland (Ky.) 11 L. R. A. 240; Leonard v. Clough (N. Y.) 16 L. R. A. 305; Mott v. Oppenheimer (N. Y.) 17 L. R. A. 409; Hickey v. Lake Shore & M. S. R. Co. (Ohio) 23 L. R. A. 396; Mygatt v. Coe (N. Y.) 24 L. R. A. 850.

For legality of combination of railroad companies, see United States v. Trans-Missouri Freight Asso. (C. C. App. 8th C.) 24 L. R. A. 73.

29 L. R. A.

tionate amounts of $634,350 in stock of the new company issued in shares of the par value of $50. By this change the railroad companies, plaintiffs, became stockholders in the amount proportionate to their $75,000 purchase of bonds. The new company continued the same relations with the railroad companies from the date of its organization down to the winter of 1892-93.

On the 11th of May, 1889, the "Central Pennsylvania Railroad Company" was incorporated to construct a railroad from Mill Hall, in Clinton county, to Unionville, in Centre county, a distance of about twenty-five miles, located with a view to form a connection with the Nittany Valley Railroad near Bellefonte and the Beech Creek Railroad near Mill Hall. The last-named railroad is, in its terminals and connections, a competitor of the plaintiff railroad companies. The plaintiffs averred that the Valentine Iron Company, since the beginning of the year 1893, has encouraged the construction of the Central Pennsylvania Railroad financially and otherwise; J. W. Gephart, the president of the iron company, being also the president of the railroad company, is also acting as superintendent of the work of construction of the competing road and is the chief representative of the undertaking; that the Nittany Valley Railroad, in 1891, was leased to the Valentine Iron Company and is operated by the iron company. That the Valentine Iron Company threatens to give the traffic coming and going to the mines and furnace for transportation over the Central Pennsylvania, and thence by its connections, over the lines of competing roads.

The plaintiffs aver that the acts of defendants are in violation of their covenants in the agreement of March 22, 1887, and pray that they be restrained by injunction. The defendants demurred to the bill:

1. Because, by the sale on the mortgage, they took the property free and discharged from all the covenants of the agreement, the agreement having been executed subsequent to the mortgage.

2. The purchaser at the mortgage sale took the land discharged of the covenants, therefore every other party to the agreement was released.

3. That the agreement was without consideration and is therefore void.

4. The agreement was against public policy.

5. It was in violation of article 17 of the Constitution and is not enforceable in law or equity.

6. That the Nittany Valley Railroad did not covenant not to aid in the construction of competitive lines of railroad.

7. That the restraint of the construction of competitive lines, whether by moral support or otherwise, is illegal.

8. That to enjoin defendants from giving traffic to a common carrier, under the laws of the commonwealth, is in restraint of trade.

9. There is an adequate remedy at law.

The court below, after argument, sustained the first, fourth, fifth, and eighth grounds of demurrer and entered a decree dismissing the bill, and from that decree plaintiff appeals, assigning sixteen errors to the decree and opinion of the court.

The bill sets out the facts in substance as we have stated them, and it follows from the demurrer that defendants admit them as averred.

The opinion of the learned judge of the court below is in good part devoted to demonstrating that the covenant to transport the traffic to and from the ore lands and furnace over plaintiff's lines and not to aid and encourage the construction of other or rival roads to the source of the traffic, is not a covenant real which runs with the land, binding upon the heir, successor, or assignee, but is a mere personal covenant binding only upon the parties to it. *Spencer's Case*, the leading case, 1 Smith, Lead. Cas. 9th Am. ed. p. 174, with many of the cases cited in the notes to the leading case, and others which do not there appear, are relied on as authority for this holding. *Spencer's Case* is taken from 5 Coke, 16, as reported by Coke, who says that among other questions it was decided: "Where the assignee shall be bound without naming him and where not; and where he shall be bound, although he be expressly named, and where not." It then appears from the case that the second of the seven resolutions adopted by the court is: "If the lessee had covenanted for him and his assigns that they would make a new wall upon some part of the thing demised, that forasmuch as it is to be done upon the land demised, that it should bind the assignee; for, although the covenant doth extend to a thing to be newly made, yet it is to be made upon the thing demised, and the assignee is to take the benefit of it, and therefore shall bind the assignee by express words. . . . But although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land and doth not touch or concern the thing demised, in any sort, there the assignee shall not be charged."

This case, decided three hundred years ago, as with many of the cases at that time, bases its conclusions, in the main, on the results arrived at by the ratiocination of the judge. They assumed certain premises and if, from these, a certain conclusion was reached then the judgment was for plaintiff or defendant; as, for instance in the first resolution, "When the covenant extends to a thing *in esse*, parcel of the demise, the thing to be done by force of the covenant is *quodammodo* annexed and appurtenant to the thing demised, shall go with the land and bind the assignee, although he be not bound by express words." Here the assignee is bound, although the covenantor hath not so said; then the same resolution goes on, "But when the covenant extends to a thing not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which hath no being." Here the covenant does not bind the assignee, although the covenantor hath so said. Resort was had to the instrument to ascertain the subject of the contract and when that was settled on, a contract was made by the judges for the parties without much regard to what the parties said; they looked not for the expressed intention with a view to giving it

effect in the judgment, but adopted a conclusion based often on an artificial or arbitrary rule of construction and this conclusion moulded the judgment; the intention was subordinated to the rule. As shown by the large number of cases, both in England and this country, cited by the able editors of the *notes* to *Spencer's Case*, there has been more or less of a struggle by the courts in the three centuries which have elapsed since that decision was announced to escape from its application, and very often, if the rule defeated the manifest intent of the parties, some distinction was found or assumed which warranted a disregard of it; and in some cases where the rule, if invoked, would plainly shut the door against equity, the door was closed against this rule. Like the arbitrary ancient rules, in *Shelley's Case* [1 Coke, 106], in *Twyne's Case* [3 Coke, 80], and others, it has been given such flexibility by so many later decisions that, without overruling well-decided cases, it is impossible to rigidly apply it at this day even in common-law actions. Whether under our system of administering equity, if this were an action at law, *Spencer's Case* would rule it on the facts, it is not important to decide. This is not an action at law, but a bill in equity, and the controlling element is the intention of the parties to the covenant, and so it is laid down by many of both the English and American decisions, some of them cited in the *notes* to *Spencer's Case*. In the *note* on page 198, English *notes*, it is said: "In *Tulk* v. *Moxhay*, 2 Phil. Ch. 774, it was laid down by *Lord* Cottenham that a covenant made by the purchaser of land that he and his assignee would use or abstain from using the land in a particular way, may be enforced in equity against all purchasers without reference to the question whether the covenant ran with the land." And it is remarked by the editor that *Keppell* v. *Bailey*, 2 Myl. & K. 517, in the court of chancery, a case cited and relied on by the court below and appellees in this case, is overruled by *Tulk* v. *Moxhay*, and the latter case has been since followed and extended.

Take the facts as they are averred in the bill in equity and as they are here admitted by the demurrer: 1. The complainants contributed $75,000 for the development of the ore land and the construction of a furnace and railroad. 2. The furance and railroad were constructed, were put in operation, and ore mines, rom which was obtained ore to run the furnace, opened. 3. The property was sold on a mortgage antedating the agreement and $75,000 contribution about seven months. 4. Those who had the legal title and equity of redemption made the contract, by which they secured plaintiffs' money, and, in consideration therefor, covenanted for themselves, successors, and assigns in the nature of a covenant to run with the lands, to give all traffic coming to or going from the ore lands and furnace to plaintiff's lines. 5. The Valentine Iron Company, the present assignee of the property from the sheriff's vendee, from January, 1891, for nearly two years, accepted all the benefits derivable from this contract as shippers and affirmed it. 6. Defendants refuse absolutely to perform the covenants entered into by their predecessors in title, although the very existence of the property occupied and enjoyed by them was created in part by the large contribution of defendants. 7. There is no adequate remedy at law for a persistent violation of such a covenant.

Should the facts, as they thus appear, move the conscience of a chancellor to afford relief to the injured party? We do not consider it important that by the judicial sale and reorganization of those interested, under a new charter, the nominal identity of the actual parties to the covenant and those now in possession has been changed. The averment of affirmance of the contract by the present defendants is admitted by the pleadings. That the affirmance of a traffic contract touching land rests in parol, will not prevent the interposition of equitable principles even where the contract post-dated a lien through which the defendant claimed title.

In *Campbell* v. *Hand*, 49 Pa. 284, adjoining owners of land on opposite banks of a stream agreed to build and keep in repair a dam for the use of both; on a judgment against one of them, antedating the agreement, his interest was sold at sheriff's sale; the sheriff's vendee used the dam, as did the debtor in the judgment; the court below held the sheriff's vendee bound to contribute to the repairs, because he had, by the use of the dam, affirmed the agreement; this court, Thompson, *J.*, says: "I will not undertake to say the contract created covenants running with the land because the covenantor could not undertake to impose a covenant or duty that might not be divested by a sale of the premises so incumbered by a prior judgment, a sale on which would carry back the title to a period coeval with the date of the lien. . . . Now, why should not the assent of the sheriff's vendee and that of the remaining co-tenant be sufficient to continue the original covenants in their original efficiency? I do not think it is a sufficient negative of the inquiry to say the remedy on the covenants is not pursued."

What would have been the effect of a denial of any affirmance of this contract by the sheriff's vendee, or these defendants, we are not called upon to say; we decide the point on their admission of the affirmance of it.

Nor is the contract as contended by appellees, and as held by the court below, without consideration; the preliminary statements to the stipulations show the value of the consideration. The land association and iron company, with the Nittany Valley Railroad Company, are about to construct the railroad from the furnace to the mines on the land, and from the furnace to a connection with the plaintiffs' lines; they are about to complete a furnace or furnaces partly built; for the purpose of securing funds, they have placed a mortgage to secure $600,000; they cannot carry out their project with a paper mortgage; they want the money which it is to secure; plaintiffs give them $75,000 and agree to carry their products at reasonable rates; if any dispute arises about what is reasonable, they agree to the establishment of a tribunal

to determine the dispute without resort to the courts. In consideration of this aid in the development of their property, defendants agree to give them their traffic. Without such development—the railroad to carry the ore from the mines to the furnace head, and from the casting house to market—their property, for present enjoyment, is useless; by the stipulated aid, it is valuable. This is an ample consideration.

It is held by the court below the contract is in violation of sections 1, 8, and 4 of article 17 of the Constitution. The first section provides that all railroads, as common carriers, shall carry each other's traffic without discrimination. There is nothing in the agreement which contravenes this provision; the railroad company must carry such freight as a shipper offers it; if freight by the public be routed over its road to destination by way of the Central Pennsylvania Railroad, it must so forward it; it is not averred in the bill that the contract is to the contrary.

Section 3 of the same article provides that all individuals shall have equal rights to transportation without discrimination. The bill does not seek to deprive the iron company of the right here guaranteed. The right of every shipper is to make a contract with such common carrier as he chooses to carry his goods to destination; if he makes none expressly, the law implies one with the carrier who accepts his goods. But he cannot make contracts with two or more carriers to carry the same goods; if he does, as but one can carry, the others can invoke the law as a remedy for his violation of contract. If he contracts with a railroad to lay its rails to his manufactory or furnace, and furnish him money to aid him in bringing the raw material to the furnace, and he, in consideration, promises to give the railroad the transportation of such manufactured product to market at reasonable rates, how is the shipper deprived of any right? He but exercises the right guaranteed by the constitution; he contracts for the carrying of his own product for shipment to market from his own manufactory, with whom he pleases; the Constitution does not go further and guarantee him a right to violate his contract when he pleases.

How this contract offends against section 4, which prohibits the consolidation of parallel and competing roads, we do not understand, although this is one of the reasons given for declaring the contract void. The Nittany Valley Railroad, whose traffic is sought by plaintiff, is not a parallel road, but a connecting road, prolonging the plaintiff's reach into new territory; the Central Pennsylvania is parallel to plaintiffs' line; it has no contract either for traffic or consolidation with plaintiffs. The right of one road to lease, make traffic contracts with, or consolidate with connecting roads not parallel or competing has not for thirty-four years been doubted, that we know of; the Act of April 23, 1861, expressly confers such right and the constitution does not affect it, except to prohibit the consolidation and leasing of parallel and competing lines. The rights of connecting roads, under this act, have been recognized many times since the adoption of the Constitution of 1874; and that contracts for through business, both freight and passenger, between connecting roads and shipper, are not only not *ultra vires*, but that they, on the contrary, have for their basis sound business principles; and special contracts may be made with a special class of shippers to secure business. See *Fitchburg R. Co.* v. *Gage*, 12 Gray, 399; *Hersh* v. *Northern Cent. R. Co.* 74 Pa. 181; *Munhall* v. *Pennsylvania R. Co.* 92 Pa. 150; *Hoover* v. *Pennsylvania R. R. Co.* 156 Pa. 220, 22 L. R. A. 263. In this last case the contract was with a manufacturing company for a special rate on coal used for manufacturing purposes; the contract was made eight years before the suit, with a view to the building up and development of the plant. This court, in a most exhaustive opinion by our brother Green, in which nearly all the authorities on the subject are noticed, held that special contracts for a special rate with a manufactory for the transportation of fuel was not undue discrimination; that blast furnaces, iron mills and rail factories are encouraged and built up in sparsely settled regions by the aid of such contracts. While the question of discrimination does not arise in this case, the same principle is involved. Is a contract by a railroad company with an iron company, in which the former contributes a large sum of money to the latter for development, and gives to it facilities for transportation, in consideration of which the iron company contracts to give it all its traffic, *ultra vires*? It is not in restraint of trade, for its express purpose and necessary effect are to increase both trade and population; not a single traveler or shipper, outside the contracting party, is affected in his selection of a route; the contract binds none of them.

It is not seldom those who have reaped benefits from a contract such as this seek to escape its obligation by taking refuge in that assumed turpitude, which, on grounds of public policy, avoids the contract; but here, and it is a gratification to us to say it, the parties to this contract violated no law; restrained not others from engaging in business; did nothing of evil example or detrimental to public morals; therefore, there is no public policy which, in the absence of express legislative enactment, makes void this contract; as there, clearly, is no adequate remedy at law for repeated or continued violations of the defendants' covenants, they ought to be enforced in equity, to the extent equity will take cognizance of their violation.

While the covenant to ship over plaintiffs' lines on the faith of which plaintiffs enlarged their facilities for shipment and paid their money will be enforced, our decree will go no further. The Central Pennsylvania Railroad is a corporation under the laws of the commonwealth authorized to construct a line of railroad between certain terminals; its manifest duty is to construct its road for the benefit of the general public; no citizen can be restrained from giving its construction moral and material aid; public policy demands that it shall fulfill the objects of its

being. Admit that the officers of defendant company are giving it moral aid and encouragement because its construction will make it possible for defendants to violate their contract for shipment; this, at most, shows disregard of a moral obligation without an infraction of the legal one, the actual shipment; the latter, equity can control, the former, it will not, both on grounds of public policy, and because its process would, to a great extent, be ineffectual; we cannot prevent men wanting to violate their contracts, while we can prevent the overt acts which constitute the breach; equity can enforce a tangible, substantial right of property under a contract, but it cannot make men good, and it is a very rare case in which it even tries to. With these defendants, however, who have pleaded, the case is different; we can restrain them from a flagrant violation of an essential covenant of their contract; the Nittany Valley Railroad Company and the Valentine Iron Company affirmed the original contract which, in fact, gave them a business existence; they are bound to give their traffic to plaintiffs; this much of the contract is within the grasp of equity.

Therefore, *the decree of the court below sustaining the demurrer is reversed* and set aside at costs of appellees, and it is adjudged and decreed that an injunction issue, directed to the Nittany Valley Railroad and the Valentine Iron Company, their and each of their officers, agents, and employés, including the said J. W. Gephart, president of the Valentine Iron Company, restraining them from giving any traffic coming from or going to points upon the railroad of the said Nittany Valley Railroad, or coming to or going from the mines and furnaces of the said Valentine Iron Company, that may be owned or controlled by the said company and originating upon said lands mentioned and described in agreement of 22d of March, 1887, to the said Central Pennsylvania Railroad Company or to any company or persons other than to the said plaintiffs. It is further ordered that the said contract be specifically performed in this respect; they, the said Nittany Valley Railroad Company and the said Valentine Iron Company, are hereby ordered and directed to give all traffic coming or going to points upon said railroad, or coming to or going from the property, mines, and furnaces of the said iron company, in so far as said traffic originates with or is controlled by them, the said companies, to them the said plaintiffs, their successors or assigns. It is further ordered this record and decree be remitted to the court below, that our order and decree may be carried into effect.

Petition to modify decree so as to permit further pleadings denied.

RHODE ISLAND SUPREME COURT.

William H. IRELAND
v.
GLOBE MILLING & REDUCTION CO.

(.....R. I.....)

1. **A nonresident's shares of stock in a foreign corporation** cannot be reached by attachment in a state where the corporation is doing business, although its officers are also in such state.

2. **A by-law giving the corporation the first right to purchase stock** which is for sale by any of its members is not valid under a statute specifying several subjects upon which by-laws may be enacted, but making no reference to the question of stock transfers.

(September 19, 1895.)

ACTION to compel a transfer of stock on the books to defendant corporation. *Judgment in favor of plaintiff.*

The facts are stated in the opinion.

Mr. **William H. Sweetland,** for plaintiff:

It is beyond the power of a corporation to make such by-laws unless specially authorized by its charter as in case of *Sweetland* v. *Quidnick Company*, considered in 11 R. I. 328, or when such power is given by general statutory provisions as in Rhode Island since the passage of Pub. Laws, chap. 1200, § 7.

Johnson v. *Laflin*, 5 Dill. 73; *Chouteau Spring Co.* v. *Harris*, 20 Mo. 388; Morawetz, Priv. Corp. § 164.

A by-law which makes approval of directors a condition precedent to transfer cannot be enforced to defeat the rights of third parties.

23 Am. & Eng. Enc. Law, p. 638 *C.* and *notes;* Morawetz, Priv. Corp. § 164, and *notes.*

The stock of Stearns, a nonresident, in the defendant foreign corporation was not attachable in a suit commenced by a nonresident plaintiff in the courts of this state.

The *situs* of stock for the purpose of attachment and execution is the domicil of the corporation and that place alone.

Plimpton v. *Bigelow*, 93 N. Y. 592; 23 Am. & Eng. Enc. Law, p. 632; *Winslow* v. *Fletcher*, 58 Conn. 394, 55 Am. Rep. 122.

A corporation is not debtor to the stockholders by reason of their owning shares, and should not be garnisheed as such.

8 Am. & Eng. Enc. Law, p. 810; Drake, Attachm. § 471; *Plimpton* v. *Bigelow*, 93 N. Y. 601.

Mr. **Warren R. Perce,** for defendant:

In *Sweetland* v. *Quidnick Co.*, 11 R. I. 328, a pre-emption clause of this character, contained in a charter, was recognized as valid and its terms were enforced.

An agreement or contract between the members or a part of them not to sell except upon certain conditions is valid, unless it amounts to an unreasonable restraint of trade.

Cook, Stock & Stockholders, § 332.

NOTE.—The validity of restrictions on transfers of stock such as that involved in the above case is treated at length, with a review of the authorities, in a *note* to New England Trust Co. v. Abbott Mass.) 27 L. R. A. 271.

See also 35 L. R. A. 306; 38 L. R. A. 299; 39 L. R. A. 100, 701.

An agreement of this sort was sustained by the Supreme Court of the United States as valid.

Brown v. *Pacific Mail S. S. Co.* 5 Blatchf. 525.

The defendant corporation had the right to make this by-law regulating the transfer of stock, and creating thereby a lien upon the stock for a certain limited time.

Child v. *Hudson's Bay Co.* 2 P. Wms. 207; *Morgan* v. *Bank of North America*, 8 Serg. & R. 73, 11 Am. Dec. 575; *Cummings* v. *Webster*, 43 Me. 192; *Geyer* v. *Western Ins. Co.* 8 Pittsb. 41.

The fact that Stearns was a director of the corporation and well knew the by-law in question is of great importance.

Morgan v. *Bank of North America*, *supra*; *Lockwood* v. *Mechanics Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

Restrictions may be created by a contract mutually agreed to by the stockholders.

Cook, Stock & Stockholders, § 408; Field, Corp. § 134; *Pendergast* v. *Bank of Stockton*, 2 Sawy. 108; *Re Dunkerson*, 4 Biss. 227; Morawetz, Priv. Corp. § 169.

A bona fide assignee of stock takes it subject to all the equities which existed against the assignor.

Field, Corp. § 134.

If the corporation has a lien upon the stock, the purchaser takes it subject to the lien.

Field, Corp. § 132; Morawetz, Priv. Corp. § 174; *Brent* v. *Bank of Washington*, 35 U. S. 10 Pet. 596, 9 L. ed. 547.

The words of the charter justified the by-law, and what was sufficient to put the purchaser upon inquiry was notice to him.

St. Louis Perpetual Ins. Co. v. *Goodfellow*, 9 Mo. 149.

The main question involved in this case has been decided in *Lockwood* v. *Mechanics Nat. Bank*, *supra*.

See also *Knight* v. *Old Nat. Bank*, 3 Cliff. 429; *Lippitt* v. *American Wood Paper Co.* 15 R. I. 141.

As the corporation is a resident of Maine, how could our court compel it to make a transfer of the stock.

Taft v. *Mills*, 5 R. I. 393.

In *Young* v. *South Tredegar Iron Co.*, 85 Tenn. 189, a foreign corporation doing business in the state, in conformity with certain statutes, was deemed to be subject, like a domestic corporation, to the attachment of its stock.

The stock in a corporation can be attached by garnishment.

Lippitt v. *American Wood Paper Co. supra.*

Sometimes it may happen that after an attachment the judgment debtor has sold the outstanding certificate; the company cannot afford to take the risk, and is not obliged to take it.

Cook, Stock & Stockholders, § 404; *Geyer* v. *Western Ins. Co.* 8 Pittsb. 41.

Tillinghast, J., delivered the opinion of the court:

The pleadings in this case present two questions for our decision, namely: First, is the stock of a nonresident, in a foreign corporation, doing business in this state, attachable here? And, second, are the by-laws of the defendant corporation, set up in its third special plea in bar, taken in connection with the statutes of the state of Maine relating to the transfer of stock in corporations, which are also pleaded, effectual to prevent William R. Stearns, the assignor of the stock in question, from transferring the same to the plaintiff by a mere indorsement and delivery thereof so as to confer upon him the right to maintain this action? The first and second pleas set up as an excuse for the refusal of said defendant corporation to transfer said stock the fact that at the time of the making of the request by the plaintiff for said transfer said stock was under two attachments, as the property of said Stearns, and hence that it could not safely transfer the same. The third plea sets up that the defendant corporation was organized August 10, 1892, under the laws of the state of Maine, at Saco, by articles of agreement or association, to which articles said Stearns was a subscribing party; and that in the proceedings of organization he participated, and was then and there elected president and a director of said corporation, which offices he filled during the ensuing year; and that then and there, as a part of the proceedings of the organization of said company, certain by-laws were unanimously adopted by said Stearns and the other incorporators of said company in relation to the transfer of stock and other matters, among which by-laws were the following: "Article 8. Capital Stock. Sec. 2. No stockholder shall assign and transfer his stock, or any part thereof, to any person, unless he shall first offer the same to the corporation at the lowest price at which he is willing to sell and assign the same. If in thirty days after such offer shall have been made in writing to the corporation, said corporation shall refuse or neglect to purchase the stock so offered, the owner thereof may sell and transfer the same to any other person at not less than the price stated in said offer. Sec. 3. Shares may be transferred by indorsement on the certificates of stock and delivery thereof, but shall not be valid (except between the parties thereto) until the same shall be recorded in proper form upon the books of the corporation. Upon surrender, a new certificate or certificates shall be issued, and the surrendered certificate or certificates shall be canceled, and replaced and secured in the certificate book." Said third plea then proceeds to state that said by-laws had been adopted and were in force at the time and before the time when the certificates of stock mentioned and described in the declaration, or any certificate of stock in the said corporation, had been issued, and that all said certificates were and are subject to said by-laws and the provisions thereof, which by-laws, from their said adoption till now, have been continuously in force, of which by-laws and the operation thereof said Stearns and said plaintiff, at and before the sale set out in plaintiff's declaration, had knowledge; that said Stearns had not, before said alleged sale, offered to said corporation his said stock at any price whatever, nor had he in any manner complied with said by-laws concerning the transfer of his said stock, of which noncompliance with said by-laws by said Stearns the

plaintiff had knowledge at the time of and before said sale; wherefore the defendant, having said lien of option upon said stock by reason of said by-law, declined to register said transfer of said stock, because said Stearns had, as aforesaid, failed to comply with said by-law relating to said transfers. Said plea, as amended by agreement of the parties since the hearing of the case, also sets up the statutes of the state of Maine in force at the time of the organization of the defendant corporation, relating to the organization and management of corporations, viz. chapter 48, §§ 16–19.

As to the first question. We think it is well settled that shares of stock owned by a nonresident defendant in a foreign corporation cannot be reached by process of attachment, although the officers of the corporation are within the state, and the business of the corporation is being carried on here. The *situs* of the stock, for the purposes of attachment and execution, is the domicil of the corporation, and that place only. See Cook, Stock & Stockholders, 3d ed. § 485, and cases cited; *Plimpton* v. *Bigelow*, 93 N. Y. 592; 23 Am. & Eng. Encyclop. Law, p. 632, and cases cited; *Winslow* v. *Fletcher*, 53 Conn. 394, 55 Am. Rep. 122.

A corporation can have but one legal residence, and that must be within the state or sovereignty creating it, although, by comity, it may be allowed to do business, through its officers and agents, in other jurisdictions. *Chafee* v. *Fourth Nat. Bank of New York*, 71 Me. 514, 36 Am. Rep. 345. Our statute which authorizes "the attachment of the shares of the defendant in any corporation," etc. (Judiciary Act, chap. 33, § 20), "is to be construed," as said by the court in *Plimpton* v. *Bigelow*, *supra*, concerning a similar statute of New York, "in view of the fundamental principle upon which all attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment, in order to any valid or effectual seizure under the process." See also *Taft* v. *Mills*, 5 R. I. 398. In the case at bar the stock in question was neither actually nor constructively in this state at the time of the attempted attachment thereof, and hence the proceeding was a nullity. And this statement is equally applicable to the attempted proceeding by trustee process or garnishment, set out in the pleadings, as to the said attachment proceeding; although we do not wish to be understood as intimating that shares of stock in a corporation can be reached in this way. In this connection, see Lowell, Transfer of Stock, § 9, and cases cited.

As to the second question. We do not think the defendant corporation had power to enact the by-law first above quoted. Section 6 of chapter 46 of the Statutes of Maine, set up in the defendant's third special plea, provides that "corporations may determine by their by-laws the manner of calling and conducting meetings; the number of members that constitute a quorum; the number of votes to be given by the shareholders; the tenure of office of the several officers; the mode of voting by proxy, and of selling shares for neglect to pay assessments; and may enforce such by-laws by penalties not exceeding twenty dollars." And the rule is that where, by the provisions of the particular charter, or by a general statute relating to corporations, power is conferred upon a corporation to enact by-laws for certain specified purposes, its power of legislation is limited to the cases and objects enumerated, all others being extended by implication. "*Expressio unius est exclusio alterius.*" See Angell & A. Corp. 5th ed. § 325; *Child* v. *Hudson's Bay Co.* 2 P. Wms. 207; *Kennebec & P. R. Co.* v. *Kendall*, 31 Me. 470; *Chouteau Spring Co.* v. *Harris*, 20 Mo. 382.

The defendant corporation, then, having no power to enact the by-law in question, it becomes unnecessary to consider whether or not it was a reasonable enactment, as contended by defendant's counsel.

The defendant's demurrers to plaintiff's replications to the first and second pleas are overruled, and said replications are sustained, and the plaintiff's demurrer to the defendant's third plea is sustained, and the plea overruled, and the case remitted to the common pleas division for further proceedings.

NEW YORK COURT OF APPEALS.

Archie D. SANDERS *et al.*, *Appts.*,
v.
POTTLITZER BROTHERS FRUIT CO., *Respt.*

(144 N. Y. 209.)

Letters and telegrams which constitute an offer and acceptance of a proposition complete in its terms may constitute a binding contract, although there is an understanding that the agreement shall be expressed in a formal writing, and one of the parties afterwards refuses to sign such an agreement without material modifications.

(Earl, Gray, and Bartlett, JJ., dissent.)

(December 18, 1894.)

NOTE.—*Sufficiency of contract by offer and acceptance without execution of contemplated formal instrument.*

While there are some expressions in the decisions upon this subject which are difficult to reconcile, the decisions are divisible into classes which are quite harmonious and which leave very little actual conflict.

General statements of the law.

Where the parties orally agree upon the terms of the contract and there is a final assent thereto so that no variation can be introduced into the writing except by mutual consent, the mere suggestion or intention to put it in writing at a subsequent time is not of itself sufficient to show that they did not mean the parol contract to be

APPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, Fifth Department, affirming a judgment entered upon the report of the referee in favor of defendant in an action brought to recover damages for the alleged breach of a contract to purchase apples. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Eugene M. Bartlett for appellants.

Mr. George W. Daggett, for respondent:

Where the minds of the parties do not meet upon the whole and exact terms of a contract, it is not binding.

Fullerton v. *Dalton*, 58 Barb. 286, affirmed 49 N. Y. 659.

Where a correspondence is intended only to settle preliminaries which are to be reduced to a formal agreement to be executed by the parties, then the proffer and acceptance of these preliminaries do not constitute a contract.

Commercial Teleg. Co. v. *Smith*, 47 Hun, 494; *Kirwan* v. *Byrne*, 9 Misc. 76; *Fullerton* v. *Dalton*, *supra.*

While each party continues to propose to other additional unratified terms no contract is consummated and no recovery can be made thereon.

Templeton v. *Wile*, 22 N. Y. S. R. 251.

To create a contract by correspondence the answer must be as specific as the proposition.

complete and binding without being put in writing. Parties may, however, agree verbally upon the terms of a contract, and yet stipulate that it is not to be binding until put in writing; in such case such a stipulation becomes an operative term of contract, and unless reduced to writing and signed by the parties does not constitute a complete and binding agreement. Hodges v. Sublett, 91 Ala. 588.

The distinction is manifest between those cases in which there is a complete verbal contract which the law does not require to be in writing and a subsequent agreement that it should be reduced to writing, and those in which it is part of the bargain that the contract shall be reduced to writing. In the first class of cases the original verbal contract is in no manner impaired by the failure to carry out the agreement and put it in writing. In the second class of cases the final contract is suspended, the contract is inchoate, incomplete, and it cannot be enforced until it is signed by all the parties. Fredericks v. Fasnacht, 30 La. Ann. 117.

The question always is, Did the parties mean to contract by their correspondence, or were they only settling the terms of an agreement into which they proposed to enter after all its particulars were adjusted, which was then to be formally drawn up, and by which alone they designed to be bound. Lyman v. Robinson, 14 Allen, 242.

The question is merely one of intention. If the party sought to be charged, intended to close a contract prior to the formal signing of a written draft, or if he signified such an intention to the other party, he would be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, he neither had, nor signified any such intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. If the written draft is viewed by the parties merely as a convenient record of their previous contract, its absence does not affect the binding force of their contract, if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed. Mississippi & D. S. S. Co. Limited v. Swift, 86 Me. 248.

But in May v. Thomson, L. R. 20 Ch. Div. 705, 51 L. J. Ch. 917, 47 L. T. N. S. 295, the master of the rolls says it very often happens that both parties use expressions in letters which, read alone, would amount to a contract, if we did not know that in fact neither of the parties intended those general expressions to constitute a contract, and in that case if the court lays hold of the letters to make a contract, it makes a contract for the parties which the parties never intended to enter into.

Suggestion of formal contract.

An acceptance and proposal of a more formal mode of carrying the acceptance into execution will not destroy the contract. Gibbins v. North Eastern Metropolitan Asylum Dist. Board of Management, 11 Beav. 1, 17 L. J. Ch. N. S. 5, 12 Jur. 22.

An intimation in a written acceptance of a tender, that a contract would be afterwards prepared, does not prevent the parties from becoming bound to perform the terms of the tender and acceptance respectively mentioned, if the intention of the parties was thereby to enter into an agreement, and if the preparation of the contract was contemplated merely for the purpose of expressing the agreement, already arrived at in formal language. Lewis v. Brass, L. R. 3 Q. B. Div. 667, 37 L. T. N. S. 738, 26 Week. Rep. 152.

The mere fact that in the course of the correspondence reference has been made to a more formal agreement will not prevent the enforcement of the contract if a definite contract has been arrived at in the letters. Cayley v. Walpole, 22 L. T. N. S. 900, 39 L. J. Ch. 609, 18 Week. Rep. 782.

The mere fact that a telegram of acceptance conveys the idea that there will be a writing does not prevent the acceptance from being a binding contract. Dalrymple v. Scott, 19 Ont. App. Rep. 477.

Mere reference to the preparation of a formal contract will not negative the idea that the parties have already bound themselves to its performance. Cheney v. Eastern Transp. Line, 59 Md. 557.

Where the parties have assented to all the terms of the contract the mere reference to a future contract in writing does not negative the existence of a present contract. If the parties make an agreement which they intend to be binding on them at the time, effect will be given to it, although they intend that it shall be superseded by a more formal written contract. Green v. Cole, 108 Mo. 70.

Understanding that there is to be a formal contract.

The majority of the decisions go farther than to hold that failure to comply with a suggestion that there shall be a formal contract will not destroy the obligation, and hold that an understanding between the parties that there is to be a formal contract will not defeat an obligation which has been assumed without the intended formality.

When a complete contract has been made orally, the fact that it is expected that a written contract will afterwards be signed, embodying the terms of the oral one, does not prevent the oral one from taking effect. Cohn v. Plumer, 88 Wis. 622.

If there has been a final agreement, the terms of which are evidenced in a manner to satisfy the statute of frauds, the agreement will be binding although the parties may have declared that the writing is to serve only as instructions for a formal agreement, or although it may be an express term that a formal agreement should be prepared and signed by the parties. As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by a writing signed by the party to be

Brown v. *Norton*, 50 Hun, 248; *Hough* v. *Brown*, 19 N. Y. 111; *Brown* v. *New York Cent. R. Co.* 44 N. Y. 79.

O'Brien, *J.*, delivered the opinion of the court:

The plaintiffs in this action sought to recover damages for the breach of a contract for the sale and delivery of a quantity of apples. The complaint was dismissed by the referee, and his judgment was affirmed upon appeal. The only question to be considered is whether the contract stated in the complaint, as the basis for damages, was ever in fact made, so as to become binding upon the parties. On the 28th of October, 1891, the plaintiffs submitted to the defendant the following proposition in writing: "Buffalo, N. Y., Oct. 28, 1891. Messrs. Pottlitzer Bros. Fruit Co., Lafayette, Ind.—Gentlemen: We offer you ten car loads of apples, to be from 175 to 200 barrels per car, put up in good order, from stock inspected by your Mr. Leo Pottlitzer at Nunda and Silver Springs. The apples not to exceed one half green fruit, balance red fruit, to be shipped as follows: First car between 1st and 15th December, 1891; second car between 15th and 30th of December, 1891; and one car each ten days after January 1, 1892, until all are shipped. Dates above specified to be considered as approximate a few days either

charged or his agent lawfully authorized, there exist all the materials which the court requires to make a legal binding contract. But if to a proposal or offer an assent be given to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation. Chinnock v. Marchioness of Ely, 4 De G. J. & S. 638.

In Thomas v. Dering, 1 Jur. 211, 1 Keen, 729, 6 L. J. Ch. N. S. 267, it is said: "It is true that mention is made in the letters of an intended formal contract to be afterwards drawn up. But there are many cases in which a correspondence referring to the future execution of a more formal agreement has been held to constitute in itself a valid contract, and I think that the correspondence is equivalent to a contract in the present case."

If the parties have reached an agreement it will be binding on them unless one of the very terms of the agreement itself is that it shall not be concluded until a solicitor intervened and drew a formal agreement. Rossiter v. Miller, 3 App. Cas. 1124, 48 L. J. Ch. 10, 39 L. T. N. S. 173, 26 Week. Rep. 865.

If parties have entered into an agreement they are not the less bound by it because they say they will send it to a solicitor to have it reduced to form. But when parties negotiate and do not say so, the mere fact that they do send it to a solicitor to have it reduced into form affords cogent evidence that they do not intend to bind themselves till it has been reduced into form. Ridgway v. Wharton, 6 H. L. Cas. 238, 4 Jur. N. S. 173, 27 L. J. Ch. 46.

The fact that an express contract contemplates a more formal contract with a corporation in which the contractee is largely interested, does not affect its binding powers. Drummond v. Crane, 23 L. R. A. 707, 159 Mass. 577.

Where an agreement is in all other respects complete (and in the absence of any understanding between the parties that the same shall not be complete until reduced to writing) it will bind the parties, although it may have been understood between them that the agreement shall afterwards be formally reduced to writing, and executed. Blaney v. Hoke, 14 Ohio St. 292.

If the agreement is put in writing, and signed, the mere fact that the parties agree to have it examined by a lawyer and such changes made as are necessary to put it in legal form will not render it unenforcible. Mackey v. Mackey, 29 Gratt. 158.

In Heyworth v. Knight, 17 C. B. N. S. 298, 10 Jur. N. S. 866, Earle, *Ch. J.*, says something was said about the letters not constituting a binding contract, because a more regular and extended contract was contemplated. That notion, however, is totally at variance with the law as laid down by many cases in the court of queen's bench, where the broker's book has been allowed to be resorted to for evidence of the contract, when the parties intended to contract by means of bought and sold notes, where there has been a variance between those documents. And Byles, *J.*, said: "I can see no principle, nor am I aware of any authority for saying, that a contract in writing which is sufficient within the statute of frauds can be invalidated or affected by a subsequent abortive attempt to put it in a more formal shape. The mere fact of an agreement providing for a more complete and formal development of the intention of the parties cannot of itself prevent the operation of the preliminary contract; it has been repeatedly so held in cases of contracts for leases."

If instructions are given to cable confirmation, the cablegram, and not the bought and sold notes which are to be exchanged to avoid "any possible mistake," will be the conclusion of the contract. Darlington Iron Co. v. Foote, 16 Fed. Rep. 646.

If a complete contract has been formed, the mere fact that the parties agree to put it in writing, and that this agreement is subsequently broken, will not prevent its being enforced. Bell v. Offutt, 10 Bush, 632.

If the oral agreement is perfect when the proposition to reduce to writing is made, the binding force will not be affected by failure to comply with the proposition. Avendano v. Arthur, 30 La. Ann. 316.

If it does not appear that either party contemplates the insertion in the formal contract of any stipulation upon which the minds have not already met, and which are not substantially inserted in the letters, nor that either party believed any further writing necessary to create a contract, then the execution of the former writing will not be necessary to bind the parties. Lawrence v. Milwaukee, L. S. & W. R. Co. 34 Wis. 427.

Where some terms unsettled.

If the contract is not complete of course it will not be binding until the missing terms are added.

If the negotiations only cover part of the terms to be settled by the contract, and the understanding is that the other terms shall be settled and put into a formal contract, and those terms cannot afterwards be agreed upon, there will be no enforcible contract between the parties. Connery v. Best, 1 Cab. & El. 291.

If the formal contract which is to constitute the contract contains terms which are never agreed upon, and one of the parties at all times insists on them, there will be no binding contract, although the correspondence between the parties settles some of the terms of the alleged contract. Jones v. Daniel [1894] 2 Ch. 332.

No contract ought to be held established if it is clear upon the facts that there were other conditions of an intended contract beyond and besides those expressed in the letters, and without the settlement of which the parties had no idea of concluding any agreement. Hussey v. Horne-Payne,

way, at the price of $2.00 per barrel, free on board cars at Silver Springs and Nunda, in refrigerator cars; this proposition to be accepted not later than the 31st inst., and you to pay us $500 upon acceptance of the proposition, to be deducted from the purchase price of apples at the rate of $100 per car on the last five cars. Yours respectfully, J. Sanders & Son." To this proposition the defendant replied by telegraph on October 31st as follows: "Lafayette, Ind., 31st October. J. Sanders & Son: We accept your proposition on apples, provided you will change it to read car every eight days from January first, none in December; wire acceptance. Pottlitzer Bros.' Fruit Co." On the same day the plaintiffs replied to this dispatch, to the effect that they could not accept the modification proposed, but must insist upon the original offer. On the same day the defendant answered the plaintiff's telegram as follows: "Can only accept condition as stated in last message. Only way we can accept. Answer if accepted. Mail contract, and we will then forward draft. Pottlitzer Bros.' Fruit Co." The matter thus rested till November 4th, when the plaintiffs received the following letter from the defendant: "Lafayette, Ind., November 2, 1891. J. Sanders & Son, Stafford, N. Y.—Gents: We are in receipt of your telegrams, also your favor of the 31st ult. While we no doubt think we have offered you a fair contract on apples, still the dictator of this has learned on his return home that there are so many near-by apples coming into market that it will affect the sale of apples in December, and therefore we do not think it advisable to take the contract, unless you made it read for shipment from the 1st of January. We are very sorry you cannot do this, but perhaps we will be able to take some fruit from you, as we will need it in the spring. If you can change the contract so as to read as we wired you, we will accept it, and forward you draft in payment on same. Pottlitzer Fruit Co." On receipt of this letter the plaintiffs sent the following message to the defendant by telegraph: "November 4th. Pottlitzer Brothers Fruit Company, Lafayette, Ind.: Letter received. Will accept conditions. If satisfactory, answer, and will forward contract. J. Sanders & Son." The defendant replied to this message by telegraph, saying: "All right. Send contract as stated in our message."

The plaintiffs did prepare and send on the contract precisely in the terms embraced in the foregoing correspondence, which was the original proposition made by the plaintiffs, as modified by defendant's telegram above set forth, and which was acceded to by the plain-

4 App. Cas. 311, 48 L. J. Ch. 846, 41 L. T. N. S. 1, 27 Week. Rep. 585.

If it is evident that there were unsettled terms there can be no contract between the parties which will be enforced. Bristol, C. & S. Aërated Bread Co. v. Maggs, L. R. 44 Ch. Div. 616.

If some of the terms of the contract are left to be settled by a formal agreement, the contract will not be enforced. Dennison v. People's Café Co. 45 L. T. N. S. 187.

If there is no concluded agreement between the parties, it cannot be enforced. Bushell v. Pocock, 53 L. T. N. S. 860.

When the agreement is to be reduced to writing, and there is no sufficient evidence from which its exact terms can be determined, it will be inferred that the understanding of the parties was that there was to be no contract until its terms should be reduced to writing. Methudy v. Ross, 10 Mo. App. 101, affirmed 81 Mo. 481.

If material terms have not yet been agreed upon, the contract will not be binding. Bourne v. Shapleigh, 9 Mo. App. 64.

If, from the nature of the correspondence, it appears that such correspondence is to be for the settlement of the preliminaries of a more formal contract, and that it is the intention of the parties that those preliminaries should be reduced to the form of a more formal agreement to be executed by the parties, then the proffer of those preliminaries by the one party, and the acceptance of them by the other, by no means constitute a contract, because it is the intention of the parties that something else should be done before the proposed agreement should become binding. Commercial Teleg. Co. v. Smith, 47 Hun, 494.

Where the execution of a formal contract is one of the terms of the agreement.

If in a public advertisement for bids there is a statement that the successful bidder will have to sign a contract, the mere acceptance of the bid will not bind the bidder. Kingston-upon-Hull Guardians of Poor v. Petch, 10 Exch. 610, 24 L. J. Exch. 23.

If a bid for a payable work is accepted, with the understanding that the contract shall be reduced to writing, there is no contract which will support an action for the price of the building if the writing is not executed. Weits v. Des Moines Independent Dist. 79 Iowa, 423.

If the agreement is made "subject to a formal contract being prepared and signed by both parties as approved by their solicitors," there will be no enforcible contract until such formal one is executed. Hawkesworth v. Chaffey, 54 L. T. N. S. 72, 55 L. J. Ch. 335.

If the party sought to be charged insists at all times upon the contract being reduced to writing, and refuses to sign all drafts presented because they contain terms not agreed upon, he cannot be held bound upon the contract. MacMackin v. Timmins (Pa.) 30 Alb. L. J. 56.

Where the agreement is made by written communications, it must appear from both or some of them to be known to both parties that the execution of the formal lease was to be a condition precedent to the agreement becoming obligatory. Cochrane v. Justice Min. Co. 16 Colo. 415.

There is some apparent conflict in the application of this rule that if the execution of a formal contract is an element of the agreement there will be no contract until it is done, and that mentioned above, that the mere understanding or suggestion that there shall be a formal contract will not make its absence fatal. The point of difference probably comes in the different views of what is necessary to make the execution of a formal contract an element of the agreement. It has been held that—

If by agreement of the parties their negotiations are to be reduced to writing there will be no perfect contract so long as the act of reducing it to writing and signing it remains to be done. Congdon v. Darcy, 46 Vt. 478.

If the intention is expressed by both parties that there shall be a formal written agreement between them, then the correspondence will be simply preliminary, and cannot be regarded as a final contract. Sidney Glass Works v. Barnee, 86 Hun, 374.

Where it has been agreed that the contract should

tiffs. This was not satisfactory to the defendant, and it returned it to the plaintiffs with certain modifications, which were not referred to in the correspondence. These modifications were: (1) That the fruit should be well protected from frost and well hayed; (2) that if, in the judgment of the plaintiffs, it was necessary or prudent that the cars should be fired through, the plaintiffs should furnish the stoves for the purpose, and the defendant pay the expense of the man to be employed in looking after the fires to be kept in the cars; (3) that the plaintiffs should line the cars in which the fruit was shipped. These conditions were more burdensome, and rendered the contract less profitable to the plaintiffs. They were not expressed in the correspondence, and I think, cannot be implied. They were not assented to by the plaintiffs, and on their declining to incorporate them in the paper the defendant treated the negotiations as at an end, and notified the plaintiffs that it had placed its order with other parties. There was some further correspondence, but it is not material to the question presented by the appeal. The writings and telegrams that passed between the parties contain all the elements of a complete contract. Nothing was wanting in the plaintiffs' original proposition but the defendant's assent to it, in order to constitute a contract binding upon both parties according to its terms. This assent was given upon condition that a certain specified modification was accepted. The plaintiffs finally assented to the modification, and called upon the defendant to signify its assent again to the whole arrangement as thus modified, and it replied that it was "all right," which must be taken as conclusive evidence that the minds of the parties had met and agreed upon certain specified and distinct obligations which were to be observed by both. It is true, as found by the learned referee, that the parties intended that the agreement should be formally expressed in a single paper, which, when signed, should be the evidence of what had already been agreed upon. But either party was entitled to insert in the paper any material condition not referred to in the correspondence, and if it was inserted without the consent of the other party it was unauthorized. Hence the defendant, by insisting upon further material conditions, not expressed or implied in the correspondence, defeated the intention to reduce the agreement to the form of a single paper signed by both parties. The plaintiffs then had the right to fall back upon their written proposition, as originally made, and the subsequent letters and telegrams; and, if they constituted a contract of themselves, the absence of the

be reduced to writing until it is actually written and signed by all the parties, either of them may recede. Villere v. Brognier, 3 Mart. (La.) 349; Bloeker v. Tillman, 4 La. 80; Avendano v. Arthur, 20 La. Ann. 316.

Although the letter states that the writer has agreed to the proposition, yet there will be no contract if the letter also states that a contract is to be executed. Wood v. Edwards, 19 Johns. 212.

If the parties agree that the contract is to be reduced to writing, it is not complete until that writing is made and signed. Des Boulets v. Gravier, 1 Mart. N. S. 420.

Agreement to execute formal contract may be binding.

The negotiations for a formal contract may have progressed to a point where, although no action could be maintained on the formal contract, yet a liability might exist for refusal to execute the agreement, which in practical effect would be the same as for a breach of the formal contract. Under such circumstances the question of liability would depend more upon the form of action than upon anything else. As to the operation of this principle to insurance contract, see *note* to Newark Mach. Co. v. Kenton Ins. Co. (Ohio) 22 L. R. A. 768.

A contract to make and execute a written agreement, the terms of which are specific and mutually understood, is in all respects as valid and obligatory where no statutory objection interposes as the written contract itself would be if executed. If, therefore, it should appear from the evidence that the minds of the parties had met; that a proposition for a contract had been made by one and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon; and that a part of the mutual understanding was that a written contract embodying those terms should be drawn and executed by the respective parties,—there is an obligatory contract which neither party is at liberty to refuse to perform. Pratt v. Hudson River R. Co. 21 N. Y. 305.

The intention of the parties to turn a parol agreement into a written one does not weaken the obligations of the parol agreement, and one of the parties cannot escape from his obligation by refusing to execute the written agreement after it has been prepared. Blight v. Ashley, 1 Pet. C. C. 15.

In reference to the case of the issuance of an insurance policy, the court, in Baldwin v. Chouteau Ins. Co. of St. Louis, 56 Mo. 154, 17 Am. Rep. 671, said, courts will interpose and furnish relief when the negotiations have reached such a point that nothing remains to be done but to execute what has been agreed upon.

In Fowle v. Freeman, 9 Ves. Jr. 351, it is said, the question is whether the whole effect of the agreement is suspended by adding to it a letter to an attorney desiring him to prepare a more formal instrument. It is impossible that the letter could have such an effect. If it had, though that formal agreement had been prepared, he would not have been obliged to sign it. At least it amounts to this: that if prepared he should execute that more formal agreement. The attorney could not introduce the least variation by his direction. He had bound himself so far that those should be the terms introduced.

But if the negotiation constitutes an agreement for a contract, and not a contract, no action can be maintained on the contract unless it is executed. Megrath v. Gilmore, 10 Wash. 339.

A written statement: "We agree to sell certain lumber and will make a contract giving the right to go on the lands and cut the timber,"—is not a contract, but merely an agreement to make one, and will not support an action as upon a sale. McDonald v. Bewick, 51 Mich. 79.

Making out policies of insurance will not enable the insurer to maintain an action for the premium where its by-laws provide for the delivery of the policies upon the payment of the premium and signature of the deposit notes, neither of which has been done. Real Estate Mut. F. Ins. Co. v. Roesale, 1 Gray, 336.

formal agreement contemplated was not, under the circumstances, material. When the parties intend that a mere verbal agreement shall be finally reduced to writing, as the evidence of the terms of the contract, it may be true that nothing is binding upon either party until the writing is executed. But here the contract was already in writing, and it was none the less obligatory upon both parties because they intended that it should be put into another form, especially when their intention is made impossible by the act of one or the other of the parties, by insisting upon the insertion of conditions and provisions not contemplated or embraced in the correspondence. *Vassar* v. *Camp*, 11 N. Y. 441; *Brown* v. *Norton*, 50 Hun, 248; *Pratt* v. *Hudson River R. Co.* 21 N. Y. 308. The principle that governs in such cases was clearly stated by *Judge* Selden in the case last cited, in these words. "A contract to make and execute a certain written agreement, the terms of which are mutually understood and agreed upon, is in all respects as valid and obligatory, where no statutory objection interposes, as the written contract itself would be, if executed. If, therefore, it should appear that the minds of the parties had met; that a proposition for a contract had been made by one party, and accepted by the other; that the terms of this contract were in all respects definitely understood and agreed upon, and that a part of the mutual understanding was that a written contract embodying these terms should be drawn and executed by the respective parties,—this is an obligatory contract, which neither party is at liberty to refuse to perform."

In this case it is apparent that the minds of the parties met, through the correspondence, upon all the terms, as well as the subject-matter, of the contract, and that the subsequent failure to reduce this contract to the precise form intended, for the reason stated, did not affect the obligations of either party, which had already attached, and they may now resort to the primary evidence of their mutual stipulations. Any other rule would always permit a party who has entered into a contract like this, through letters and telegraphic messages, to violate it, whenever the understanding was that it should be reduced to another written form, by simply suggesting other and additional terms and conditions. If this were the rule the contract would never be completed in cases where, by changes in the market, or other events occurring subsequent to the written negotiations, it became the interest of either party to adopt that course in order to escape or evade obligations incurred in the ordinary course of commercial business. A stipulation to re-

Where it appears that the contract when finished should be a formal one.

If the intention was that before the contract should become binding it should be executed in duplicate, it will not be held to have been duly executed until duplicates at least substantially alike have been executed and delivered. Crane v. Portland, 9 Mich. 498.

Where the agreement is to be reduced to writing and signed by the parties before it is to take effect, the agreement will not be binding in law until it is signed. Irish v. Pulliam, 32 Neb. 24.

When the understanding is that the contract is to be reduced to writing, or that it is to be signed before it is acted on or is to take effect, it is not binding until it is so written out or signed. Morrill v. Tehama Consol. Mill & Min. Co. 10 Nev. 125; Boyd v. Hind, 36 Eng. L. & Eq. 566.

A contract does not become complete and binding until reduced to writing and signed, if such appears to be the intention of the parties. Jersey City Water Comrs. v. Brown, 32 N. J. L. 504.

If the correspondence shows that the parties did not understand that it made an agreement between them, but that they intended that the agreement should be formally reduced to writing, there will be no contract until the writing is executed. Brown v. New York Cent. R. Co. 44 N. Y. 79.

If in agreeing upon a bargain the parties also agree that there shall be a formal act passed before a notary with the intention that the bargain shall not be made perfect until the notarial act is so passed, the parties, though they may have agreed upon the terms, may recede before the act is complete. Dietz v. Farish, 53 How. Pr. 217.

If after oral negotiations a paper is drawn up in consequence of the clear intention of both parties to have a written instrument signed by each as the evidence of any contract they might make, and the fact that neither considered any contract concluded until the paper was fully executed, there will be no binding contract unless the paper is signed. Ambler v. Whipple, 87 U. S. 20 Wall. 546, 22 L. ed. 408.

Where the parol agreement is assented to, which is understood between the parties to be put into writing, it is not binding until it is put in that form. Eads v. Carondelet, 42 Mo. 113.

But the reduction of a contract to writing is not necessary to its enforcibility unless the parties intended that it should not be binding until it was put in writing. Montague v. Weil, 30 La. Ann. 50.

Failure to execute draft of contract.

A contract may be found to exist between the parties, although the agreement reduced into writing as a draft has not been formally executed by either. Broyden v. Metropolitan R. Co. 2 App. Cas. 666.

Estoppel.

When parties make and sign a written memorandum of agreement with the understanding that a formal contract embracing the same stipulation is thereafter to be written out and executed, if they afterwards act upon the memorandum it will be treated as a valid and binding contract, although never written out in a formal manner. Riggins v. Missouri River, Ft. S. & G. R. Co. 73 Mo. 598.

If the terms of a contract which is to be reduced to writing, but never is, are agreed on, parties receiving benefits under it will not be heard to say that the understanding that it was to be reduced to writing was not carried out, for the purpose of avoiding the obligation placed on them by it. Miller v. McManis, 57 Ill. 127.

Although one of the parties notifies the other that he will not perform the contract unless it is reduced to writing, he cannot, after he has gone on and performed a large part of the work, repudiate it and recover a higher compensation, although the notice to reduce to writing was not complied with. Paige v. Fullerton Woolen Co. 27 Vt. 485.

Illustrations of proposals for formal contract.

If the execution of the written agreement is to be made a condition of the contract, the intention must be expressed in such a way as to show that such condition was to be insisted on, and for those

duce a valid written contract to some other form cannot be used for the purpose of imposing upon either party additional burdens or obligations, or of evading the performance of those things which the parties have mutually agreed upon by such means as made the promise or assent binding in law. There was no proof of any custom existing between the shippers and consignees of such property in regard to the payment of the expense of firing, lining, and haying the cars. If it be said that such precautions are necessary in order to protect the property while in transit, that does not help the defendant. The question still remains, Who was to bear the expense? The plaintiffs had not agreed to pay it, any more than they had agreed to pay the freight or incur the other expenses of transportation. The plaintiff sent a plain proposition, and the defendant accepted without any such conditions as it subsequently sought to attach to it. That the parties intended to make and sign a final paper does not warrant the inference that they also intended to make another and different agreement. The defendant is in no better position than it would be in case it had refused to sign the final writing, without alleging any reasons whatever. The principle, therefore, which is involved in the case, is this: Can parties who have exchanged letters and telegrams with a view to an agreement, and have arrived at the point where a clear and definite proposition is made on the one side and accepted on the other, with an understanding that the agreement shall be expressed in a formal writing, ever be bound until that writing is signed? If they are at liberty to repudiate the proposition or acceptance, as the case may be, at any time before the paper is signed, and as the market may go up or down, then this case is well decided. But if, at the close of the correspondence the plaintiffs became bound by their offer, and the defendant by its acceptance of that offer, whether the final writing was signed or not, as I think it was, under such circumstances as the record discloses, then the conclusion of the learned referee was erroneous. To allow either party to repudiate the obligations clearly expressed in the correspondence, unless the other will assent to material conditions, not before referred to, or to be implied from the transaction, would be introducing an element of confusion and uncertainty into the law of contract. If the parties did not become bound in this case, they cannot be bound in any case.

The judgment should be reversed, and a new trial granted, costs to abide the event.

All concur, except **Earl, Gray,** and **Bartlett,** *JJ.*, dissenting.

purposes a mere statement at the close of the letter that, "if this is agreed to, the agreement can be drawn up and signed," is not sufficient for that purpose. Allen v. Chouteau, 102 Mo. 309.

A letter stating, "We accept" the offer, "and now hand you two copies of the conditions of sale which we have signed; we will thank you to sign them and return one of the copies to us,"—will not constitute a contract until the copies are signed. Crossley v. Maycock, L. R. 18 Eq. 180, 43 L. J. Ch. 379, 22 Week. Rep. 397.

An agreement to take a lease "subject to the preparation and approval of a formal contract," is not such contract as can be specifically enforced. Winn v. Bull, L. R. 7 Ch. Div. 29, 47 L. J. Ch. 139, 26 Week. Rep. 230.

An agreement "subject to a contract to be settled" or "subject to a proper contract" is not one that can be enforced. Harvey v. Principal of Barnard's Inn Corp. 50 L. J. Ch. 750, 45 L. T. N. S. 280, 29 Week. Rep. 922.

A statement in a letter accepting an offer for a house, that the other party "should make an appointment to meet to draw the agreement," is not sufficient to show that the agreement was not concluded so as to be binding on the parties. Cowley v. Watts, 17 Jur. 172, 22 L. J. Ch. 591.

An acceptance "subject to the terms of a contract being arranged," will not constitute a complete contract. Honeyman v. Marryatt, 6 H. L. Cas. 112, 26 L. J. Ch. 619, 4 Jur. N. S. 17.

The mere reference to a future contract is not enough to negative the existence of a present one. Bonnewell v. Jenkins, L. R. 8 Ch. Div. 70, 47 L. J. Ch. 758, 38 L. T. N. S. 81, 26 Week. Rep. 294.

Intention to have formal contract as evidence.

The fact that the parties have decided to have a formal written agreement executed is strong evidence that the oral agreement was not understood or intended to be binding. Bryant v. Ondrak, 87 Hun, 477.

The fact that the parties agree to reduce the agreement to writing to be signed by the parties, is strong evidence that they did not intend the writing to be complete until it was reduced to writing and signed. Irish v. Pulliam, 32 Neb. 24.

The fact that parties negotiating a contract contemplate that a formal agreement shall be made and signed is some evidence that they do not intend to bind themselves until the agreement is reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definitely complete in all its terms which they intended should be binding upon them, and which, for greater certainty or to answer some requirement of the law, they designed to have expressed in a formal written agreement. Wharton v. Stoutenburgh, 35 N. J. Eq. 266.

H. P. F.

OHIO SUPREME COURT.

Charles H. STEWART, Admr., etc., of Hugh B. Wilson, Deceased, *Plff. in Err.*,

v.

WHEELING & LAKE ERIE R. CO. *et al.*

(52 Ohio St. —.)

*1. **Section 5056 of the Revised Statutes,** which provides that: "When any part of the real property, the subject-matter of action, is situate in any county or counties other than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties, before it shall operate therein as notice so as to charge third persons," or affect interests acquired by them in the property not situate in the county where the action was brought,—relates to actions and judgments in the state courts, and not to those in courts of the United States.

2. **A suit brought in a federal court to foreclose a mortgage on the property of a railroad corporation** operates as constructive notice throughout the district, and all persons acquiring an interest in or lien on any part of the property during the pendency of the suit will be bound by the decree and sale made thereunder; the purchaser will take the property discharged from all such liens and interests, though the persons obtaining them be not parties to the suit; they must seek satisfaction from the proceeds of the sale, to reach which they should become parties, and bring their claims to attention of the court by appropriate pleadings.

3. **But a judgment recovered in a state court against the railroad company, prior to the commencement of the foreclosure suit,** by a creditor who was not made a party, remains unaffected by the decree and sale; such judgment becomes a lien on the real property owned by the company at the time of its recovery, in the county where rendered, including lands acquired for the roadway, right of way, depots, and other purposes of the company, and continues to be so against the property in the hands of the purchaser at the foreclosure sale.

4. **While in such case the judgment creditor may not, except as authorized by statute, sell on execution** the property to which his lien attached, either where it is part only of the corporate property and is necessary, in connection with the balance of the property, to enable the corporation to accomplish the purposes of its creation, and discharge the duties it has assumed toward the public, or, where the sale would materially impair the uses and value of the balance of the property, he may, by a proceeding in equity to which all persons in interest are made parties, enforce his lien by subjecting the whole of the property to resale, and obtaining a proper application of the proceeds.

5. **In a proceeding for that purpose, the purchaser at the foreclosure sale may, if necessary for his protection, be subrogated** to the rights of the mortgagee, to the extent of the purchase money paid; and the proceeds of the resale must first be applied to the satisfaction of incumbrances superior to the lien of the judgment creditor, if any there be, including those set up in the foreclosure suit, and if nothing then remains for the judgment creditor, he cannot recover costs.

*Headnotes by the COURT.

(June 11, 1895.)

ERROR to the Circuit Court for Huron County to review a judgment affirming a judgment of the Court of Common Pleas refusing to recognize the validity of the liens of certain judgments upon the property of the Wheeling & Lake Erie Railroad Company.

Reversed as to one lien holder, and affirmed as to the others.

Statement by **Williams, J.:**

On the 20th day of May, 1889, Charles H. Stewart, as the administrator of the estate of Hugh B. Wilson, deceased, commenced his action, in the court of common pleas of Huron county, against the Wheeling & Lake Erie Railroad Company, the Wheeling and Lake Erie Railway Company, the Central Trust Company, of New York, the Mercantile Trust Company, of New York, as trustee, John W. Cassell, William S. Fox, and Cyrus McNeely.

The petition, after stating the due appointment and qualification of the plaintiff as administrator, and the corporate character of the several companies defendants, alleges that the defendant railroad company, prior to and during the year 1885, was the owner, and in possession of, and operating a line of railroad in and through Huron, and other counties of the state, and was the legal owner, and in possession of certain real estate situated in the county of Huron, consisting of its roadway and lands adjoining the same, depot grounds, and grounds occupied by its machine shops, station houses, car houses, engine houses, and other buildings; that at the October term, 1885, of the court of common pleas of that county, the plaintiff recovered a judgment against the said railroad company, for the sum of $4,049.84, and costs, which became a lien on the property of the railroad company, and remains in full force, and unsatisfied; that, afterward, on the 6th day of March, 1886, the plaintiff caused an execution to be issued on his judgment, which was returned unsatisfied, for want of goods and chattels, or unincumbered lands whereon to levy, the property of the company then being incumbered to an amount exceeding its value; but the incumbrances having been subsequently discharged the plaintiff caused another execution to issue, which was, on the 19th day of April, 1889, levied on the property of the railroad company in Huron county. The petition then alleges that the other defendants each claim to have some lien on, or right in, the property, by reason of which a sale under the execution cannot be effected, and prays they may be required to set up their claims, or be barred, and for an adjustment of whatever liens may be set

NOTE.—On the subject of execution or judicial sales of corporate franchises, or of property necessary to enjoyment of such franchises, see *note* to Brady v. Johnson (Md.) 20 L. R. A. 737.

See also 29 L. R. A. 212; 32 L. R. A. 631.

up, and a sale of the property, and for general relief.

The defendants, Cassell, Fox, and McNeely, and J. L. Ames, who was made a party, each filed an answer and cross-petition setting up judgments recovered by them respectively in the court of common pleas of Huron county, against the railroad company, and the levy of executions issued upon them; the judgment of Fox was recovered on the 4th day of February, 1884, and was for the sum of $739.50; that of Ames, on the 14th day of September, 1885, for $1,427.18; that of Cassell, on the 25th day of October, 1885, for $1,846.18; and McNeely recovered two judgments—one, on the 24th day of May, 1886, for $590.70, and the other on the 21st day of February, 1887, for $285.35. The executions issued on the judgments were all levied at the same time the plaintiffs' execution was levied, and upon the same property; and the cross-petitions contain substantially the same prayer as the petition. The railroad company filed no answer. The answer of the railway company to the petition, and the several cross-petitions, denies generally their allegations, and avers, that on the 1st day of November, 1879, the railroad company executed its first-mortgage bonds, thirty-five hundred in number, each for the sum of one thousand dollars, payable on the 1st day of November, 1909, bearing interest at the rate of six per cent per annum, payable semiannually on the 1st day of May and November, in each year, and sold and delivered twenty-eight hundred of the bonds to bona fide purchasers; that to secure the payment of the principal and interest of the bonds, the railroad company executed and delivered its mortgage, of deed of trust, to the Farmers' Loan & Trust Company, as trustee, and thereby conveyed to the trust company, its successors and assigns, all the railroad company's property, real and personal of every description, including the real estate in Huron county, in said petition described, "in trust for the benefit and the security of the several persons, copartnership firms, and corporate bodies who should at any time be or become holders of any of the above-mentioned bonds, to secure the due and punctual payment of the principal and interest of said bonds according to the tenor and effect thereof. The mortgage or deed of trust contained a provision that in case default should be made in the payment of any of the installments of interest upon any of said bonds and such default should continue for the period of six months, the principal of all the bonds secured thereby should become immediately due and payable; and it was duly recorded during the year 1880, in the office of the recorder of deeds of Huron county, Ohio, and in each of the other counties in which any real property of said railroad company was situate. The railroad company failed to pay the interest, which became due on the first day of November, A. D. 1883, and on the eighth day of July, A. D. 1884, the Farmers' Loan & Trust Company filed its bill of complaint in the circuit court of the United States for the northern district of Ohio eastern division against the Wheeling & Lake Erie Railroad Company praying that all of the property and franchises herein before described be sold under a decree of said court to satisfy the conditions of said mortgage or deed of trust; and on the same day said railroad company duly entered its appearance in said suit. That on the 18th day of January, A. D. 1886, a decree was rendered in said suit by said circuit court of the United States, finding the sum of three million two hundred and forty-two thousand seven hundred and sixty ($3,242,760) dollars, due upon said bonds hereinbefore described, and adjudging and decreeing that if the said, the Wheeling & Lake Erie Railroad Company should fail within the period of ten days thereafter to pay into said court said last-mentioned sum, all equity of redemption of said, the Wheeling & Lake Erie Railroad Company, in and to said mortgaged property and franchises should be barred and foreclosed, and said mortgaged property and franchises should be sold by Wilbur F. Goodspeed, special master commissioner, who, thereafter, for the sum of five hundred and five thousand dollars, sold said railroad property and franchises, including the property in the petition described, to George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees; and on the 22d day of June, A. D. 1886, said circuit court of the United States duly confirmed said sale and ordered said Wilbur F. Goodspeed, as special master commissioner, to execute and deliver to said trustees a deed of conveyance for said railroad property and franchises. That in pursuance of the aforesaid order of said circuit court of the United States, said Wilbur F. Goodspeed, special master commissioner, on said 22d day of June, A. D. 1886, executed and delivered to said George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees, a deed conveying to said trustees the railroad property and franchises hereinafter specifically described, being the property described in said mortgage or deed of trust and the same property described in said petition; said deed was duly recorded by the recorder of deeds for the county of Huron, Ohio, on the —— day of ——, A. D. 1886, in volume —— of Deeds, at page—. That on the 25th day of June, A. D. 1886, for a valuable consideration, the said George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees, executed and delivered to this defendant, the Wheeling & Lake Erie Railway Company, their certain deed, whereby they conveyed to this defendant all their right, title, and interest in said railroad and property so sold and conveyed to them by said Wilbur F. Goodspeed, special master commissioner, being the property described in said mortgage or deed of trust as well as in said petition; that said last-mentioned deed was recorded in the office of the recorder of deeds for the county of Huron, Ohio, on the —— day of ——, A. D. 1886, in volume —— of Deeds, at page ——. This defendant therefore denies that the judgment mentioned in the petition and cross-petitions ever became a lien on the real estate in the petition described, or on any part thereof."

The answer of the Mercantile Trust Company sets up bonds to the amount of three

OHIO SUPREME COURT.

Charles H. STEWART, Admr., etc., of Hugh B. Wilson, Deceased, *Plff. in Err.*,
v.
WHEELING & LAKE ERIE R. CO. *et al.*

(52 Ohio St. —.)

*1. **Section 5056 of the Revised Statutes,** which provides that: "When any part of the real property, the subject-matter of action, is situate in any county or counties other than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties, before it shall operate therein as notice so as to charge third persons," or affect interests acquired by them in the property not situate in the county where the action was brought,—relates to actions and judgments in the state courts and not to those in courts of the United States.

2. **A suit brought in a federal court to foreclose a mortgage on the property of a railroad corporation** operates as constructive notice throughout the district, and all persons acquiring an interest in or lien on any part of the property during the pendency of the suit will be bound by the decree and sale made thereunder; the purchaser will take the property discharged from all such liens and interests, though the persons obtaining them be not parties to the suit; they must seek satisfaction from the proceeds of the sale, to reach which they should become parties, and bring their claims to attention of the court by appropriate pleadings.

3. **But a judgment recovered in a state court against the railroad company, prior to the commencement of the foreclosure suit,** by a creditor who was not made a party, remains unaffected by the decree and sale; such judgment becomes a lien on the real property owned by the company at the time of its recovery, in the county where rendered, including lands acquired for the roadway, right of way, depots, and other purposes of the company, and continues to be so against the property in the hands of the purchaser at the foreclosure sale.

4. **While in such case the judgment creditor may not, except as authorized by statute, sell on execution** the property to which his lien attached, either where it is part only of the corporate property and is necessary, in connection with the balance of the property, to enable the corporation to accomplish the purposes of its creation, and discharge the duties it has assumed toward the public, or, where the sale would materially impair the uses and value of the balance of the property, he may, by a proceeding in equity to which all persons in interest are made parties, enforce his lien by subjecting the whole of the property to resale, and obtaining a proper application of the proceeds.

5. **In a proceeding for that purpose, the purchaser at the foreclosure sale may, if necessary for his protection, be subrogated** to the rights of the mortgagee, to the extent of the purchase money paid; and the proceeds of the resale must first be applied to the satisfaction of incumbrances superior to the lien of the judgment creditor, if any there be, including those set up in the foreclosure suit, and if nothing then remains for the judgment creditor, he cannot recover costs.

*Headnotes by the COURT.

(June 11, 1895.)

ERROR to the Circuit Court for Huron County to review a judgment affirming a judgment of the Court of Common Pleas refusing to recognize the validity of the liens of certain judgments upon the property of the Wheeling & Lake Erie Railroad Company.

Reversed as to one lien holder, and affirmed as to the others.

Statement by **Williams**, *J.*:

On the 20th day of May, 1889, Charles H. Stewart, as the administrator of the estate of Hugh B. Wilson, deceased, commenced his action, in the court of common pleas of Huron county, against the Wheeling & Lake Erie Railroad Company, the Wheeling and Lake Erie Railway Company, the Central Trust Company, of New York, the Mercantile Trust Company, of New York, as trustee, John W. Cassell, William S. Fox, and Cyrus McNeely.

The petition, after stating the due appointment and qualification of the plaintiff as administrator, and the corporate character of the several companies defendants, alleges that the defendant railroad company, prior to and during the year 1885, was the owner, and in possession of, and operating a line of railroad in and through Huron, and other counties of the state, and was the legal owner, and in possession of certain real estate situated in the county of Huron, consisting of its roadway and lands adjoining the same, depot grounds, and grounds occupied by its machine shops, station houses, car houses, engine houses, and other buildings; that at the October term, 1885, of the court of common pleas of that county, the plaintiff recovered a judgment against the said railroad company, for the sum of $4,049.84, and costs, which became a lien on the property of the railroad company, and remains in full force, and unsatisfied; that, afterward, on the 6th day of March, 1886, the plaintiff caused an execution to be issued on his judgment, which was returned unsatisfied, for want of goods and chattels, or unincumbered lands whereon to levy, the property of the company then being incumbered to an amount exceeding its value; but the incumbrances having been subsequently discharged the plaintiff caused another execution to issue, which was, on the 19th day of April, 1889, levied on the property of the railroad company in Huron county. The petition then alleges that the other defendants each claim to have some lien on, or right in, the property, by reason of which a sale under the execution cannot be effected, and prays they may be required to set up their claims, or be barred, and for an adjustment of whatever liens may be set

NOTE.—On the subject of execution or judicial sales of corporate franchises, or of property necessary to enjoyment of such franchises, see *note* to Brady v. Johnson (Md.) 20 L. R. A. 737.

See also 29 L. R. A. 212; 32 L. R. A. 631.

up, and a sale of the property, and for general relief.

The defendants, Cassell, Fox, and McNeely, and J. L. Ames, who was made a party, each filed an answer and cross-petition setting up judgments recovered by them respectively in the court of common pleas of Huron county, against the railroad company, and the levy of executions issued upon them; the judgment of Fox was recovered on the 4th day of February, 1884, and was for the sum of $739.50; that of Ames, on the 14th day of September, 1885, for $1,427.18; that of Cassell, on the 25th day of October, 1885, for $1,846.18; and McNeely recovered two judgments—one, on the 24th day of May, 1886, for $590.70, and the other on the 21st day of February, 1887, for $285.35. The executions issued on the judgments were all levied at the same time the plaintiffs' execution was levied, and upon the same property; and the cross-petitions contain substantially the same prayer as the petition. The railroad company filed no answer. The answer of the railway company to the petition, and the several cross-petitions, denies generally their allegations, and avers, that on the 1st day of November, 1879, the railroad company executed its first-mortgage bonds, thirty-five hundred in number, each for the sum of one thousand dollars, payable on the 1st day of November, 1909, bearing interest at the rate of six per cent per annum, payable semiannually on the 1st day of May and November, in each year, and sold and delivered twenty-eight hundred of the bonds to bona fide purchasers; that to secure the payment of the principal and interest of the bonds, the railroad company executed and delivered its mortgage, of deed of trust, to the Farmers' Loan & Trust Company, as trustee, and thereby conveyed to the trust company, its successors and assigns, all the railroad company's property, real and personal of every description, including the real estate in Huron county, in said petition described, "in trust for the benefit and the security of the several persons, copartnership firms, and corporate bodies who should at any time be or become holders of any of the above-mentioned bonds, to secure the due and punctual payment of the principal and interest of said bonds according to the tenor and effect thereof. The mortgage or deed of trust contained a provision that in case default should be made in the payment of any of the installments of interest upon any of said bonds and such default should continue for the period of six months, the principal of all the bonds secured thereby should become immediately due and payable; and it was duly recorded during the year 1880, in the office of the recorder of deeds of Huron county, Ohio, and in each of the other counties in which any real property of said railroad company was situate. The railroad company failed to pay the interest, which became due on the first day of November, A. D. 1883, and on the eighth day of July, A. D. 1884, the Farmers' Loan & Trust Company filed its bill of complaint in the circuit court of the United States for the northern district of Ohio eastern division against the Wheeling & Lake Erie Railroad Company praying that all of the property and franchises herein before described be sold under a decree of said court to satisfy the conditions of said mortgage or deed of trust; and on the same day said railroad company duly entered its appearance in said suit. That on the 18th day of January, A. D. 1886, a decree was rendered in said suit by said circuit court of the United States, finding the sum of three million two hundred and forty-two thousand seven hundred and sixty ($3,242,760) dollars, due upon said bonds hereinbefore described, and adjudging and decreeing that if the said, the Wheeling & Lake Erie Railroad Company should fail within the period of ten days thereafter to pay into said court said last-mentioned sum, all equity of redemption of said, the Wheeling & Lake Erie Railroad Company, in and to said mortgaged property and franchises should be barred and foreclosed, and said mortgaged property and franchises should be sold by Wilbur F. Goodspeed, special master commissioner, who, thereafter, for the sum of five hundred and five thousand dollars, sold said railroad property and franchises, including the property in the petition described, to George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees; and on the 22d day of June, A. D. 1886, said circuit court of the United States duly confirmed said sale and ordered said Wilbur F. Goodspeed, as special master commissioner, to execute and deliver to said trustees a deed of conveyance for said railroad property and franchises. That in pursuance of the aforesaid order of said circuit court of the United States, said Wilbur F. Goodspeed, special master commissioner, on said 22d day of June, A. D. 1886, executed and delivered to said George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees, a deed conveying to said trustees the railroad property and franchises hereinafter specifically described, being the property described in said mortgage or deed of trust and the same property described in said petition; said deed was duly recorded by the recorder of deeds for the county of Huron, Ohio, on the —— day of ——, A. D. 1886, in volume —— of Deeds, at page—. That on the 25th day of June, A. D. 1886, for a valuable consideration, the said George J. Forrest, Melville C. Day, and Daniel E. Garrison, trustees, executed and delivered to this defendant, the Wheeling & Lake Erie Railway Company, their certain deed, whereby they conveyed to this defendant all their right, title, and interest in said railroad and property so sold and conveyed to them by said Wilbur F. Goodspeed, special master commissioner, being the property described in said mortgage or deed of trust as well as in said petition; that said last-mentioned deed was recorded in the office of the recorder of deeds for the county of Huron, Ohio, on the —— day of ——, A. D. 1886, in volume —— of Deeds, at page ——. This defendant therefore denies that the judgment mentioned in the petition and cross-petitions ever became a lien on the real estate in the petition described, or on any part thereof."

The answer of the Mercantile Trust Company sets up bonds to the amount of three

millions of dollars, and a mortgage securing the same, executed by the railway company on the 6th day of July, 1886, which bonds, it is alleged, are in the hands of holders for value, and the mortgage embraces all the property purchased by the railway company, including that described in the plaintiff's petition. The mortgage was recorded in Huron county, and in each of the other counties in which any of the property is situated, in August, 1886. The defendant prays that its mortgage lien, and the interests of the holders of the bonds secured by it, may be protected. The Central Trust Company, in its answer, sets up a subsequent mortgage executed by the railway company, on the same property, to secure bonds to the amount of one million five hundred thousand dollars, in the hands of holders for value, which mortgage was recorded in the several counties where the property is located, in May, 1888, and prays that its rights and those of the bond holders may be protected. Demurrers to these several answers were filed by the plaintiff, and cross-petitioning judgment creditors, which were overruled, and replies were then filed controverting their allegations, and alleging that "if said defendants or either of them, obtained the title or liens, or any of them, in their said answers pretended, the same were procured with full knowledge and notice of the prior rights, lien, and interest of the plaintiff," and the other judgment creditors of the railroad company.

After trial and judgment in the court of common pleas, the cause was taken to the circuit court on appeal, where it was submitted upon an agreed statement of facts; and that court also made and entered its findings of fact, upon the issues joined, from which it appears that the allegations of the petition, and of the several cross-petitions filed by those having judgments against the railroad company, as they have already been stated, are true, and the averments, as they have been stated, in the answers of the railway company, the Central Trust Company, and the Mercantile Trust Company are also true; and, upon that state of facts the court held that neither the plaintiff, nor either of the other judgment creditors, was entitled to any relief, and, rendered judgment against them for costs. A motion for a new trial, filed by them, was overruled, and a bill of exceptions, at their request, was duly signed and allowed, and they are each asking the reversal of the judgment rendered against them.

Mr. **G. T. Stewart** for plaintiff and cross-petitioners in error.

Messrs. **Swayne, Swayne, Hayes,** and **Tyler** for the railway company, defendant in error.

Williams, J., delivered the opinion of the court:

The mortgage executed by the defendant railroad company, to the Farmers' Loan & Trust Company, November 1, 1879, embraced all of the property of the mortgagor, including that which the plaintiff, in the action below, sought to have subjected to sale for the payment of his judgment. The mortgage was duly recorded in 1880, in each of the counties where any of the property was situated. The suit to foreclose that mortgage was commenced in the United States circuit court of the proper district on the 8th day of July, 1884, and the appearance of the defendants duly entered on the same day. That suit, which was regularly and continuously prosecuted, resulted in a decree of foreclosure, rendered on the 13th day of January, 1886, under which all of the property was sold, and the sale confirmed on the 22d day of June, 1886. The purchasers, after receiving their deed for the property, conveyed it in due form to the defendant railway company, on the 25th day of June, 1886. These conveyances were properly recorded. The plaintiff below, and the several cross-petitioners, except Fox, recovered their judgments against the railroad company, after the commencement, and during the pendency of the foreclosure suit, and none of them were made parties thereto. Fox recovered his judgment before the commencement of that suit, but was not made a party. It is claimed by the defendants in error that all of these judgment creditors, except Fox, are bound by the decree in the foreclosure suit, and whatever lien or right they acquired against the property, by their judgments, was devested by its sale under the decree, and the purchasers took the title discharged therefrom.

That the court in that suit had jurisdiction of the parties, and of the property included in the mortgage, is not questioned; nor is it, that the prosecution of the suit was close and continuous; and it is well settled that all persons who, in such case, purchase, or otherwise acquire an interest in the subject of the litigation, take with constructive notice of the pendency of the suit, and will be bound by its result, though not made a party. The rule as formulated by *Lord Chancellor* Bacon, and generally adhered to since is, that "no decree bindeth any that cometh in bona fide by conveyance from the defendant before bill exhibited, and is made no party, neither by bill nor the order; but, where he comes in *pendente lite*, and while the suit is in full prosecution, and without any color of allowance or privity of the court, there regularly the decree bindeth." The rule is founded in necessity, as well as upon public policy, as, without it, the judgment of the court could in all cases be frustrated, or rendered ineffectual by conveyance or incumbrance made or suffered during the pendency of the suit; new suits would then become necessary against those so obtaining an interest in the subject of the action, who might, in the same way, compel still further suits, and so on, until there would be no end to the litigation. As was said by *Chancellor* Kent, in *Murray* v. *Ballou*, 1 Johns. Ch. 566, 1 L. ed. 247, "no doubt the rule sometimes operates with hardships upon a purchaser without notice, but this seems to be one of the cases in which private mischief must yield to the general convenience." In general, a suit is to be determined upon the

state of case existing when it was instituted; and persons who procure an interest in its subject-matter during its pendency should, if they wish to assert any claim founded upon that interest, become parties, and bring it to the attention of the court by appropriate pleadings. The rule is quite as applicable to judgment creditors as it is to purchasers, or other incumbrancers, and there is no reason why it should not be; the lien of the judgment attaches only to the right or title which the debtor had at the time of its rendition, and the position of the creditor is not more meritorious than that of a mortgagee or bona fide purchaser. It is contended, however, by counsel for the plaintiff in error, that section 5056 of the Revised Statute, forbids the application of the rule in this case, and prevents the foreclosure suit brought in the United States court from operating as a *lis pendens* affecting the liens of the judgments recovered in Huron county. That section provides that: "When any part of real property, the subject-matter of an action, is situated in any county or counties other than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the recorder's office of such other county or counties, before it shall operate therein as notice so as to charge third persons, as provided in the preceding section; but it shall operate as such notice, without record, in the county where it is rendered; but this section shall not apply to actions or proceedings under any statute which does not require such record." The preceding section provides that: "When the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency; and while pending no interest can be acquired by third persons in the subject-matter thereof as against the plaintiff's title." These sections belong to the code of civil procedure; and it is obvious they relate to actions brought, and judgments rendered in the state courts, and not to those in the courts of the United States. Section 5056 is, by its terms, limited to judgments recovered in one county, concerning real property partly situated in another county; and actions of that nature are authorized by a preceding section of the Code, section 5022. In the federal courts, actions are not brought in counties, but in the district or circuit where jurisdiction of the parties and subject-matter may be properly obtained: and, throughout the territorial limits of that jurisdiction their judgments operate as liens, and actions pending as constructive notice, like those of state courts within their appropriate jurisdiction. Similar statutes have received like construction elsewhere. A statute of the state of Virginia provided that "no *lis pendens*, or attachment against the estate of a nonresident, shall bind or affect a purchaser of real estate, without actual notice thereof, unless and until a memorandum setting forth the title of the cause the general object thereof, the court in which it is pending, a description of the land and the name of the person whose estate is intended to be affected thereby, shall be left with the clerk of the court of the county or corporation in which the land is situated, who shall forthwith record the said memorandum in the deed book, and index the same by the name of the person aforesaid." When that statute was in force, an assignee in bankruptcy brought suit in the federal court at Richmond, to set aside, as fraudulent, a deed for certain real property in Petersburg. Pending the suit, a third person, in good faith, purchased the property from a defendant, and paid full value for it, without notice of the fraud, or pending suit. The court held he took nothing by his purchase as against the decree in the federal court, notwithstanding no *lis pendens* was filed or recorded as required by the Virginia statute. *Rutherglen* v. *Wolf*, 1 Hughes, C. C. 78. In the case of *Wilson* v. *Hefflin*, 81 Ind. 85, it appeared that during the pendency of a suit in the federal court to reform a mortgage so as to embrace a tract of land not described in it, and foreclose the mortgage when so reformed, Wilson purchased the land, which was situated in a county where the federal court did not sit, and where, upon the records, the title was in the name of his grantor, and no incumbrance of the land appeared of record. His purchase was made in good faith, for value, and without actual notice of the mistake in the mortgage, or the pendency of the suit to reform and foreclose it. Subsequently, the court decreed reformation of the mortgage, and sale of the property. In an action brought by Wilson, who was in possession of the land, to quiet his title as against the decree of the federal court, he relied on a statute of Indiana which had not been complied with, similar in its provisions to that of Virginia, heretofore mentioned; but the court decided against him, holding that the statute had "no effect upon suits in the United States courts." And in *Majors* v. *Cowell*, 51 Cal. 478, it was held that the clause of the practice act of that state, "relating to the filing of a *lis pendens*, does not apply to suitors except in the state courts."

It follows that the judgments recovered against the defendant railroad company, while the suit was pending in the federal court to foreclose the mortgage embracing the property which it is sought to subject to their payment, created no lien, nor gave any right or remedy to those creditors that can now be enforced or be made effectual against the property. But Fox, whose judgment was recovered prior to the commencement of that suit, and who was not made a party to it, occupies a different position, and is not without remedy, unless it is to be denied upon some other ground. The nature, as well as the existence of that remedy, is well settled. It is the duty of a mortgagee to make all persons who appear of record to have a lien upon or interest in the mortgaged premises parties to his action of foreclosure, and if he does not, their lien or interest remains unaffected thereby; and any such incumbrancer, whether prior or subsequent to the mortgage, who has not been made a party, may maintain action to enforce his lien, and have a resale of the property for that purpose; if a subsequent incumbrancer, he is only entitled to

have applied to the payment of his claim such part of the proceeds of the resale as may be necessary, which remains after the payment of the prior incumbrance and costs, and if nothing so remains he cannot recover costs; but he is not required, as a condition of his right of resale, to first pay such prior incumbrance. The purchaser at the first sale takes the title of the mortgagor and mortgagee, and may, for his protection, be subrogated to the rights of the latter to the extent of the purchase money paid. *Frische* v. *Kramer*, 16 Ohio, 126, 139, 47 Am. Dec. 368; *Myers* v. *Hewitt*, 16 Ohio, 449; *Childs* v. *Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Stewart* v. *Johnson*, 30 Ohio St. 24; *Holliger* v. *Bates*, 43 Ohio St. 437; *Vanderkemp* v. *Shelton*, 11 Paige, 28, 5 L. ed. 45.

But it is contended the remedy cannot properly be enforced in this case, because the railroad company, when the judgment was recovered against it, was a public agency whose property was essential to the exercise of its franchise, and the discharge of those duties it had assumed toward the public; and the railway company holds the property, it is claimed, impressed with the same public trust, and secured by the same right of exemption. There are authorities which maintain the general proposition, that the real property of corporations classed as public agencies, such as railroad companies, which is essential to the exercise of their corporate franchise, and the performance of their duties to the general public, cannot be sold on execution, without statutory authority; and, further, that a part only of the property of such a corporation cannot be so sold, when the sale would practically destroy, or seriously impair the uses and value of the remainder. Conceding, however, that considerations of public policy, or the peculiar nature, uses, and incidents of property owned by such quasi public corporations, forbid the sale, upon execution of the whole or parts of the property, with or without the corporate franchise, it does not follow that a lien upon it may not be created by the recovery of a judgment against the corporation, which may be preserved in some mode, and enforced by some appropriate proceeding. If it could not be, it is evident the purposes of the corporation would generally, if not always, fail; for ordinarily, in conducting its business, it becomes necessary to contract debts and incur obligations, and it being understood the creditor has no means of enforcing payment, the corporation could obtain no credit. As said by Gholson, *J.*, in *Coe* v. *Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518: "It may be true that a railroad corporation holds its property, in a certain sense, as a public trust, to answer the purposes of a public highway, the transportation of persons and property. But it is consistent with that public trust to contract obligations. Indeed, the very exercise of the trust necessarily involves obligations to individuals, and to meet those obligations the property of the corporation must, in some form, be liable. The question is, in what form? Shall it be in the ordinary legal form applicable to the property of individuals, or shall peculiar rules be introduced, which may have the effect to delay creditors, and operate as a shield to protect property from their just demands?" The court, in that case, distinguishes between the franchise of being a corporation, which, it is said, properly speaking, is a franchise of the incorporators, and the franchise to operate the road and make profits therefrom; and holds that the former cannot be conveyed or sold, while the latter may be. And with respect to the property of the corporation, after it has been mortgaged, and the respective rights of the mortgagee, and subsequent lien holders, it is said: "The property must be subject in some form to the just claims against the party subsequently arising, and this will frequently and necessarily lead to interruption and disappointment in a prior arrangement, as to the time within which it is to be performed;" and, further, that the company "could not by its own act exempt from the claims of its creditors any part of its property," nor could the mortgagee "object to the creation of other legal liens upon the property embraced in the mortgage." In *Lane* v. *Baughman*, 17 Ohio St. 642, 93 Am. Dec. 653, it is held that "the remedy of a judgment creditor of a railroad company, where its property is incumbered by mortgage, is in equity to subject the interest of the mortgagor to the payment of the judgment, except where his claim is such as to entitle him to have it paid out of the earnings of the company, when his appropriate remedy is to subject the earnings to its payment." And this court held in *Dayton, X. & B. R. Co.* v. *Lewton*, 20 Ohio St. 401, that a party who has a lien on a specific part only of the property of a railroad corporation, is not entitled to a sale of such part, where the sale will have the effect to break the continuity of the road and interfere with the public interests. The lien asserted in that case was in the nature of a vendor's lien on a piece of land used for the company's roadway. Speaking of the lien holder's remedy in such case, McIlvain, *J.*, says: "The public has and can have no right which springs from an act of injustice to the defendant in error. Its only right is to preserve the continuity of the road, of the line of public travel and transportation. And this right is as well subserved if the ownership and management of the highway be in the hands of one party as another. Hence the public has no interest impaired by a sale of the whole line." And, "because a part may not be sold on account of the paramount right of the public to keep the highway intact, a necessity arises, in order that justice may be done to the defendant in error, to decree a sale of the whole line of the road to satisfy his lien. And this is the only mode in which the rights and interests of other parties, either as owners or lien holders upon the road, can be protected, and their property or security saved from absolute destruction."

In general, the liability of property for the owners' debts, except in so far as there are express legal exemptions, is as unlimited as the power of disposition, which is an inseparable incident of ownership, when there

is no legal disability; for the incurring of indebtedness for the payment of which the property may be taken, is but a mode of disposition by the owner. Under our laws railroad companies are authorized to appropriate lands for their roadways, depots, workshops, and for various other uses, and to acquire by purchase or donation any lands in the vicinity of the line of the road, or through which it passes, deemed necessary or convenient for the right of way, or that may be granted to aid in the construction of the road; and to hold and convey the same in such manner as the directors may prescribe. Rev. Stat. 3281, 3282. And that the lien of a judgment may attach to such property, as it does to that of an individual, is distinctly recognized in the legislation of this state. Thus, it is provided by section 3398, of the Revised Statutes that the lien of certain mortgages and deeds of trust executed by the company shall be postponed to the lien of judgments recovered against the company for labor thereafter performed for it, or material or supplies thereafter furnished to it, or for damages, or losses, thereafter sustained by the misconduct of its agents, or in actions founded on its contracts or liability as a common carrier thereafter made or incurred. And the subsequent and supplemental sections point out the mode of enforcing the lien of the judgment and preserving its priority. Section 3516-35, declares that if one company, owning a railroad jointly with another company, shall refuse to pay its part of the costs of making necessary additions and improvements as directed by the statute, judgment may be recovered therefor, which "shall be a valid lien upon the interests of the party so in default in said railroad or part of railroad owned jointly as aforesaid, and such interest may be sold at public sale as in other cases upon execution," and the purchaser shall enjoy "all the rights, privileges, and franchises which were exercised or enjoyed by the company owning the same at the time of the sale." Other instances may be found in sections 3299, 5866, 6449. By section 5375 of the Revised Statutes, a judgment is made a lien on all the lands of the debtor, and any vested interest he may have in lands, situated in the county where the judgment is rendered, either from the first day of the term of the court at which it is rendered, or from the day of its rendition. And we are of the opinion that judgments recovered against railroad corporations become liens upon their real property situated in the county where rendered, and that lands owned by such corporations for their roadways, rights of way, depots, and other purposes must be regarded as property of that character, and subject to such liens. We are also of the opinion that while the judgment creditor may not, except as authorized by statute, sell on execution the property to which his lien attaches, separate from the franchise of the company, nor, when it is part only of the corporate property and is necessary in connection with the balance of the property to enable the company to accomplish the purposes of its organization, and perform the duties it owes to the public, or its sale will materially impair the uses and value of the balance of the property, he may, by a proceeding in equity, to which all persons interested are made parties, enforce his lien by subjecting the whole of the property and franchises of the corporation to sale.

The pleadings do not seem to have been drawn with this view of the case; the property is not adequately described in the petition, or cross-petition of Fox; but such description is supplied by the answer of the railway company. Then, the recovery of Fox's judgment was subsequent to the record of the mortgage under which the former sale was had, and it appears the proceeds were insufficient to pay the indebtedness secured by it; and, as it is not shown that the claim on which the judgment was rendered was such as to entitle it to priority over the mortgage, the latter must be treated as the superior lien, and entitled to receive the unpaid balance out of the proceeds of any sale of the property that may be had at the instance of Fox, before any part can be properly applied on his judgment. The holder of the mortgage, or of the indebtedness secured by it, is therefore a necessary party, but as he can only be interested in the distribution of the proceeds of the sale, it will be sufficient if the party is brought in before that takes place. The presence of the party is not necessary before the decree of sale. It may turn out that the resale will produce no more, nor even enough to pay the balance of the mortgage debt; but, whether a suitor's remedy promises to be productive of beneficial results, or not, is for his consideration; the court is concerned only with his rights.

The judgment rendered by the Circuit Court against Fox is reversed, and the cause will be remanded for a decree in his favor in accordance with this opinion.

In other respects the judgment is affirmed.

Horan, 49 N. Y. 111, 10 Am. Rep. 335; *Clark* v. *Coolidge*, 8 Kan. 190.

Equity will interfere to prevent municipal authorities from transcending or from making an illegal use of their powers, and relieve against their unauthorized or illegal acts.

2 Dill. Mun. Corp. 3d ed. §§ 906, 914, 916, *et seq.*; 1 Pom. Eq. Jur. 2d ed. §§ 242, 258, 259, 260; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *Crampton* v. *Zabriskie*, 101 U. S. 601, 25 L. ed. 1070.

While the legislature may extend the corporate boundaries of municipalities as it sees fit, it cannot authorize the imposition of municipal taxation upon such real estate as evidently derives no benefit from its connection with the municipality. Such taxation would virtually amount to a taking of property for public use without making compensation.

Cheaney v. *Hooser*, 9 B. Mon. 330; *Covington* v. *Southgate*, 15 B. Mon. 491; *Sharp* v. *Dunavan*, 17 B. Mon. 228; *Arbegust* v. *Louisville*, 2 Bush, 271; *Swift* v. *Newport*, 7 Bush, 37; *Henderson* v. *Lambert*, 8 Bush, 607; *Courtney* v. *Louisville*, 12 Bush, 419; *Morford* v. *Unger*, 8 Iowa, 82; *Butler* v. *Muscatine*, 11 Iowa, 433; *Fulton* v. *Davenport*, 17 Iowa, 404; *Langworthy* v. *Dubuque*, 18 Iowa, 86, 16 Iowa, 271; *Buell* v. *Ball*, 20 Iowa, 282; *Deeds* v. *Sanborn*, 26 Iowa, 419; *Durant* v. *Kauffman*, 34 Iowa, 194; *Brooks* v. *Polk County*, 52 Iowa, 460.

Messrs. **Trumbull & Trumbull**, for respondent:

Relief will not be granted in a court of equity by injunction, against illegality in tax proceedings, as a matter of right.

Cooley, Taxn. 2d ed. p. 760.

To obtain relief in equity, in this class of cases, by injunction, it must be brought under some acknowledged head of equity jurisprudence.

Pom. Eq. Jur. 1st ed. §§ 259–265; Cooley, Taxn. pp. 761, 762; 1 High, Inj. §§ 485, 486.

The questions involved are not, in the sense of the code, of common or general interest.

Newcomb v. *Horton County*, 18 Wis. 566; *Cutting* v. *Gilbert*, 5 Blatchf. 259; *First Div. of St. Paul & P. R. Co.* v. *Parcher*, 14 Minn. 297; Cooley, Taxn. p. 771.

If what is alleged in the complaint is true, mere inspection of the record would show the invalidity of the proceeding on the part of respondents, and equity would not assume jurisdiction.

Cooley, Taxn. p. 779, and *notes*; *Marsh* v. *Brooklyn*, 59 N. Y. 280; *Cox* v. *Clift*, 2 N. Y. 118; *Susquehanna Bank* v. *Broome County Supvrs.* 25 N. Y. 312; *Hunnewinkle* v. *Georgetown*, 82 U. S. 547, 21 L. ed. 231; *Wells* v. *Buffalo*, 80 N. Y. 253.

Assuming that the tax levied, and which it is alleged that the respondents are threatening to collect, is illegal, it by no means follows that it works irreparable injury.

1 High, Inj. § 545; *Judd* v. *Fox Lake*, 28 Wis. 583; *Sage* v. *Fifield*, 68 Wis. 546; *Brooklyn* v. *Meserole*, 26 Wend. 132; *Heywood* v. *Buffalo*, 14 N. Y. 534; *Guest* v. *Brooklyn*, 69 N. Y. 506

Courts of equity will not interfere to review the proceedings of inferior tribunals.

1 High, Inj. § 544; *Blake* v. *Brooklyn*, 26 Barb. 301; *Ewing* v. *St. Louis*, 72 U. S. 5 Wall. 413, 18 L. ed. 657; *Dows* v. *Chicago*, 78 U. S. 11 Wall. 108, 20 L. ed. 65; *Mooers* v. *Smedley*, 6 Johns. Ch. 28, 2 L. ed. 43; *Parmeter* v. *Bourne*, 8 Wash. 45; *State* v. *Warner*, 17 L. R. A. 263, 4 Wash. 773.

Where complainants have been guilty of laches in asserting their rights, and have apparently acquiesced for a series of years in the annexation, they will be estopped from enjoining, upon the ground of invalidity of the annexation, a tax imposed upon their property annexed by the municipality.

1 High, Inj. § 547, p. 428; *Logansport* v. *LaRose*, 99 Ind. 117; 1 Beach, Pub. Corp. § 428, p. 414; *Black* v. *Brinkley*, 54 Ark. 372; *Graham* v. *Greenville*, 67 Tex. 62.

The alleged irregularities in the annexation proceedings is a collateral attack, and will not be entertained by the court where it appears that there was jurisdiction and that the proceedings were not absolutely void.

Graham v. *Greenville*, *supra*; *Atchison, T. & S. F. R. Co.* v. *Wilson*, 33 Kan. 223; 1 Dill. Mun. Corp. p. 268, *note*; *Terre Haute* v. *Beach*, 96 Ind. 143.

The presentation of the petition to the council as stated in the complaint called into exercise its jurisdiction as conferred by the act.

Strieb v. *Cox*, 111 Ind. 299; *Million* v. *Carroll County Comrs.* 89 Ind. 5.

The objection that the notice of election was not published in a newspaper printed and published outside of such city and in the county in which such territory so proposed to be annexed is situated, is subject to the same objection as being a collateral attack.

State v. *Waxahachie*, 81 Tex. 626; *McCraw* v. *Harralson*, 4 Coldw. 34; *Dithon* v. *Smith*, 10 Iowa, 212.

Where it is impossible to give notice, the want of such a notice will not avoid the election.

Powell v. *Jackson*, 51 Mich. 129.

Where an injunction has been applied for to restrain the collection of a tax partly legal and partly not, the court will make the payment of the legal a condition precedent to the granting of the injunction.

1 High, Inj. §§ 497, 498; Cooley, Taxn. p. 763; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. ed. 663; *German Nat. Bank of Chicago* v. *Kimball*, 103 U. S. 732, 26 L. ed. 469.

Gordon, J., delivered the opinion of the court:

This was an action brought in the superior court of the county of Jefferson for the purpose of restraining the collection of taxes assessed against the lands of plaintiff for municipal purposes. The ground upon which relief is sought is that the property against which said taxes are levied is situated within that portion of territory attempted to be annexed to the city of Port Townsend by virtue of certain proceedings upon the part of the officers of said city, which proceedings, he alleges, were had and taken without authority of law, and are therefore void. Issue of fact was joined by answer and reply, and thereafter, upon motion of the respondents, judgment was rendered upon the plead-

ings in favor of respondents, from which judgment this appeal is prosecuted.

The city of Port Townsend was incorporated under an act of the legislature of the territory of Washington, approved November 29, 1881. The theory of the complaint, and the sole ground upon which the relief is sought, is that the attempted annexation proceedings were void. The prayer of the complaint is: "That upon the final hearing herein the court will order and declare the said attempted annexation of said property so as hereinbefore set forth attempted to be annexed to said city of Port Townsend, and the acts and doings of said city of Port Townsend in relation thereto, void, and of no effect."

Various errors are assigned in the appellant's brief, relating principally to matters within the discretion of the lower court, all of which, save those hereinafter noticed, were abandoned upon the oral argument in this court; and, although we have examined and considered them, we do not think that any of them are of sufficient importance to warrant a reversal of the cause. Section 9 of the Act of March 27, 1890, being section 501, 1 Hill's Code, is as follows: "The boundaries of any municipal corporation may be altered and new territory included therein, after proceedings had as required in this section. The council, or other legislative body of such corporation, shall, upon receiving a petition therefor, signed by not less than one fifth of the qualified electors thereof, as shown by the vote cast at the last municipal election held therein, submit to the electors of such corporation, and to the electors residing in the territory proposed by such petition to be annexed to such corporation, the question whether such territory shall be annexed to such corporation and become a part thereof." The section further provides for the calling of a special election to be held for that purpose, and giving notice therefor, and provision is made for canvassing and declaring the result. Continuing, the section provides that: "If it shall appear upon such canvass that a majority of all the votes cast in such territory and a majority of all the votes cast in such corporation shall be for annexation, such legislative body shall, by an order entered upon their minutes, cause their clerk, or other officer performing the duties of clerk, to make and transmit to the secretary of state a certified abstract of such vote, which abstract shall show the whole number of electors voting in such territory, the whole number of electors voting in such corporation, the number of votes cast in each for annexation, and the number of votes cast in each against annexation." It then provides that "from and after the date of the filing of such abstract such annexation shall be deemed complete, and thereafter such territory shall be and remain a part of such corporation." It is alleged in the complaint that this section does not apply to, and has no relation whatsoever to, the city of Port Townsend. Learned counsel for the appellant, in his very able and exhaustive brief, has failed to advance any reasoning in support of the position thus assumed. A similar question was involved in the case of *State* v. *Warner*, 4 Wash. 778, 17 L. R. A. 268, and of that section this court there said: "In our judgment, there can be no doubt that the intention was to make it apply to municipal corporations of every class, whether existing under special territorial charters or under the constitution and subsequent laws of the state." Further consideration convinces us that this is the true meaning of that section.

It appears from the complaint in this action that in September, 1890, a petition was presented to the council of the said city, signed by a number of persons, requesting that said outlying territory (describing it, and which includes the lands of appellant) be annexed to the city of Port Townsend, and that the city limits be extended so as to include the same. Continuing, the complaint alleges that "the said city council, in pursuance thereof, and in attempting to annex the said property and extend said boundaries, caused a notice of a special election to be published." Then follows the notice, the sufficiency of which is not questioned. "That said city council caused said notice of said election to be published for the time required by law in a newspaper printed and published within the limits of the city of Port Townsend, as required by the acts of the legislature aforesaid." Further, it alleges that "on October 27, 1890, an election was held under and by virtue of said notice, and thereafter the council proceeded to declare the result, and made its finding and declaration in respect thereto, showing a majority of 341 in favor of annexation, and thereupon the city council made an order that the city attorney and clerk draw an abstract to be filed with the secretary of state." Continuing, the complaint alleges "that ever since the finding and declaration aforesaid as to the canvassing of said vote and the drawing and filing of the abstract aforesaid with the secretary of state, the said city of Port Townsend has assumed and taken control of and legislated for and assessed taxes for general and special purposes upon and against all the property, both real and personal, within the limits described in and mentioned in said notice of election." It is alleged in the answer, and admitted by the reply, that the plaintiff was a signer of the petition (already mentioned) which was presented to the council, asking for such annexation. It is also admitted that since said attempted annexation various streets have been laid out within the territory so annexed, by authority of said city, and improvements made thereon, aggregating thousands of dollars; that the appellant also signed some of the petitions to the council praying for said improvements and the grading of said streets. It also appears that during the years 1891-92 he furnished the assessor of the city with a detailed list of all his property within the limits thereof, including in said list his property situated in the annexed portion of said city. Upon the facts above noticed, we think the judgment appealed from must be affirmed for two principal reasons, viz.: (1) A private citizen cannot question the right of a

municipal corporation to exercise the authority, powers, and functions of an incorporated city. This can be done only in a direct proceeding, prosecuted by the proper public officers of the state. (2) The appellant is precluded by his conduct from maintaining the present action. The following authorities, and many others that might be cited, support the first proposition above laid down: *Voss* v. *Union School Dist. No. 11*, 18 Kan. 467; *Stafford County School Dist. No. 25* v. *State*, 29 Kan. 57; *Graham* v. *Greenville*, 67 Tex. 62; *Stockle* v. *Silsbee*, 41 Mich. 615; *Clement* v. *Everest*, 29 Mich. 19; *Mullikin* v. *Bloomington*, 72 Ind. 161; *Atchison, T. & S. F. R. Co.* v. *Wilson*, 38 Kan. 228. In the case last above cited the court says: "To maintain this suit, and to defeat the tax complained of, the plaintiff must establish, and the court must determine, that the organization of the district is illegal. This cannot be done in the present action. The legality of the organization cannot be questioned in a collateral proceeding, nor at the suit of a private party. The organization cannot be attacked, nor any action taken affecting the existence of the corporation, except in a direct proceeding, prosecuted at the instance of the state by the proper public officer." In *Clement* v. *Everest*, *supra*, it is said: "It would be dangerous and wrong to permit the existence of municipalities to depend on the result of private litigation. Irregularities are common and unavoidable in the organization of such bodies; and both law and policy require that they shall not be disturbed, except by some direct process, authorized by law, and then only for very grave reasons." In *Mullikin* v. *Bloomington*, *supra*, the court says: "As there is a statute under which the town might have become a city, and the complaint shows an attempt to comply with this statute, and shows also acts performed, after such attempt (conceding that the statute was not strictly complied with), as a city corporation, and that powers were asserted under the general act for the incorporation of cities, a citizen, in his own behalf, cannot attack the right of the corporation to exercise the functions, powers, and authority of an incorporated city. In such cases as the present the right to exercise the powers and authority of a corporation can only be questioned by a proceeding in the nature of a quo warranto, filed by some one possessing competent authority, in behalf of the state." Without multiplying authorities upon a proposition so generally recognized and understood, we think it can be safely said that, where the legislature has conferred upon a city the power to enlarge its corporate limits, and, having jurisdiction of the general subject-matter thereof, the city authorities proceed to act and to declare a result, and thereafter to act upon such result, the legality of such acts cannot be called in question in a collateral proceeding. So here the subject of annexing territory to the city was one over which the council of the city of Port Townsend had jurisdiction by virtue of section 9 of the Act of 1890, *supra*. That jurisdiction was brought into exercise by the filing of the petition, regardless of whether the petition complied with the statute, and regardless of any errors or irregularities in the proceedings of the council. "The power to hear and determine a case is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action." *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547. In *Morrow* v. *Weed*, 4 Iowa, 77, 66 Am. Dec. 122, it was held: "If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, its sufficiency cannot be called in question in a collateral proceeding." To the same effect is the very well considered case of *Terre Haute* v. *Beach*, 96 Ind. 143. The objections urged against the proceedings of the council of the respondent city do not go to any question of jurisdiction, but constitute mainly irregularities and informalities not affecting jurisdiction, and afford no ground for collateral attack.

The appellant's participation in the annexation proceedings, his subsequent recognition of the jurisdiction of the city authorities, his acquiescence in the result reached and declared by them, and his gross laches in the assertion of his rights, constitute an equitable bar to the cause of action which he, after the lapse of nearly three years, first attempted to assert; and it would be immaterial to the result were we to determine that his conduct amounted to a ratification, or an election, or requires the application of the doctrine of estoppel. *Strosser* v. *Fort Wayne*, 100 Ind. 443; *Hayward* v. *Eliot Nat. Bank*, 96 U. S. 611, 24 L. ed. 855; *Graham* v. *Greenville*, *supra*. In *Strosser* v. *Fort Wayne*, *supra*, it is said: "If a taxpayer were permitted to long acquiesce in the order of annexation, and then secure its overthrow, great confusion would ensue, and much injustice be often done. High considerations of public policy and of justice require that a taxpayer who is notified that a public corporation claims to have extended its limits so as to take in his property should act with promptness, and proceed with diligence, if he would resist the attempted annexation." We think the lower court was right in giving judgment for the respondents and in denying appellant's application for leave to amend, and said *judgment is affirmed.*

Hoyt, *Ch. J.*, and Anders and Dunbar, *JJ.*, concur.

WEST VIRGINIA SUPREME COURT.

Lafayette E. WARD, *Appt.*,
v.
John B. WARD *et al.*, Heirs of Maria E. Ward, Deceased.

(.....W. Va.....)

*1. **By common law, one joint tenant, tenant in common, or coparcener using the common land** exclusively, but not ousting or excluding his co-owners, is not chargeable to them for use and occupation; but this rule has been changed by section 14, chap. 100, Code, as to joint tenants and tenants in common, but not as to parceners.

2. **A coparcener,** merely from sole occupation of the premises, is not chargeable in favor of coparceners, unless he excludes them.

3. **Where it is proper to allow a coparcener for improvements** a charge for use and occupation may be set off against the improvements.

4. **Permanent improvements made by one coparcener** without request or agreement of others are not chargeable to the others personally or upon their shares in the land; but if made by their request or agreement, they are a debt upon them, and a lien on their shares in the land.

5. **One joint tenant, tenant in common, or coparcener can compel others to contribute** to make necessary repairs to a mill or house, after request to assist and refusal. But this compulsion is as to future repairs, not

*Headnotes by BRANNON, J.

NOTE.—*Liability of cotenants for improvements and repairs.*

I. *Improvements.*
- a. *Liability at common law.*
- b. *Liable in assumpsit for improvements.*
- c. *Rule in equity.*
- d. *Lien for improvements.*
- e. *Interest on improvements.*
- f. *Position of grantee of cotenant's share.*

II. *Repairs.*
- a. *General doctrine.*
- b. *Liability in assumpsit.*
- c. *Necessity of a demand and notice.*
- d. *Lien for repairs.*

Upon the question of the liability of cotenants to account for the use and occupation of the premises and for rents and profits received therefrom, see *note* to Gage v. Gage (N. H.) 28 L. R. A. 329.

The question of improvements as considered in a claim for rents and profits will be found in the same *note*, head XVIII., p. 354.

The liability of cotenants for money expended in payment of taxes, or removing incumbrances, will form a separate note.

The question of improvements and repairs as considered in this note is confined exclusively to the consideration of the subject as between cotenants strictly so called, namely, joint tenants, tenants in common, and coparceners, and does not, therefore, include improvements and repairs as between a tenant for life and remaindermen, trustee and *cestui que trust*, guardians and minors, and persons expending money therein in the belief that they are the true owners, purchasers under a defective title and others, all of which will be treated of hereafter.

I. *Improvements.*

a. *Liability at common law.*

Where the repairs and improvements are not necessary as a reparation of the common property, nor the property itself such in character as to bring the case within the principle of contribution, and the erection of the house is voluntary for the sole benefit of the party erecting it, and not necessary to the preservation or joint enjoyment of the estate, and no benefit or advantage is derived therefrom by the cotenants, they are not liable for such improvements. Louvalle v. Menard (1844) 6 Ill. 39, 41 Am. Dec. 161; Harry v. Harry (1891) 127 Ind. 91; Elrod v. Keller (1888) 89 Ind. 382; Carver v. Fennimore (1886) 116 Ind. 266, 228; Lane v. Taylor (1872) 40 Ind. 495.

A tenant in common cannot recover from a cotenant the expenses and improvements made, unless the cotenant assented to the improvements. Coakley v. Mahar (1885) 26 Hun, 167; Ford v. Knapp (1884) 31 Hun, 522; Scott v. Guernsey (1866) 60 Barb. 163, 48 N. Y. 106.

And this is so both at law and in equity, in the absence of fraud or consent on the part of the owner. Bazemore v. Davis (1875) 55 Ga. 504.

As one tenant, whether in possession or not, owes no duty to his cotenant which requires him to improve, cultivate, or rent the premises. Sconce v. Sconce (1884) 15 Ill. App. 169.

He cannot at his pleasure charge his cotenants for improvements which they neither agreed to nor desired, nor can he ordinarily claim for that which he has done solely for his own advantage, and for which he has reaped the benefit. Moore v. v. Thorp (1889) 7 L. R. A. 731, 16 R. I. 655.

This is so no matter what may be the rule in regard to necessary repairs, in the absence of an express or implied contract to pay for them, and the parties must rely upon the agreement. Taylor v. Baldwin (1850) 10 Barb. 582.

As against his consent, one cotenant cannot be compelled to unite in making improvements which are not necessary. *Ibid.*

Especially where cotenants are well known and easy of access, improvements made are at the risk of the improving tenant, and will not, as a matter of right, be allowed to him in the partition of the premises. Johnson v. Pelot (1885) 24 S. C. 254, 58 Am. Rep. 253.

Such tenants cannot erect buildings or make improvements on the common property without consent, and then claim to hold until reimbursed a portion of the money expended; nor can they authorize this to be done by a third person. Crest v. Jack (1834) 3 Watts, 238, 27 Am. Dec. 352; Dech's App. (1868) 57 Pa. 467.

And in the absence of any agreement or understanding with his cotenants to that effect, a cotenant cannot recover any portion of the costs or value of the improvements, either in an action brought by him for that purpose, or by way of set-off in another action brought against him by his cotenant. Walter v. Greenwood (1882) 29 Minn. 87.

So with regard to improvements placed upon the property and for labor and trouble incurred in conducting a business upon the premises, the cotenant is not bound to account in the absence of a special agreement. Neil v. Shackelford (1876) 45 Tex. 119.

Improvements which are unnecessary, expensive, useless, fanciful, or ornamental, and made with the design to render it out of the power of the proprietor to pay for them, and in order to cause an abandonment of his claim, will not be allowed. Whitledge v. Wait (1804) Sneed (Ky.) 295, 2 Am. Dec. 721.

See also 36 L. R. A. 753; 47 L. R. A. 540.

those already made by one of the co-owners. This compulsion only applies to mills and houses, not to fences or other repairs to other properties.

6. **In partition the part improved,** if it can be done without injury to others, should be assigned to the improver; but, where this cannot be done, the cost of improvement cannot be charged to him to whom it goes.

7. **Where, however, the property is not susceptible of partition,** and must be sold to divide the proceeds, the coparcener who made repairs and permanent improvements shall receive out of the proceeds that amount by which the property, at the date of sale, remains enhanced in value from the improvements, not their original cost.

8. **Where there is no exception to a commissioner's report, except as to error on its face,** it is taken as admitted by the parties to be correct, both as to the principles and the evidence on which it rests, and the court will not look into it, but must act on it as so admitted, except as to infants and persons *non compos*. If excepted to not later than the first term after its return, or later by leave of court, the admission of its correctness ceases, and the court will examine it; but on the hearing of such exception, unless taken within ten days after completion of the report before the commissioner, no evidence before him can be used, unless he has made it a part of the report, or certified it, or the court requires him to certify such evidence by order, in which cases it may be used to sustain the exceptions; but depositions taken after the return of the report cannot be used to overthrow

Neither will they be allowed where there is no safe or intelligible legal or equitable basis by which the excess can be calculated and ascertained. Campbell v. Campbell (1870) 21 Mich. 438.

Nor where there is no proof that they were advised, or assented, and where such improvements are not for the benefit of the estate, but solely for the use and enjoyment of the party in possession. Rowan v. Reed (1857) 19 Ill. 21.

So it is with respect to the expense of additions made to the buildings on the common property in the absence of an agreement or assent on the part of the latter. Stevens v. Thompson (1845) 17 N. H. 108.

And with reference to expenses incurred by a cotenant in clearing the land not assented to by his cotenant. Kidder v. Rixford (1844) 16 Vt. 169, 42 Am. Dec. 504.

Neither has the joint owner, cultivating land not exceeding one half of it, any right of action against his cotenant for improvements or repairs made for the purpose of improving and aiding the collection of a crop. Becnel v. Becnel (1871) 23 La. Ann. 150.

And a disseisor wrongfully holding possession, and denying and attempting to destroy the other's title, is not entitled to contribution for improvements. Austin v. Barrett (1876) 44 Iowa, 488.

Neither will compensation for improvements and ameliorations be awarded to a parcener so as to make his coparceners his debtors. Graham v. Graham (1828) 6 T. B. Mon. 562, 17 Am. Dec. 166.

If a tenant in common cultivates or improves the property, he does so at his own risk, and if loss ensues he has no right to contribution; and, on the other hand, if a profit is made, his cotenant cannot claim the benefit. Pico v. Columbet (1859) 12 Cal. 414, 73 Am. Dec. 550.

As the enjoyment of the estate may be ample compensation for the improvements made, where there are no equities existing favorable to the claim for such improvements. Rowan v. Reed (1857) 19 Ill. 21.

In no event, however, ought a balance for improving to be charged up against coheirs. Graham v. Graham, *supra*.

If a tenant in common, or joint tenant, desires to improve without asking the assent of the co-owner, his course is to have his share set off by partition, and then to deal with it as he thinks proper. Crest v. Jack (1834) 3 Watts, 238, 27 Am. Dec. 353.

For a tenant in common in possession has no right to raise a charge for improvements. Hancock v. Day (1840) McMull. Eq. 69, 36 Am. Dec. 293.

One tenant in common cannot make the fact that he has made improvements on the common property operate as a conveyance to him of any right, title, or interest in or to the land on which such improvement is made. Curtis v. Poland (1886) 66 Tex. 511.

And the rule applies as forcibly to the case of a husband of a tenant in common as to one of the immediate cotenants. Rothwell v. Dewees (1863) 67 U. S. 2 Black, 613, 17 L. ed. 309.

In equity, however, if one tenant in common stands by and permits the improvements to be made, and so conducts himself as to encourage their making, he will be charged with such improvements, it being a fraud to allow him to receive the benefits without contributing to the costs. Crest v. Jack, *supra*.

So when such improvements enhance the value and proceeds of the estate, the cotenants should not be enabled to take advantage, to his injury, of improvements for which they have contributed nothing. Moore v. Thorp (1889) 7 L. R. A. 731, 16 R. I. 655.

So expenses incurred by a co-owner as manager of the estate held in common must be borne ratably by the other cotenants, where such expenses are incurred in making useful improvements, there being no objection raised at the time. Percy v. Millaudon (1828) 6 Mart. N. S. 616, 17 Am. Dec. 196.

In Kidder v. Rixford (1844) 16 Vt. 169, 42 Am. Dec. 504, the court distinguished the case from that of Percy v. Millaudon, *supra*, which required joint tenants to contribute ratably to useful expenses incurred upon the property by a joint owner who had the management, where no opposition had been made to such expenses, holding that such case was taken from the civil law and was not the rule at common law.

And the use of improved lands without the payment of rent may be a fair set-off to any additions made by the party in possession by taking and subjecting the land to cultivation. Rowan v. Reed (1857) 19 Ill. 21.

In Peyton v. Smith (1889) 23 N. C. 349, it was held that one tenant in common of land had a right to charge his cotenant with a just proportion of expenses incurred in relation to the common estate where it is shown that the attempts made were in all respects proper.

A tenant in common making necessary improvements such as a prudent and vigilant man would make according to his best judgment, with the consent of his cotenant, is entitled to be paid his proportion by a cotenant, although such improvements could have been made with greater advantage. Reed v. Jones (1855) 8 Wis. 421.

Or the circumstances must lead to or show a mutual understanding between the parties, entitling him to compensation. Redfield v. Gleason (1888) 61 Vt. 220.

And he is then entitled to contribution. Jordan v. Soule (1887) 79 Me. 590; Soule v. Frost (1884) 76 Me. 119; Bayley v. Denny (1874) 26 La. Ann. 255.

And it rests upon the cotenant claiming the benefit of improvements made by him to show

the report. They can be used only to support a motion to recommit the report.

9. Error on the face of a report may be taken advantage of in the lower or appellate court, with or without exceptions.

10. Where exception is taken to a commissioner's report before the commissioner, within ten days after its completion, it is his duty to certify the exceptions and evidence before him relating to the exceptions, with such remarks as he may see proper to make, in order that the exceptions may be heard by the court upon such evidence. He should so certify the evidence as to show it to be the evidence sent up.

11. Where such exception has been so taken within the ten days, the party excepting, or the adverse party, may take further evidence before the return of the report, and upon it the commissioner may amend his report, or make an amended report, as may suit the case, and then return his report and amendment, if any, to the office of the court.

(April 12, 1895.)

APPEAL by complainant from a decree of the Circuit Court for Taylor County in favor of defendants in a suit brought by one coparcener of certain real estate to recover for the use and occupation of the premises by his coparceners and compel them to contribute for repairs made by him on the property. *Reversed in part.*

The facts are stated in the opinion.

that by mutual consent he had the exclusive possession of a part of the estate and made improvements thereon, and if it appears that, although he had the exclusive possession, he did not hold with the consent of his cotenants, he cannot so recover or claim the improvements. Reed v. Reed (1878) 68 Me. 568.

So an exception to the above rule exists where one cotenant performed services which neither the law, nor his partnership obligations, nor the relation of cotenancy, imposed upon him. Redfield v. Gleason (1888) 61 Vt. 220.

Where, however, the parties stand in a peculiar relation to each other, such as the proprietors of a town which they seek to lay out and build up, such improvements will be allowed, and the necessary improvements in such a case will be such as are proper, fit, and adapted to the accomplishment of the double object in view, the enhancement of their own property by improvement and the building up of an important town, even though such improvements may not be profitable, the collateral advantages resulting therefrom being such as an advantageous man would make. Reed v. Jones (1855) 8 Wis. 421.

So improvements commenced during the lifetime of a cotenant and completed after his death, pursuant to the contract and plan entered into by the cotenants, will be allowed to the cotenant, the intention of the parties being executed. Sears v. Munson (1867) 23 Iowa, 380.

And with respect to repairs made under a lease by one tenant who erected a new building upon the premises with the acquiescence of his cotenant, the share of such cotenant was held chargeable with his proportion of the expenditures. Prentice v. Janssen (1880) 79 N. Y. 478.

In an action of assumpsit to recover the value of crops raised upon property held in common, the court allowed evidence of the amount of lime put upon the land by the defendant, necessary to raise the crop. Luck v. Luck (1886) 113 Pa. 256.

But a tenant in common with minors, making necessary and valuable improvements and repairs, is not entitled to exclusive possession until reimbursed the amount so expended. Young v. Gammel (1854) 4 G. Greene, 207.

And a rule to allow the costs of improvements would subject the owner of the premises to a want of judgment or economy of the improver, and render him liable to be built out of his land by the improvidence of the tenant. Moore v. Williamson (1858) 10 Rich. Eq. 323, 73 Am. Dec. 96.

At common law no allowance will be made for improvements, when the California practice act only permits it to the extent of being used as a set-off for damages for withholding possession. Ford v. Holton (1855) 5 Cal. 319.

The Louisiana code, which makes provision for the protection of the rights of coproprietors of property, does not embrace the right to judicially force one to make a contract and incur a debt for the improvement of property, according to the view of the other. Morgan v. Morgan (1871) 23 La. Ann. 502.

Under the Revised Statutes of Maine, ed. 1883, chap. 88, § 16, the value of the improvements made by a tenant in common are to be considered, and the assignment of shares made in conformity therewith. Reed v. Reed, *supra*.

Questions arising under the Maine Statute of 1855, as amended by the Revision of 1857 (which gives a cotenant a right to partition at common law), relating to improvements by cotenants, as they refer entirely to the individual interests and proportion of the parties, must be determined by the jury before an interlocutory judgment. Allen v. Hall (1861) 50 Me. 253; Ham v. Ham (1855) 39 Me. 216.

The meaning of the language of the above statute was in that case held to be that the tenant making the improvements should have the entire benefit, and if they were not assigned to him specifically he should have their value over and above his share of the common property. *Ibid.*

And it was also held that a tenant in exclusive possession of any part of the premises "by the mutual consent" of the cotenants, and having made improvements thereon, was entitled to have such part assigned to him, unless, exclusive of the improvements, it exceeds his share. Allen v. Hall, and Reed v. Reed, *supra*.

But a tenant in possession, making improvements without the consent of his cotenant, cannot claim to have his share so set out as to embrace such improvements, and he may be compelled to take some other portion of the estate, but he is entitled to have the improvements made by him considered and the assignment made in conformity therewith. Allen v. Hall, *supra*.

And a tenant in common in possession without consent, making improvements, is entitled to have the benefit of their actual value to the estate assigned to him, though such share may be on other part of the property. Reed v. Reed, *supra*.

In an action of trespass to try title it was held that the mere fact that the parties are tenants in common does not deprive them of the right to compensation for improvements, under the Texas Statute, Rev. Stat. art. 4814. Thompson v. Jones (1890) 77 Tex. 626, 629.

The General Statutes of Massachusetts, chapter 136, § 1, which re-enact the earlier statutes, provides that persons holding lands as joint tenants, coparceners, or tenants in common may be compelled to divide the same, either by writ of partition at the common law, or in the manner provided in that chapter, and makes particular and minute provisions for such partition, but this does not provide for compensation for betterments or improve-

Mr. **W. R. D. Dent** for appellant.
Messrs. **B. F. Martin** and **Frank Woods** for appellees.

Brannon, J., delivered the opinion of the court:

Maria Ward died seised of an hotel property known as the "Ward House," in the town of Grafton, leaving a husband and six children. Her husband, George W. Ward, occupied the property as tenant by the curtesy from February, 1878, when his wife died, until December, 1880, when he died. Four of his children lived in the hotel with him, the plaintiff, L. E. Ward, John B. Ward, Mrs. Broyles, and Archibald Ward. Before the father's death, and for eleven years afterwards, the plaintiff, L. E. Ward, occupied a stable on the property as a livery stable, and after his death Mrs. Broyles and husband occupied the hotel. Mrs. Broyles, by purchase from coparceners at different times after her father's death, became owner, including her own share, of five sixths of the property. L. E. Ward brought this suit in the circuit court of Taylor county, alleging that in 1879 he and several others of the parceners, seeing that the property was badly in need of repair, almost entirely rebuilt and greatly enlarged the hotel, at great expense, he furnishing a large amount of means, labor, and material, of the amount of $1,538.26, and that Archibald F. Ward and Lloyd M. Broyles, for his wife, furnished material and labor, for

ments made by a cotenant. Husband v. Aldrich (1888) 135 Mass. 317, 318.

The Massachusetts Statute of 1850, chapter 278, re-enacted in Gen. Stat., chap. 126, § 46, provides that when in any writ or other process of partition" the respondent or defendant denied the right of the petitioner or plaintiff, and claimed the estate himself, and had held the same under a title which he believed to be good, he should be entitled to compensation for buildings or improvements.

Under that act an allowance for improvements will not be made by the court, where there is no denial of title or holding under the title believed by the tenant in possession to be good. Aldrich v. Husband (1881) 131 Mass. 480; Chandler v. Simmons (1870) 105 Mass. 412.

And further, that, although a tenant in common disseised can maintain a statutory action for partition, yet the respondent has no remedy for improvements. Husband v. Aldrich, *supra;* Marshall v. Crehore (1847) 13 Met. 462.

b. *Liable in assumpsit for improvements.*

Assumpsit will not lie by one tenant in common against his cotenant for a board fence built upon the land in place of one that has rotted down, where such fence is not a substantial benefit to the premises, and a previous request to join and a refusal are not shown. Mumford v. Brown (1826) 6 Cow. 475, 16 Am. Dec. 440.

In Haven v. Mehlgarten (1857) 19 Ill. 91, an action in assumpsit was held to lie by a resident co-owner against his cotenant or his heirs, to recover money expended in the necessary preservation of their property and franchises, which they were authorized to establish and required to repair and maintain under penalty of forfeiture, even without a special request to contribute, such being implied by reason of the nature of their ownership and relation and the character of the work done.

As to the remedy by way of assumpsit for rents and profits and use and occupation, see *note* to Gage v. Gage (1890) (N. H.) 23 L. R. A. 844, div. V., subdiv. c.

c. *Rule in equity.*

Although at common law, independent of statute, one cotenant cannot charge another with the value of improvements made by him upon the premises, unless they are made with the latter's consent, yet in equity a different rule is applied, and the court, acting upon the maxim, "he who seeks equity must do equity," will decree an account and suitable compensation and take them into consideration in decreeing a partition of the premises, even though such improvements have been made without consent, or a promise of contribution, or a request and refusal, when made by a cotenant who believes he owns the fee in severalty, and also when made bona fide, provided they are necessary, useful, substantial, and permanent, enhancing the value of the estate, or when made under circumstances creating an equitable lien, and not merely for the purpose of ornamentation, embarrassment, incumbrance, or hindrance; and the court in such cases will direct that the portion of the premises so enhanced in value be assigned to the tenant making such improvements, or, if that cannot conveniently be done, and a sale is therefore resorted to, will decree that the purchase money shall be so apportioned as to reimburse such tenant his outlay.

These principles are borne out by the courts of the various states in the following cases: Wilkinson v. Stuart (1883) 74 Ala. 198; Sanders v. Robertson (1876) 57 Ala. 455; Drennen v. Walker (1860) 21 Ark. 557; Seale v. Soto (1868) 35 Cal. 102; Beverly v. Burke (1851) 9 Ga. 440, 54 Am. Dec. 351; Thomas v. Malcom (1869) 39 Ga. 328, 99 Am. Dec. 459; Willingham v. Long (1873) 47 Ga. 540; Bazemore v. Davis (1875) 55 Ga. 504, 520; Louvalle v. Menard (1844) 6 Ill. 39, 41 Am. Dec. 161; Howey v. Goings (1851) 13 Ill. 95, 54 Am. Dec. 427; Dean v. O'Meara (1868) 47 Ill. 120; Kurtz v. Hibner (1870) 55 Ill. 514, 521, 8 Am. Rep. 665; Mahoney v. Mahoney (1872) 65 Ill. 406; Field v. Leiter (1886) 117 Ill. 341; Martindale v. Alexander (1886) 26 Ind. 104, 89 Am. Dec. 458; Elrod v. Keller (1883) 89 Ind. 382; Carver v. Coffman (1887) 109 Ind. 547; Smith v. Frost (1809) 1 Bibb, 377; Hart v. Hawkins (1814) 3 Bibb, 510, 6 Am. Dec. 666; Withers v. Thompson (1827) 4 T. B. Mon. 323; Nelson v. Clay (1833) 7 J. J. Marsh. 140, 23 Am. Dec. 397; Borah v. Archers (1838) 7 Dana, 176; Respass v. Breckinridge (1820) 2 A. K. Marsh. 587; Bridgford v. Barbour (1882) 80 Ky. 529; Crafts v. Crafts (1859) 13 Gray, 360; Wilson v. Duncan (1870) 44 Miss. 642; Pickering v. Pickering (1885) 63 N. H. 468, 470; Brookfield v. Williams (1840) 2 N. J. Eq. 341; Obert v. Obert (1846) 5 N. J. Eq. 397; Dougbaday v. Crowell (1856) 11 N. J. Eq. 201; Hall v. Piddock (1871) 21 N. J. Eq. 311; Conklin v. Conklin (1845) 3 Sandf. Ch. 64, 6 L. ed. 771; Felix v. Rankin (1839) 3 Edw. Ch. 323, 6 L. ed. 675; Town v. Needham (1832) 3 Paige, 545, 3 L. ed. 268, 24 Am. Dec. 246; Hitchcock v. Skinner (1839) Hoffm. Ch. 21, 6 L. ed. 1050; Taylor v. Baldwin (1850) 10 Barb. 588; Green v. Putnam (1847) 1 Barb. 500; Dows v. Congdon (1858) 16 How. Pr. 571; Adams v. Smith (1887) 20 Abb. N. C. 60, 101; Scott v. Guernsey (1866) 48 N. Y. 106; Ford v. Knapp (1886) 102 N. Y. 135, 55 Am. Rep. 782; Thomas v. Evans (1887) 105 N. Y. 601, 615, 59 Am. Rep. 519; Jones v. Carland (1856) 55 N. C. 502; Pope v. Whitehead (1873) 68 N. C. 191, 200; Collett v. Henderson (1879) 80 N. C. 337; Moore v. Thorp (1889) 7 L. R. A. 731, 16 R. I. 655; Williman v. Holmes (1850) 4 Rich. Eq. 476; Scaife v. Thomson (1880) 15 S. C. 368; Annely v. De Saussure (1881) 17 S. C. 391; Johnson v. Harrelson (1883) 18 S. C. 604; Buck v. Martin (1884) 21 S. C. 502, 53 Am. Rep. 702; Johnson v. Pelot (1885) 24 S. C. 254, 58 Am. Rep. 253; Broyles v. Waddel (1872) 11 Heisk. 32; Reeves v. Reeves, Id. 669; Robinson v. McDonald (1854) 11 Tex. 385, 62 Am. Dec. 480; Neil v. Shackelford (1876) 45 Tex. 112; Oe-

which amount expended by him he claimed compensation. He further alleged that for several years Broyles and his wife had the possession and use of the hotel property, except the stable, without payment of rent, but had paid taxes, and put some repairs on the property from time to time as needed, and that he, the plaintiff, had occupied the stable without payment of rent. He prayed that an account of the rent and improvements be taken, the amount due him and others be decreed; that the property be rented or sold to satisfy those charges; and also that the property, not being susceptible of partition, might be sold, and the proceeds divided. The other parties resisted this demand of the plaintiff for improvements, saying that such improvements were made by their father while in possession as tenant by the curtesy, and any charge by the plaintiff was against him, not against his coparceners, as they never assented to such improvements, and neither they nor their property were liable therefor. The case was referred to a commissioner, and he reported a large sum as due the plaintiff from Mrs. Broyles, one of the parceners, for rent and improvements. The court disallowed all claim by the plaintiff for improvements or rent, and, declaring the property insusceptible of partition, directed its sale. The plaintiff appealed.

First, let us consider the subject of rent. Are those of the heirs who occupied the property after the end of the father's estate by the

born v. Osborn (1864) 63 Tex. 495; Curtis v. Poland (1886) 66 Tex. 511; Dodson v. Hays (1887) 29 W. Va. 577, 579; Wood v. Wood (1869) 16 Grant, Ch. (U. C.) 471; Biehn v. Biehn (1871) 18 Grant, Ch. (U. C.) 497; Hovey v. Ferguson, Id. 498; Swan v. Swan (1820) 8 Price, 518.

The rule applies where the tenants in common have severally made valuable improvements on distinct portions of the property sought to be partitioned, and an interlocutory decree ordering "that there be set off to the several parties such portions of the premises as will include their respective improvements, provided always that the right or interests of neither of the other parties be prejudiced thereby," is correct, and will not be disturbed in the absence of a departure from the rule. Seale v. Soto (1868) 35 Cal. 102.

So improvements will be allowed even though made by tenants in common entitled in reversion. Hall v. Piddock (1871) 21 N. J. Eq. 311.

And the court will require either payment of a ratable proportion of the improvements before the division, or will add the proportion to the share to be allotted to the tenant in possession. Hitchcock v. Skinner (1839) Hoffm. Ch. 21, 6 L. ed. 1050.

A cotenant's right to improvements will not be defeated by the fact that they are made after notice of a cotenant's title. Alleman v. Hawley (1888) 117 Ind. 532.

Especially as against the claim of one subsequently establishing his right as cotenant. Johnson v. Pelot (1885) 24 S. C. 254, 58 Am. Rep. 258.

But the account for improvements will not exceed that for the rents. Broyles v. Waddel (1873) 11 Heisk. 32; Horton v. Sledge (1856) 29 Ala. 478, 498.

So a tenant in common will not, in partition proceedings, be entitled to compensation for any improvements, unless made at a time when he really and bona fide believed himself to be the true owner of the land; and, unless he was induced to make those improvements by that belief really entertained, he will not be entitled to any compensation for improvements made when he knew his title was disputed. Horton v. Sledge, *supra*.

Therefore new improvements made *pendente lite* will not be taken into account in the commissioner's report. Reed v. Jones (1855) 3 Wis. 421.

And a cotenant cannot insist upon making new improvements to be so paid, neither can the court cause expensive improvements to be made preliminary to partition. Field v. Leiter (1886) 117 Ill. 341.

Therefore buildings erected by a cotenant in possession for his own use after petition filed cannot be taken into account in the commissioner's appraisements. Parsons v. Copeland (1854) 38 Me. 537.

Yet such equitable claim is neither a right, title, nor interest in or to the land so improved. Curtis v. Poland (1886) 66 Tex. 511.

When, however, the value of the improvements has been ascertained by the verdict of the jury, the plaintiff has the right to pay a share of the value and have a partition and the report of the commissioners confirmed, where no other question in the case remains to be settled or ascertained, and to retain his full share of the common property. Stafford v. Nutt (1871) 35 Ind. 98.

The one reason for enforcing the equitable doctrine of contribution for improvements arises from the necessity for the preservation of the estate, or the benefit to the joint owner by an enhancement of its value. Burch v. Burch (1885) 82 Ky. 622, 624.

But the right of a cotenant to recover for improvements does not exist in all cases, and each case must depend upon its own facts. Curtis v. Poland (1886) 66 Tex. 511, 514.

A tenant in common improving land of which he is rightfully in possession, having an equitable claim to such portion or to its rental value, does not lose such claim by a sale of the land on account of its indivisibility. Moore v. Thorp (1889) 7 L. R. A. 731, 16 R. I. 655.

Where the estate is not susceptible of a division, a cotenant making improvements will not be entitled to call for payment from the other cotenant, his right being to have the property sold and the proceeds distributed. Alleman v. Hawley (1888) 117 Ind. 532.

In case of a sale the purchase money should be so apportioned that the party making the improvements should have the increased value in addition to his *pro rata* interest. Dean v. O'Meara (1868) 47 Ill. 120.

The share of a tenant in common arising upon such sale may be charged with amounts thus expended, and also with the costs and expenses in defending the common title. Adams v. Smith (1887) 20 Abb. N. C. 60, 101.

A bill in equity cannot be maintained for a sale and division of the chattels in the exclusive use of one cotenant in business upon their joint property, unless it is shown that they were agreed to be or were used in carrying on the business for the joint benefit of the cotenants, or that the tenancy was of a character requiring or contemplating a sale of such chattels or a termination of the tenancy, except by consent, or unless it is shown that such sale and division are necessary by reason of death or insolvency for the purpose of settling the estate, the remedy at law being sufficient. Blood v. Blood (1872) 110 Mass. 545.

As the equity of the improving tenant to the additional value is applicable to every case where the facts are of such a character as to demand it, and where it can be enforced without injustice to the others, as where the improving tenant believes himself to be exclusive owner, or where it would work a great hardship to deprive him of it, the allowance being made consistently with the equity of the cotenants. Johnson v. Pelot (1885) 15 S. C. 254, 58 Am. Rep. 258.

curtesy liable to pay rent, or rather compensation, for use and occupation? At common law neither a joint tenant, tenant in common, nor coparcener occupying the common property, and thus taking more than his share of the rents and profits, can be made to account to his fellows, unless he has been appointed bailiff or receiver by his fellows. Each one has right to enter and use the land, and this right cannot be impaired by the fact that others absent themselves or do not claim their right to a common enjoyment. Unless the one in possession denies the right of the others to enter and enjoy the estate, or agrees to pay rent, nothing can be claimed of him. It is presumed that the others consent to his use. He cannot call on the others to help him farm or otherwise use the property, and, in case of loss from failure of crops or other cause, he cannot call on the others to contribute to the loss. If the others do not wish to occupy the premises with their co-owners, the remedy of partition is at hand, or, if the property be indivisible, the court will sell it, and divide its proceeds. Lomax, Dig. 501, 481; 2 Minor, Inst. 437, 429; Freeman, Cotenancy, § 269; *note* to *Early* v. *Friend*, 78 Am. Dec. 665: This is the view stated in Freeman on Contenancy, § 258; *Gayle* v. *Johnston*, 80 Ala. 395.

By section 14, chapter 100, Code, it is provided that an action of account may be maintained "by one joint tenant, or tenant in common, or his personal representative, against

The fact that improvements were necessary cannot, however, be inferred from the fact that they are valuable, neither can such fact be inferred from their nature, even though they or some of them are such as may be necessary. Elrod v. Keller (1883) 89 Ind. 382, 388.

It has been held that the mere fact that improvements enhance the value of the common property does not entitle the tenant making them to an allowance for the difference in value, and that if such fact were found it would not warrant the allowance. *Ibid.*

If, in partitioning land, it cannot be so divided as to allow unimproved land to such joint tenant or tenant in common as may not have contributed to the improvements, he will not be entitled to charge his cotenant rent for the portion of the improved land which he may have obtained, nor has the improver a right to charge for the improvements. Nelson v. Clay (1833) 7 J. J. Marsh. 140, 23 Am. Dec. 397.

The value of the improvements made by one co-owner will not be included in the estimated value of the entire property for the purpose of division. Borah v. Archers (1838) 7 Dana, 176.

A part owner, enhancing the value of the common estate at his own cost, is entitled to such equitable compensation as will leave only the value of the estate without the improvements to be divided among the tenants in common. Moore v. Thorp (1889) 7 L. R. A. 731, 16 R. I. 655; Hall v. Piddock (1871) 21 N. J. Eq. 311; Kurtz v. Hibner (1870) 55 Ill. 514, 8 Am. Rep. 665; Moore v. Williamson (1858) 10 Rich. Eq. 323, 73 Am. Dec. 98; Dean v. O'Meara (1868) 47 Ill. 120; Green v. Putnam (1847) 1 Barb. 500; Conklin v. Conklin (1845) 3 Sandf. Ch. 64, 6 L. ed. 771; Swan v. Swan (1820) 8 Price, 518.

The improving tenant has been allowed the increased value of the premises imparted by such improvements, and not the original costs of his improvements. Williman v. Holmes (1850) 4 Rich. Eq. 476; Scaife v. Thomson (1880) 15 S. C. 368; Annely v. De Saussure (1881) 17 S. C. 391; Johnson v. Harrelson (1883) 18 S. C. 604; Buck v. Martin (1884) 21 S. C. 592, 53 Am. Rep. 702.

So the tenant is entitled to the full benefit of the increased value of improvements made with consent or knowledge and without objection. Dodson v. Hays (1887) 29 W. Va. 577, 598; Moore v. Williamson (1858) 10 Rich. Eq. 323, 73 Am. Dec. 98.

In Collett v. Henderson (1879) 80 N. C. 337, a direction to commissioners, to value the share at what it would have been worth without the improvements, and to report to the court for further orders, was, upon appeal by the defendants, held correct, the court stating that it would be unjust and inequitable in the others to take the common property enhanced in value by the expenditures of one of them without making him compensation, and he was held entitled to an account.

In Collett v. Henderson, *supra*, the amount was allotted at a valuation without regard to the improvements.

No partition will be granted without allowing the party the full value of such interest. Green v. Putnam (1847) 1 Barb. 500.

If the improvements are made under the mistaken belief that the tenant holds the land, an allowance will be made in proceedings for partition for the amount that the land is enhanced in value. Elrod v. Keller (1883) 89 Ind. 382; Conklin v. Conklin (1845) 3 Sandf. Ch. 64, 6 L. ed. 771; Scott v. Guernsey (1866) 48 N. Y. 106.

If the lands upon which the improvements stand are more than the share to which the cotenant making such improvements will be entitled, he must make recompense in money, but if the remaining lands are sufficient to give the other cotenants their share in value, it must be given out to them. Brookfield v. Williams (1840) 2 N. J. Eq. 341.

Where the improvements were made while the improving tenant was in exclusive possession holding as sole owner, before any claim or notice of opposing title had been made, she was entitled to the value of the improvements. Johnson v. Pelot (1885) 24 S. C. 254, 58 Am. Rep. 263.

In Pope v. Whitehead (1873) 68 N. C. 191, 200, the court decreed partition to the devisees entitled under a will, directing the commissioners to assign to one of such devisees as cotenant a share of the land so as to include every part upon which he had made improvements, valuing it at what it would have been worth without the improvements, or at its original valuation.

So the heirs of a tenant in common, who has improved the property which is sold in partition proceedings under the statute, are entitled to the actual increase in price caused by his improvements before division. Louvalle v. Menard (1844) 6 Ill. 39, 41 Am. Dec. 161.

A step-father of coheirs, whose mother, a tenant in dower, had made valuable improvements upon the land in good faith, was held entitled to the improvements upon the death of the mother. Bond v. Hill (1873) 37 Tex. 626.

Money expended by coheirs in valuable improvements upon the premises in good faith, under the belief that they were the sole owners, were allowed to them in partition proceedings to the extent that the value of the premises was enhanced thereby. Conklin v. Conklin (1845) 3 Sandf. Ch. 64, 6 L. ed. 771.

In the above case the court followed the opinion in St. Felix v. Rankin (1839) 3 Edw. Ch. 223, 6 L. ed. 675, where the complainant, supposing that he had the whole title, improved part of the estate and mortgaged and sold a portion, the court in partition proceedings awarding him the portion improved making his mortgages liens thereon.

A party lawfully and voluntarily in possession

the other for receiving more than comes to his just share or proportion, and against the personal representative of any such joint tenant or tenant in common." This statute originated in England, and there and in a majority of the American states it has received the construction, which I would think the proper one, that merely by exclusive occupation and use one tenant in common or joint tenant does not become liable to account to others, but only where he receives rents or proceeds of the estate from strangers. Freeman, Cotenancy, § 274; *note* to *Early* v. *Friend*, 78 Am. Dec. 665; *Chambers* v. *Chambers*, 14 Am. Dec. 585, and *note*. But in *Early* v. *Friend*, 16 Gratt. 21, 78 Am. Dec. 649, which was decided at a date making it binding authority here, it is held that one tenant in common may sue his cotenant, who has occupied the whole property, for an account of rents and profits. He is accountable whether he receives rents and profits from strangers, or receives them by occupying the premises himself, with interest from each year's close. *Rust* v. *Rust*, 17 W. Va. 901, holds just the same. In *Dodson* v. *Hays*, 29 W. Va. 577, syllabus 2, this doctrine was somewhat qualified in the holding that where the property is such as to admit of use by several, and less than his just share is used by one tenant in common in a manner not hindering or excluding the others from the use of their shares, he does not receive more than his share, within the meaning of section 14, chapter 100,

without individual right, although not entitled to demand payment for improvements made without the consent of the heirs, is entitled, along with the heirs and in their right, to hold possession until partition, when such improvements may be set off against the rents and profits, although those made without consent of the coheirs cannot be charged against the corpus of the estate. Jones v. Johnson (1873) 28 Ark. 211, 233, 234.

A tenant for life in possession who is also entitled as tenant in common in remainder will be allowed compensation for improvements made by him during his life estate, but where he has no interest in remainder such improvements will not be allowed him. Broyles v. Waddel (1872) 11 Heisk. 32.

In Putnam v. Ritchie (1837) 6 Paige, 390, 3 L. ed. 1033, where industrial accessions had been made to property in good faith by a person having the legal title to the property, the real owner being compelled to resort to proceedings in chancery to assert his equitable title, the court acted upon the civil-law rule of natural equity and compelled the real owner to compensate the adverse party for such industrial accessions or improvements as a condition for granting relief.

The rule was applied in a case where the complainant had entered upon a part of the common estate, reduced it from a wild or waste condition to cultivation, and made valuable improvements thereon, his labor and money being expended with the knowledge and the implied consent, if not the express authorization, of his cotenant, who had not improved any part of the estate, leaving it, so far as he was concerned, in the condition in which it was when acquired. Wilkinson v. Stuart (1883) 74 Ala. 198.

In *Re* Heller (1832) 3 Paige, 199, 3 L. ed. 115, the cotenants of an idiot were entitled to compensation by partition of land the buildings of which were pulled down by such lunatic cotenant.

In Biehn v. Biehn (1871) 18 Grant, Ch. (U. C.) 497, the father of the contestants let one son into possession of the property and the son made improvements which nearly doubled the value. It was held he was entitled to a charge for improvements and to have the land allotted to him upon division of the estate, provided its value in an unimproved condition would not exceed the amount of his share, the court questioning whether in such a case he was not entitled to an absolute decree for the land. The same point was made in Hovey v. Ferguson (1871) 18 Grant, Ch. (U. C.) 498, the court stating that if the son was entitled to the land itself irrespective of the conditions of the father's estate at the time of his death, in case of intestacy, it would be most reasonable that the value of the amount without the son's improvements should be deducted from his share of the estate.

In decreeing a partition the court, in Wood v. Wood (1869) 16 Grant, Ch. (U. C.) 471, directed the master to take notice of the possession and improvements made by the parties, upon the respective portions occupied by such cotenants, under a quitclaim agreement, which was declared invalid and a partition decreed.

Where a co-owner executed a deed of trust to secure debts to two creditors, one of whom was the owner of the other portion of the property, and the latter went into possession and worked the premises improving the same and paying taxes thereon, it was held upon foreclosure of the trust, that, although the party making such improvements and claiming them as a tenant in common might not be entitled to contribution so far as his *cestuis que trust* were concerned, yet in equity, the property being sold under the deed and the price being enhanced, he should be refunded the amount of such improvements, and also the amount paid for taxes, being charged with the reasonable rents and profits upon one half. Gardner v. Diederichs (1866) 41 Ill. 158, 171.

With respect to a West India estate, in Scott v. Nesbitt (1808) 14 Ves. Jr. 437, allowances were made for advances for supplies for persons acting as consignees, not under a regular appointment, but with permission of the true owners, or by one tenant in common, if not upon the ground of a lien by the colonial law or usage, upon the nature of the subject, which required expenditure, the court remarking that under similar circumstances a tenant in common would be entitled in the account against the other tenant in common and the estate itself to various charges which he could not make in England, considering the nature of the West India estate and how far it differed from a mere estate of land in that country.

So in Marryatt v. Hooke, cited in Scott v. Nesbitt (1808) *supra*, at page 445, it was held with regard to a tenant in common of a Jamaica estate, that he must, in respect to the different nature and the expenditure belonging to the management of that property, be allowed the benefit of that principle of English law which would be given in equity to a person having a species of landed estate which could not be represented as mere landed property, as a tenant in common of soil containing mines or alum works in the management of which there must be expenditure incurred between the tenants, the court in such cases giving the account between them, making allowances that would not be given in the case of an estate to be managed in the ordinary course of husbandry, allowing as against the estate claims incurred for the benefit of those taking it, all the claims being such as might be properly allowed in that court.

Where improvements are made without consent, and the land is not susceptible of division, and the improvements are not found to have been necessary to the enjoyment of the estate, the value of them cannot be allowed to a party making them

Code, and is not accountable for the profits of that portion owned by him to his cotenants.

But it will be observed that this statute in terms applies to joint tenants and tenants in common, and does not mention parceners. Does the statute apply by analogy to them? Its letter does not. Joint tenancy, tenancy in common, and coparcenary are the three notable joint estates, and to them alike the common-law rule applied that one cotenant using alone the common property was not liable to account therefor, and the legislature in changing the rule leaves out coparceners, and expressly names joint tenants and tenants in common. Why do this, unless it intended to exclude coparceners from the statute? Could there be a stronger instance of the application of the principle of construction that "the mention of the one is the exclusion of the other?" The lawmakers did not intend that the sister or brother remaining under the roof of the old home, or making bread from the home farm after the departure of parents, should every day be running in debt to the others. While it might be reasonable, as between joint tenants or tenants in common, often strangers, it would not be so between brothers and sisters. There was reason for omitting parceners from the statute. It is humane and reasonable to assume that brothers and sisters do not object, but consent, that brothers and sisters continuing on the premises are still at home, and not expected to pay rent. Such we know to

from the proceeds arising from a sale of the land. Elrod v. Keller (1883) 89 Ind. 382.

Where the amount paid by the committee of a lunatic was on the whole inconsiderable, not for betterments as permanent improvements, but merely to keep premises in tenantable condition, the heirs were held not liable to reimburse same to the next of kin of the lunatic. Adams v. Smith (1887) 20 Abb. N. C. 60, 101.

Where the owner of land granted a three years' lease of the property to the defendant for a stone quarry, reserving power to lease to others any part of the premises which could be used without injuring defendant, and later defendant purchased a certain interest in land, plaintiffs and other defendants subsequently buying the remaining portions, defendant having considerably improved the land during the terms of his lease, it was held in partition proceedings that the question of improvements was to be considered as arising between landlord and tenant, and not as between tenants in common, and that, such improvements having been made during his tenancy, his rights were only those of an outgoing tenant, and he had no claim for improvements made for his own benefit. Cosgriff v. Foss (1892) 65 Hun, 184.

A claim for improvements, although properly set up in a partition suit, is an equity for the consideration of the court in settling the rights of the parties, and cannot be set up in an answer in bar of the action, but may be properly set up in a cross-complaint. Martindale v. Alexander (1866) 26 Ind. 104, 89 Am. Dec. 458.

The claim for improvements can only be made by cross-petition, which should be filed before the judgment of partition and the appointment of commissioners, so that the rights of the parties may be adjusted and the duty of the commissioners clearly pointed out. Stafford v. Nutt (1871) 35 Ind. 98. But in a case where such a claim was not filed until after the commissioners had filed their report, it was held that the matter was in the discretion of the court, and it was not error on their part to entertain the question of improvements.

A defendant in partition proceedings, claiming for improvements and for taxes, should file his counterclaim along with the answer. Alleman v. Hawley (1888) 117 Ind. 532.

If the cotenant cuts timber from land adjoining the part improved by him, it is competent for the court in partition proceedings to direct that such land shall be valued as it was with the timber on it, and to include it in the assignment to such cotenant. Obert v. Obert (1846) 5 N. J. Eq. 397, 406.

Under the Alabama statute, giving the judge of probate statutory jurisdiction in partition proceedings between coparceners, joint tenants, and tenants in common, the judge of probate cannot take cognizance of the equitable right of the complainant and adjust the partition so as to meet and satisfy it, a partition by lot being all that he can decree, and he is therefore without power to give the commissioners special instructions necessary to adjust the equitable rights of the parties, and if such judge first acquires jurisdiction, equity will not interfere in the absence of special circumstances rendering such statutory jurisdiction inadequate. Wilkinson v. Stuart (1883) 74 Ala. 198.

The claim of a cotenant for improvements made by him will give a court of equity jurisdiction to restrain the proceedings taken before the probate judge under the Alabama Statute, sections 3497-3513 of the Code of that state. *Ibid.*

In Husband v. Aldrich (1883) 135 Mass. 317, 318, it was stated that even if jurisdiction existed in equity to make partition of lands of which partition could not be made at law, the statute excluded by clear implication such jurisdiction as to lands which were subject to its provisions, the plain import of the statute being that partition should be made of lands without regard to the state of the accounts between the cotenants for improvements or erections thereon, and that a part owner might have his part of the land set off to him, although he may not have paid as much for it in proportion as his cotenant paid, and although he might be indebted to his cotenants for improvements upon the lands, and any right to a partition not according to the interests of the tenants in the land, but according to the improvements made upon the common property by them, was excluded.

In the above case the plaintiff in partition in equity sought to have that part of the premises upon which her husband built a house assigned to her without including the value of the buildings in the partition, the erections being made without the knowledge or consent of the cotenant, but the court held this could not be done, neither could the portion of the estate upon which the house stood be set off to him. *Ibid.*

d. *Lien for improvements.*

There can, strictly speaking, be no liens upon estates held in cotenancy for improvements made thereon, in the absence of an express agreement between the cotenants. Taylor v. Baldwin (1850) 10 Barb. 582.

Yet with regard to the money expended in improvements, equity regards it as a lien in so far as it will refuse to interfere unless compensation be made. Green v. Putnam (1847) 1 Barb. 500; Robinson v. Moore (1892) 1 Tex. Civ. App. 93.

Especially when one joint tenant agrees with the other that the latter shall expend his money and improve the property and have a lien on it for the money, and the latter does so, it being presumed that the former by agreement induced him to make the expenditure. Houston v. McCluney (1874) 8 W. Va. 135.

Equity has, under peculiar circumstances, in a

be the uniform course between members of a family. The same presumption does not hold between two who own as joint tenants or tenants in common. Thus, I think neither the letter nor reason nor the equity of the statute applies to parceners. Prof. Minor, admitting that parceners are not within the letter of the statute, says that "it is believed" that the common-law rule of nonliability has been changed by construction of the statute, partly because courts of equity before the Statute of Anne in England had obliged parceners to render an account, and partly from the irresistible reasonableness of the thing, and partly because of the force of the analogy between joint tenants, tenants in common, and coparceners. 2 Minor, Inst. 437. I have examined the authorities there referred to, and find that this opinion rests on *Drury* v. *Drury*, decided in the year 6 of the reign of Charles I., which does seem to sustain the position, as it makes one of two heirs account to the other heirs; but the report in 1 Rep. in Ch. 48, 49, is so meager that we cannot tell how far the element of ouster or exclusion may have entered into the case. *Dean* v. *Wade*, Id., decided ten years later, simply adopted *Drury* v. *Drury* expressly as a precedent. No facts are given. Eq. Cas. Abr. chap. 2, title *Account* (A), p. 5, *note*, so far from sustaining Prof. Minor, is against his position, as it limits the equity jurisdiction to joint tenants and tenants in common, and that under the Statute of Anne, not

few cases established a lien not arising out of contract, or established by usage. Taylor v. Baldwin, *supra*.

Such lien, whenever recognized, being founded upon the equitable doctrine of contribution. Burch v. Burch (1885) 82 Ky. 622.

A claim for improvements being rather an equitable charge upon the land improved, than a right, title, or interest in or to it, and gives a cotenant a lien to secure compensation to him for necessary or proper improvements made by him. Curtis v. Poland (1886) 66 Tex. 611.

And it has been held that a cotenant making improvements with the express consent of his coowner acquires a lien for a proportion of the costs, which may form the subject of a deed of trust given by him upon such property. Baird v. Jackson (1881) 96 Ill. 78.

Yet it does not follow that it will be valid against a creditor of the cotenant having an attachment levied on the property so as to constitute a legal lien, whether such creditor has notice or not. Houston v. McCluney (1874) 8 W. Va. 135.

If two or more make a joint purchase, and afterwards one of them lays out money in repairs or improvements and dies, the same is a lien upon the land and a trust for the benefit of the representatives of the party advancing it, and such is the case in all cases of a joint undertaking, either in trade or in other dealing, the parties being considered tenants in common, or the survivors as trustees for those who are dead. Lake v. Gibson (1729) 1 Eq. Cas. Abr. 290.

e. *Interest on improvements.*

Where the improvements are undertaken by one tenant in common at the request of another, upon the express understanding that the latter shall furnish his share of the costs, the former will be allowed interest on the money furnished or advances beyond his proportion, where the latter fails to make such allowances and urges the former to complete the work, undertaking to see that he loses nothing by such advance. Sears v. Musson (1867) 23 Iowa, 380.

Upon the question of interest in a claim for rents and profits, see *note* to Gage v. Gage (1890) (N. H.) 29 L. R. A. 853.

f. *Position of grantee of cotenant's share.*

A grantee under an executory contract for the purchase of the share of one cotenant when partioned is in equity a tenant in common with the other owner and a party to the partition proceedings, though not bound by the express covenant contained in the deed of partition. Venable v. Beauchamp (1835) 3 Dana, 321, 28 Am. Dec. 74.

The equitable claim or right of a cotenant to reimbursement or compensation for improvements, even if secured by lien, will not pass to a purchaser from a cotenant through a deed not sufficient to pass a debt secured by a lien created by a contract. Curtis v. Poland (1886) 66 Tex. 511.

II. *Repairs.*

As to how far the question of repairs will be considered by way of deduction in an action for use and occupation and rents and profits, see *note* to Gage v. Gage (1890) (N. H.) 29 L. R. A. 829, 855, head XVIII.

a. *General doctrine.*

In Coke upon Littleton, 54b, and 200b, it is said: "If two tenants in common or joint tenants be of a house or mill and it fall into decay, and the one is willing to repair the same and the other will not, he that is willing shall have a writ *de reparatione faciendo*; and the writ saith *ad reparationem et sustentationem ejusdem domus teneantur*, whereby it appeareth that owners are in that case bound *pro bono publico* to maintain houses and mills which are for habitation and use of men, and if there be two joint tenants of wood or arable land, the one has no remedy against the other to make enclosure and reparation for safeguard of the wood or corn."

The rule is based upon the pre-eminence and privilege given to houses by law. Bowles' Case (1616) 11 Coke, 82.

The above doctrine has been followed in Calvert v. Aldrich (1868) 99 Mass. 74, 96 Am. Dec. 698; Carver v. Miller (1808) 4 Mass. 559; Anderson v. Greble (1831) 1 Ashm. 136; McDearman v. McClure (1876) 31 Ark. 559; Coffin v. Heath (1843) 6 Met. 76.

In Carver v. Miller, *supra*, however, the court doubted whether the doctrine applied to mills, but this doubt was removed by statute (Rev. Stat. 1836) giving co-proprietors of mills in that state, Massachusetts, a right to repair after a call or due notice of a meeting of all of them when he may cause the same to be done and claim contribution, otherwise his only remedy is to look to the profits therefor.

But the repairs must be necessary. Fowler v. Fowler (1882) 50 Conn. 256.

They must be absolutely necessary to save the building from decay. Broyles v. Waddel (1872) 11 Heisk. 32.

And they must be necessary to the enjoyment of the common property. Dech's App. (1868) 57 Pa. 467, 472.

So that for such as are both necessary and permanent the repairing tenant is entitled to reimbursement. Jenkins v. Jenkins (1886) (N. J.) 5 Atl. Rep. 135.

As repairs mean ordinary repairs and not improvements. McAlear v. Delaney (1884) 19 N. Y. Week. Dig. 252.

The tribunal in which the action is tried is the judge as to such repairs. Anderson v. Greble (1831) 1 Ashm. 136.

It must, however, be shown that the money has been actually expended in repairs. Doane v. Bad-

mentioning coparceners. It is but a note citing no case. Though Kent is cited by Prof. Minor, Kent does not insert it in his text. It is an annotator's note, based on the old English case and the note in Eq. Cas. Abr. just mentioned, and the Kentucky case of *O'Bannon* v. *Roberts*, below referred to. Lomax refers to same authority. Now, as to the Kentucky case cited by Prof. Minor (*O'Bannon* v. *Roberts*, 2 Dana, 54), it supports Prof. Minor's inclination to an opinion. But examine the case. The opinion plainly shows that *Judge* Nicholas hesitated to hold that one parcener may be held to account in equity for profits and rents of land exclusively occupied by him, saying that Statutes 8 & 4 Anne, the source of ours, applied only to joint tenants and tenants in common, but he felt bound by a former Kentucky case, *Graham* v. *Graham*, 6 T. B. Mon. 562, 17 Am. Dec. 166. When that case is examined, it has nothing whatever to do with the point, for it was a case where one child claimed exclusively in severalty as purchaser of their father by a forged title bond. It was a case of ouster, where one heir shut out another by adverse claim. The syllabus itself states that he held in severalty. I must refer to *Chinn* v. *Murray*, 4 Gratt. 348, cited by Minor. It is peculiar. A judicial partition was made in 1820, which lay unconfirmed till 1836, and on appeal as late as 1848 it was reversed. The parties took possession and improved the parcels under the partition as their own. Improvements were allowed as far as they added to the present value, and rents and profits were charged, or rather set off. This case cannot be said to hold the clear proposition that a coparcener, merely from occupation of the premises, receives more than his share, under the said code section, by construction. It is a case of charge to offset improvements, which I elsewhere say can be done. The parties had to be allowed improvements, because made under the mistaken belief that they owned the parcels in severalty, under a partition so long acquiesced in, and, claiming improvements, they must be charged for use and occupation. Where it is proper to allow improvements,

ger (1815) 12 Mass. 65; Mumford v. Brown (1826) 6 Cow. 475, 16 Am. Dec. 440.

Beyond this the right to recover contribution is not ordinarily carried. Gardner v. Diedericks (1866) 41 Ill. 158.

Since the rule does not extend to other repairs. Kidder v. Rixford (1844) 16 Vt. 169, 42 Am. Dec. 504.

Therefore where the repairs were not such in the strict sense of the term, and were not absolutely necessary as repairs, but partook more of the nature of improvements, the court held they could not be recovered. Taylor v. Baldwin (1850) 10 Barb. 582.

So, also, in Israel v. Israel (1868) 30 Md. 128, 96 Am. Dec. 571, the court disallowed expenses incurred which did not add to the preservation of the property.

It has been held, however, that for repairs which are of this nature, the law will imply a promise to pay, upon the same principle that it will imply a promise to pay joint debts paid by one debtor. Fowler v. Fowler (1882) 50 Conn. 256.

For the common law recognizes the legal obligation of each cotenant to pay his just proportion in such cases. Alexander v. Ellison (1880) 79 Ky. 148.

So in equity they will, upon refusal to do so, be held to contribute ratably for such expenditures upon a bill for partition. Coffin v. Heath (1843) 6 Met. 76; McDearman v. McClure (1876) 31 Ark. 559; Harrison v. Harrison (1878) 56 Miss. 174.

The equitable doctrine being based upon the doctrine that where the parties stand *in æquali jure*, equality of burden becomes equity. Coffin v. Heath, *supra*.

All acts done by one tenant in common are presumed to be for the interest of all the cotenants, and in conformity to all their rights, until an adverse claim is notoriously set up and established by competent proof. Baker v. Whiting (1839) 3 Sumn. 475.

As contribution rests upon the principle that the payment has removed a common burden and established a common benefit. Screven v. Joyner (1833) 1 Hill, Eq. 260, 26 Am. Dec. 199.

And it has been held that necessary reparation should be done and charged on the estate when one tenant refuses to join in the making thereof, or from disability is unable to do so. Alexander v. Ellison (1880) 79 Ky. 148.

For the reason that the income is applied in repayment thereof where practicable. *Ibid.*

And this for the reason that, if one makes repairs, and the other receives a part of the benefit, they ought not to be permitted, by refusing to unite in necessary repairs, to compel their cotenant to bear the whole expense or to allow his interest to suffer because they are reckless of their own. *Ibid.*

Yet in the case of repairs it does not seem to be well settled, in the absence of statutory provisions, that one tenant in common can make the necessary repairs and charge his cotenant in an action for the amount in the absence of contract. Taylor v. Baldwin (1850) 10 Barb. 582.

And in Massachusetts an action for contribution cannot be maintained where there is no agreement or consent to the repairs. Calvert v. Aldrich (1868) 99 Mass. 74, 96 Am. Dec. 698.

So in Stevens v. Thompson (1854) 17 N. H. 103. It was questioned whether a tenant in common of a farm could compel his cotenant to contribute to the repairs of a house upon the premises in the absence of an agreement respecting the same.

And a cotenant has been held not liable to account for insurance money received by him and expended in repairing and restoring the property. Annely v. De Saussure (1887) 26 S. C. 497.

But under a covenant to repair, which runs with the land, the purchaser of a cotenant's share is liable for a proportion of the expenses so incurred. Denman v. Prince (1862) 40 Barb. 215.

The old writ was not employed to obtain contribution for repairs previously made, but to compel the tenant to make such repairs, under the order and direction of the court, as are adjudged to be proper, and was not in use in these states. McDearman v. McClure (1876) 31 Ark. 559.

But the writ will not lie where the repairs have been made under an agreement express or implied. Coffin v. Heath (1843) 6 Met. 76.

It applies only as against a cotenant, and not as against a reversioner. Carver v. Miller (1808) 4 Mass. 559.

Action upon the case is now substituted therefor. Doane v. Badger (1815) 12 Mass. 65.

So no tenant in common has a right to the exclusive use of the common property for the payment of repairs, unless they have been made in conformity with the Maine Statutes, chapter 86. Buck v. Spofford (1849) 31 Me. 34.

An agreement between cotenants to occupy in severalty according to their interests, each to make necessary repairs to a certain value in severalty, all

rents and profits should be charged. Where it is proper to charge rents and profits, improvements should be allowed. The decree in the case says that, "under the circumstances of the case," justice required an allowance for improvements, and then said that rents and profits be charged. The opinions do not touch on the point. They do not consider whether the said statute naming joint and in common tenants includes within its equity coparceners. The matter was not discussed, not even mentioned. The Virginia cases sustaining an account are cases of joint tenants and tenants in common. So the two West Virginia cases cited above. If there is a case in either state pointedly holding that a mere sole use by a coparcener subjects him to account, I have not seen it, except *Fry* v. *Payne*, 82 Va. 759, holding, by a mere remark, a parcener liable to account for sole use; but there was no consideration of the point whether the statute applied to parceners, but it was assumed it did. The distinction between parceners and joint tenants or tenants in common was not thought of. So, I do not think these parceners could by law demand an account of use and occupation. But, in addition, all the parceners, save one, including the plaintiff, by uniting in the form of a letter signed by all as an agreement, declared that they did not wish the hotel to go into the hands of strangers, and wished Broyles, then in possession, not to leave it, but to keep it and use it, and insure and paint and repair it, and, after all the improvements contemplated by it had been made, if he thought the heirs were entitled to anything he could pay; but, if he thought they were not, then pay nothing, leaving it to him, and they would be satisfied. This was April 17, 1884. It spoke no intent to charge back rent, but by plain implication disclaimed it, and disclaimed an intention to charge in future. The suit would not change this. Mrs. Broyles still had right till partition or sale, so she did

repairs exceeding such value to be charged jointly to the parties according to their interest, was construed as meaning that whenever repairs at any one time became necessary, not exceeding such specified amount, they were to be made at the sole expense of the tenant, but if the repairs required at one time were more than such sum, the whole was to be joint charged. Kidder v. Rixford (1844) 16 Vt. 169, 42 Am. Dec. 504.]

Where there was a joint promise to pay for the repairs done by one cotenant, and the evidence showed that the undertaking was several, and after the repairs were completed one of the defendants performed his part of the agreement, it was held the action must be brought against the other defendants severally for the performance by each of his part, and not against them jointly. Converse v. Ferre (1814) 11 Mass. 325.

Under Mass. Stat. 1795, chap. 74, § 6, the major part of the proprietors in interest on any mill agreeing to repair or rebuild, may do so, and are to be reimbursed out of the profits in case any proprietor refuses to agree to the reparation or rebuilding or to pay his proportion of the expenses, and are entitled to their action against the deficient proprietor to recover the same, and any particular contract to repair or rebuild, entered into by the proprietors, is not to be avoided by the act. The above statute, however, applies only to a part owner, and not to his heirs or assignees. Carver v. Miller (1808) 4 Mass. 559.

The common law gives no right of action by one tenant in common expending more than his share in repairing the common property against the deficient tenants. It gives a right of action in respect to co-owners of mills for the balance justly due from one for the repair of the joint property. Converse v. Ferre, *supra*.

b. *Liability in assumpsit.*

Assumpsit will not lie by one tenant in common against another for repairs to the land, though they be proper or necessary, without a previous request to join in the repairs and a refusal thereof. Mumford v. Brown (1836) 6 Cow. 475, 16 Am. Dec. 440.

In the above case the court questioned whether assumpsit would be the proper remedy, even though there were a prior request and refusal. Ibid.

But if a tenant in common has expended money for the joint benefit, and does not bring in question the title to the land, he may recover in assumpsit of his cotenant the sum expended by him beyond his just proportion. Gwinneth v. Thompson (1829) 9 Pick. 31, 19 Am. Dec. 350.

c. *Necessity of a demand and notice.*

At law one tenant in common can compel the other tenants to join in the expense of reparations of a house, where the reparations are necessary to the preservation or enjoyment of the estate, but in order to sustain his action he must show a request to unite in a refusal as well as an actual expenditure; in such a case the expenditure is for the benefit of all the tenants, and contribution is enforced on the principle that parties standing in equal rights are bound to bear an equality of burden. Louvalle v. Menard (1844) 6 Ill. 39, 41 Am. Dec. 161; Kidder v. Rixford (1844) 16 Vt. 169, 42 Am. Dec. 504; Coffin v. Heath (1843) 6 Met. 76; Calvert v. Aldrich (1868) 99 Mass. 74, 96 Am. Dec. 698.

Such request and refusal are necessary before assumpsit will lie for repairs, or the common-law writ *de reparatione facienda*. Green v. Putnam (1847) 1 Barb. 500.

So damages cannot be recovered until after the request and refusal. Doane v. Badger (1815) 12 Mass. 65.

The New Hampshire Statutes, ed. 1830, 126 (Rev. Stat. chap. 126), which provide that the necessary repairs in mills, mill dams, or flumes owned by joint tenants or tenants in common shall be made by such owners in proportion to their respective interests, contain no provision relative to the repairs of houses, and it is said that in order to maintain such action it must be proved that there was a previous notice and opportunity given to the cotenant to make repairs. Stevens v. Thompson (1845) 17 N. H. 103.

And see Carver v. Miller (1808) 4 Mass. 559, *supra*, head II., a.

d. *Lien for repairs.*

When houses situated on the joint property are falling into decay, and one tenant out of his own means makes reparation, he should not only be entitled to contribution, but should be secured by a lien on the interest of his cotenants, especially if they refuse, or being under disability are unable to consent, to bear their share of the expense. Alexander v. Ellison (1880) 79 Ky. 148.

Not only would they be personally liable to contribute in equity, but their estate will be subjected to a lien, whether the tenants agree to repair or not, if by the repairs a common benefit has been conferred on the owners so that *ex æquo et bono* they ought to pay for such a benefit. Coffin v. Heath (1843) 6 Met. 76. R. W.

not exclude an actual effort at entry and enjoyment by others. Let the question of liability for use and occupation be settled as it may on general principles of law. This agreement in this case repels a charge.

Next, as to improvements claimed by L. E. Ward. Can he be allowed for them? One joint tenant or tenant in common at common law could compel others to unite in the expenses of the necessary reparation of a house or mill owned by them, though the rule is limited to these parts of the common property, and does not apply to fences enclosing wood or arable land. This right was enforced by a writ *de reparatione facienda*. It did not apply to past repairs, and could only be resorted to after request to unite in the repairs and refusal. 1 Lomax, Dig. (504) 648; 2 Minor, Inst. 430; 4 Kent, Com. 370. It was confined to a mill or houses, because it is for the public good to maintain houses and mills, which are for the habitation and use of men,—as *Lord* Coke said in Co. Litt. 200*b*; Id. 54*b*: "If there be two joint tenants of wood or arable land, the one has no remedy against the other to make inclosure or reparation for safeguard of the wood or corn." *Bowles' Case*, 11 Coke, 82. I have no doubt this old common-law writ, though disused, might yet be resorted to. It applies to future, not past, repairs. Freem. Coten. § 261; *Calvert* v. *Aldrich*, 99 Mass. 76, 96 Am. Dec. 693. I think it can be safely laid down, with the exception stated, no joint tenant, tenant in common, or parcener can compel his cotenant to make improvements, or maintain an action against him personally to compel him to contribute to the expense of improvements made by him upon the estate, without his consent, express or implied, or fix it as a lien on his interest in the estate. One cannot improve his fellow out of his estate. He has voluntarily put improvements on land of another, knowing his right, and he cannot impose a debt on him or his estate without his consent. Freem. Coten. §§ 261, 262; *Aldrich* v. *Husband*, 131 Mass. 480; *Husband* v. *Aldrich*, 135 Mass. 317; *Nelson* v. *Clay*, 7 J. J. Marsh. 138, 23 Am. Dec. 387; *Hancock* v. *Day*, McMull. Eq. 69, 36 Am. Dec. 293; *Scott* v. *Guernsey*, 48 N. Y. 106; *Calvert* v. *Aldrich*, 99 Mass. 74, 96 Am. Dec. 693; *Mumford* v. *Brown*, 6 Cow. 475, 16 Am. Dec. 440. It is not the case of one making improvements in good faith believing the land to be his. The common law denied such a one relief, and it is only allowed by statute. Code, chap. 91. It seems that, where a tenant in common or joint tenant is called on for rents and profits in equity, he may deduct ordinary repairs on the principle that he who asks help from a court of equity must do equity. *Hannan* v. *Osborn*, 4 Paige, 343, 3 L. ed. 463; *Ruffners* v. *Lewis*, 7 Leigh, 720, 743, 30 Am. Dec. 513; 2 Minor, Inst. 420; 1 Story, Eq. Jur. § 655; *Graham* v. *Pierce*, 19 Gratt. 28, 100 Am. Dec. 608, syllabus 6; Freem. Coten. § 279. Where partition is made, the part improved should, if not prejudicial to others, be allotted to the one who made improvements, estimating its value without improvements. 2 Minor, Inst. 420; *Patrick* v. *Marshall*, 2 Bibb, 41, 4 Am. Dec. 670; *Nelson* v. *Clay*, 7 J. J. Marsh. 138, 23 Am. Dec. 387. But if this cannot be done, he to whom the improvement falls does not have to pay for it. *Nelson* v. *Clay*, *supra*. Where improvements are made with consent of the cotenants, they are personally bound, and the demand is a lien on their shares. *Houston* v. *McCluney*, 8 W. Va. 135; Freem. Coten. § 262.

It seems to be claimed in the brief of counsel that the letter to L. M. Broyles, written by some of the heirs, justifies a charge by L. E. Ward for improvements. After requesting him not to leave the house, but to stay, it recited what he ought to pay, viz., keep and use the property, have it insured, keep taxes paid, keep the house in good repair; and then said: "Go to work and have the house painted and repaired as in your opinion you think it should be; and, after all this improvement has been made, if you think, after calculating the expenses of the improvements and the taxes, etc., which you may have paid heretofore, that the heirs are entitled to anything, then you can arrange and pay them their proportion; and if you think that nothing is coming to the heirs after paying for painting, etc., then we are satisfied." This did not refer to improvements made by L. E. Ward before the letter, but to future improvements. The word "paid" refers to taxes. But although it be law that one coparcener cannot, without consent, make permanent improvements, and charge his coparcener or his share with their cost, where the estate is partible in kind, as a tract of land, how is it in the case of a house or land which is impartible in kind for any reason, so that it has to be sold in order to effect a partition, as was the case in the present instance? Is there no difference here? Circumstances alter cases. Is it right for a court of justice to sell the land greatly increased in value by the expenditure of one brother, and put the money into the pocket of another with its eyes shut to the fact that the property brought more, a great deal, by reason of the new house built by one of the brothers? Ought it not to be ascertained how much the value was enhanced by the improvements, and pay the amount of enhancement to the one whose means produced it, and divide the balance? This is different from the case where there is division in kind. In the later case, to charge the brother who did not consent to the improvement is to force upon him a debt he did not assent to, and to mortgage his estate with a debt which he cannot pay and which will take away his patrimony. One ought not to be made a debtor without his consent; but, where the whole is to be converted into money and distributed, another principle is admissible, doing harm to no one and justice to all. The others get just what they would have received without the improvements, and the one making them is reimbursed. I have observed that in Illinois this doctrine has been frequently applied. *Louvalle* v. *Menard*, 41 Am. Dec. 161, and *note*; *Howey* v. *Goings*, 13 Ill. 95, 54 Am. Dec. 427; *Dean* v. *O'Meara*, 47 Ill. 130. And on further search I find this excep-

tion approved in *Moore* v. *Thorp*, 16 R. I. 655, 7 L. R. A. 781. I think *Elrod* v. *Keller*, 89 Ind. 382, would also allow it in such a case as we have in hand. *Alleman* v. *Hawley*, 117 Ind. 533, does. It does not follow that the original cost of improvements be given, but the actual enhancement of value at time of sale by reason of improvements is ascertained. See opinion in last-cited case, and in *Moore* v. *Williamson*, 10 Rich. Eq. 328, 73 Am. Dec. 93. The opinion in the last case very properly says that, if the cost of improvements be allowed, "it would subject the owner to the want of judgment or economy of the improver, and render him liable to be built out of his land by the improvidence of his tenant." I would add that the improvement may have depreciated from some time before the sale.

It is objected that the bill does not charge a request on the part of the cotenant for the improvements. It would be necessary to charge them otherwise than as indicated above, but it is not necessary to so charge them; that is, as a simple increase of value.

It follows, from what has been said, that, while there could be no claim for use and occupation against Broyles and his wife, yet the decision of the court below is wrong in wholly disallowing all claim for improvement made by the plaintiff out of the proceeds of sale, in the manner above stated, which was directed to be made because the property was found insusceptible of partition.

A reference was made to a commissioner, and his report charged rents and profits to Mrs. Broyles for the hotel, and to the plaintiff for the stable, and charged Mrs. Broyles, as the owner of five sixths of the property, with five sixths of the money spent by the plaintiff in improvements. The commissioner made a part of his report a deposition of the plaintiff, and, as the report imports, there was no other oral evidence before him. Taking that deposition alone, it supports the report as to the charge for improvements, as it shows consent on the part of the cotenants. No exception was made within ten days, and the plaintiff contends that the result reached and returned by the commissioner must be taken as correct, and cannot be impaired by after-exceptions and evidence afterwards taken, and that the court could not, upon depositions afterwards taken, overturn and reject the result reached by the commissioner, but must confirm or recommit. *Ward* v. *Ward*, 21 W. Va. 262. The plaintiff's deposition must be considered a part of the re .—a part of its face. *Lynch* v. *Henry*, 25 W. Va., opinion page 424; *Kester* v. *Lyon*, 40 W. Va. ——. It is plain that if we decide the exception only by the face of the report, including that deposition, we must overrule it, because the deposition sustains the report in the point of view of fact. But after the report, and we will say after the exception, the defense took depositions. They deny the statement of the plaintiff's deposition, that the other heirs agreed that the plaintiff make the improvements. The court read them on the hearing. Could they be read to impair the finding of the report in favor of the plaintiff as to the improvements? This may seem at first an immaterial question, since, as above stated, the plaintiff ought to be allowed out of the sale an amount equal to the amount of increase of value at the time of sale imparted to the property by the improvements; but a second thought makes it material, in this: that if there was an agreement between the parties that the improvements be made, that would entitle the plaintiff to perhaps a larger recovery, that is, the original cost of improvements with interest from the date when made, while, if there was no request, he would get out of the sale the mere increase of value. Can these depositions be read then? If there had been no exception, they could not, as, without exceptions, a report is taken, as to adult parties, to be correct, and will not be examined by the court except for errors on its face. *Kester* v. *Lyons*, 40 W. Va. ——. But where there is an exception, but not within ten days, how is it? Where the party says that he does not intend to be regarded as admitting the correctness of the report, but excepts to it, and appeals to evidence subsequently presented in the case, can he overthrow the report with that evidence? Is he unalterably bound by the report, if not erroneous on its face? If he had excepted within ten days, he could have taken other evidence, and the commissioner could retain the report to await it, and upon it make remarks, or even make a further or amended report. I think this is so because section 7, chapter 129, Code, says that, if exceptions be taken within ten days, the commissioner shall with his report "return the exceptions, and such remarks thereon as he may deem pertinent and the evidence relating thereto." *Judge* Green expressed the same opinion in *Lynch* v. *Henry*, 25 W. Va. 423. I have some question as to the last matter, but think it tenable, and that the rule may be convenient in practice. The code, after providing for exceptions before the commissioner within ten days, goes on to add: "But any party may except to such report at the first term of the court to which it is returned, or by leave of the court after such term." What does this mean? It may be asked of what use such exception, if evidence taken after the return of the report cannot be read? The answer can be given, that the party may think the commissioner has reached the wrong conclusion on the evidence, and, desiring to have it reviewed, desires to except to get rid of the admission of its correctness which would operate against him from silence, and designs to ask the court to review the evidence, if it has been made part of the report, and, if it has not been, then to ask the court to order the evidence to be certified to be read with his exception, which he may do, if he has been prevented from excepting within the ten days. *Arnold* v. *Slaughter*, 36 W. Va. 590, syllabus 4.

If we say that after a report has been made a party may go on and take depositions, and have them read, we introduce confusion in practice, install a bad practice, and put a premium upon negligence and delay. A case is referred to a commissioner. He gives notice, and proceeds to execute the order of ref-

erence. The parties ought to attend before him. They can be much better heard upon the facts before a commissioner than in court. It is the most important proceeding in the case, save, perhaps, the final hearing; in many cases even more important than that. If the action of the commissioner is unsatisfactory, the party can, within ten days after he has finally announced his conclusion by a completed report, except, and, if he does not want more evidence, ask the commissioner to certify the evidence to the court for its review; and if he is surprised at the inferences drawn by the commissioner upon that evidence, and thinks he can strengthen his case by additional evidence, he can except within ten days, and take more evidence, and, under proper circumstances, the commissioner will delay returning his report to enable the party to do so, as the statute giving him right to take such evidence ought to be liberally construed to promote a fair, full hearing; and then the commissioner can report on such evidence, or make an amended report, or send up his original report, the exceptions, and all the evidence, old and new. After all the toil before a commissioner, after he has given his decision, and after the full opportunity for a hearing before him, a negligent litigant ought not to be allowed to reopen the case, often to the inconvenience and surprise of the other party. If so, where the utility of this tedious hearing before that important auxiliary of the court, the commissioner? It would be an almost meaningless performance. We do not think the code means such a reopening by giving right to except at the first term after the report. We think such after-taken depositions cannot be read on the hearing to impair the report, as was done in this case. We think the only office they can perform is to support a motion for a recommittal of the report, or to suggest to the court, where it appears contrary to justice to confirm the report, the propriety of such rehearing before the commissioner; but on such evidence the court cannot overturn the report, or remodel or restate the account, which may work great injury and surprise to the other party, but must recommit the report, if dissatisfied with it. *Ward* v. *Ward*, 21 W. Va. 262.

I have said this much upon this matter of commissioners' reports because of the importance, in every day's practice, of proper understanding as to proceedings before commissioners, and the frequent controversies arising upon them. Under these views, it would have been error to overturn the report, based on the theory that the improvements were made with the consent and agreement of the coheirs, but for the fact that the bill and amended bill have no allegation that the coheirs requested such improvements to be made or consented thereto. As this was not charged, the finding of the report is error apparent on its face, and vindicates the action of the court against the argument that only by using the after-taken depositions it rejected the finding of the report. Does it thence follow that the total disallowance of anything to the plaintiff is justified by this omission in the bills? By no means. The bills charged the fact of the improvements, and that the hotel property itself was not susceptible of partition, and must be sold, and the same decree which disallowed all compensation for improvements subjected the property to sale in order to divide its proceeds, and upon those facts the plaintiff was entitled to something on the principle of increased value above stated. Nor ought the court to have confirmed the report and decreed its full finding, because it allowed, not an amount for increased value, but the account of expenditure by the plaintiff in improvements, and because it charged use and occupation. There ought to have been a recommittal to ascertain the amount of increased value, viewing the case on those facts. The court could not make a new statement. If the plaintiff amended his bill by the allegation wanting, he could have claimed the account filed by him, with interest, if he could succeed in sustaining the theory or contention that his coparceners agreed to the making of improvements by him, but without such allegation he could not. He can still amend his bill to that effect, if he wishes to do so.

It is contended that in no view can the plaintiff claim anything at all for the improvements, since they were made in 1879, while the father yet lived, and his estate by the curtesy existed, and the heirs had only an estate in reversion, not in possession, and the improvements were made for and by the father. All the children, save two daughters, continued to reside in the home as a family with their father, after the mother's death, and the existence of this curtesy would not prevent any reversioner, by agreement with the others, from making improvements beneficial to the inheritance, and charging the property with them. Nor would it debar one from claiming such increase of value in the reversion or inheritance as his improvements imparted. Of course, were it shown that the plaintiff contracted with the father to make them; if the father became his debtor, his sole debtor, for them, and he looked to the father for pay,—he could claim nothing from the heirs. I do not consider that the evidence at present shows such a case as enables us to say this.

So much of the decree complained of as disallows the claim of the plaintiff or Lavina Broyles or L. M. Broyles for repairs, improvements, or rents is reversed, and the cause remanded for further proceedings in respect thereto, according to principles above stated so far as applicable, and further according to principles governing courts of equity in such case.

CALIFORNIA SUPREME COURT.

CAPITAL GAS CO., *Respt.*,
v.
J. D. YOUNG, Auditor of Sacramento, *Appt.*

(.....Cal.....)

The fact that the mayor of a city is also the president and a stockholder of a gas company which furnishes gas to the city, not by virtue of any contract, but by requirement of law, when the mayor has no authority in the matter of procuring the gas, does not defeat the right to enforce payment from the city, although the charter of the city provides that no officer shall be directly or indirectly interested in any contract, work, or business, or the sale of any article for which payment is to be made from the city treasury, and that all contracts in violation thereof shall be void.

(September 18, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Sacramento County granting a writ of madamus to compel defendant to audit a claim by plaintiff against the city of Sacramento for gas furnished it. *Affirmed.*

The facts are stated in the Commissioner's opinion.

Messrs. **J. Frank Brown** and **Clinton L. White**, for appellant:

Respondent is not entitled to have this judgment affirmed until it can establish to the satisfaction of the court that a shareholder in a corporation organized and conducting business for profit is not interested directly or indirectly in contracts made by the corporation.

The situation here is such as to bring the case within the mischiefs provided against in section 211 of the charter.

Todd v. *Robinson*, 54 L. J. Q. B. 47; *Dwight* v. *Palmer*, 74 Ill. 296; *San Diego* v. *San Diego & L. A. R. Co.* 44 Cal. 106; *Shakespear* v. *Smith*, 77 Cal. 688; *Finch* v. *Riverside & A. R. Co.* 87 Cal. 597; *Capron* v. *Hitchcock*, 98 Cal. 427; *Wickersham* v. *Orittenden*, 93 Cal. 29.

Mr. **A. L. Hart**, for respondent:

There can be no violation of the rule that no man can faithfully serve two masters whose interests are in conflict, unless, in the performance of his duties, the agent has found opportunity to exercise skill or industry against, or to drive a bargain advantageous or disadvantageous to, his principal. Such is not the case here.

Searls, *C.*, filed the following opinion:

The Capital Gas Company, a corporation organized and existing under the laws of the state of California, is, and for more than twelve years last past has been, engaged in the business of furnishing gas to the residents of the city of Sacramento (a municipal corporation), and to consumers generally, for profit, and has had shares of stock issued to and held by divers persons; and C. H. Cummings is, and for more than one year last past has been, the duly appointed and acting secretary of said corporation. The said corporation has during a period of more than twelve years last past been engaged in said business, under and pursuant to certain franchises duly granted to it by said city of Sacramento. On the 11th day of January, 1882, the board of trustees of said Capital Gas Company, by resolution regularly passed, fixed the price to be paid by consumers thereof at $3 for each 1,000 cubic feet. J. D. Young, the appellant herein, is, and for more than three years last past has been, the duly elected and qualified auditor of said city of Sacramento; and under the provisions of the charter thereof, duly adopted, it is the duty of said auditor to draw and sign all warrants upon the treasury for claims against said city which have been allowed by the board of trustees thereof. The fire department is, and for more than one year prior to 1894 was, one of the departments of the municipal government of the city of Sacramento. At all the times herein mentioned, B. U. Steinman was, and still is, the holder and owner of stock in said Capital Gas Company, and was, and still is, the president of said company, and since the first Monday in January, 1894, has been, and still is, the duly elected and acting mayor of said city of Sacramento. Between the 1st day of February, 1894, and the 1st day of March, 1894, the fire department of the city of Sacramento used and consumed 8,600 cubic feet of gas, furnished and distributed by the Capital Gas Company, which gas, according to the rate fixed as aforesaid, was of the value of $25.80; and thereafter, and on the 1st of March, 1894, the said gas company presented its bill therefor in said amount, duly itemized and verified, to the board of trustees of said city, which bill was allowed by said board for said sum of $25.80, and presented to the auditor aforesaid, who rejected the same, and returned it to the board as provided by the charter. Thereafter the same bill was again allowed and approved by the board of trustees and by B. U. Steinman, the mayor, in due form, and was again presented to the auditor, who refused to audit the same or to draw his warrant therefor on the treasurer of said city in favor of the said gas company. Said sum of $25.80 is still due and owing from the said city to said gas company. The gas so furnished was not furnished under any express contract, nor was it furnished pursuant to any contract entered into before the election of said mayor, except that it was so furnished pursuant to the franchises of the said gas company and the law applicable to said gas company.

Section 211 of the charter of the city of Sacramento provides as follows: "No member of the board of trustees, and no officer of or employé of the city, shall be or become directly or indirectly interested in or with the performance of any contract, work, or busi-

NOTE.—As to validity of a contract between a public officer and the public which he represents, see Tippecanoe County Comrs. v. Mitchell (Ind.) 15 L. R. A. 820, and *note*, also Spearman v. Texarkana (Ark.) 22 L. R. A. 855.

See also 45 L. R. A. 420.

ness, or in the sale of any article, the expense, price, or consideration of which is payable from the city treasury, or in the purchase or lease of any real estate or property belonging to or taken by the city, or which shall be sold for taxes or assessments, or by virtue of legal process at the suit of the city. Any member of the board or any officer or employé of this city violating the provisions of this section, or who shall be directly or indirectly interested in any franchise, right, or privilege granted by the city while he is such member, officer, or employé, unless the same shall devolve upon him by law, shall forfeit his office, and be forever disqualified from holding any position in the service of the city; and all contracts made, or rights or franchises granted, in violation of this section, shall be absolutely void."

Upon the facts as found by the court, of which the foregoing is a condensed statement, the court below adjudged that an alternative writ of mandate theretofore issued in the cause be made peremptory, requiring the appellant herein, as auditor, to issue his warrant upon the treasury of the city of Sacramento, and upon the proper fund therein, for the amount of the demand, viz. $25.80. The defendant, auditor as aforesaid, appeals from the judgment, and the cause comes up on the judgment roll.

The officers of a municipal corporation, like those of private corporations, are agents of the corporate body. It is a cardinal doctrine of the law of agency that, "whenever an agent is invested with authority to use any discretion in the exercise of the powers conferred upon him, it is an implied condition that this discretion shall be used in good faith for the benefit of the principal, and in accordance with the true purpose of the agent's appointment. To this extent every agency which is not a purely ministerial one involves a fiduciary relation between the parties." Morawetz, Priv. Corp. § 516. It is in consonance with this principle that officers of a corporation may not, under any circumstances, use their official position for their own benefit, or for the benefit of any one except the corporation itself, and they may not represent the corporation in any contract or transaction in which they are personally interested in obtaining an advantage at the expense of the corporation. In such cases it is said the corporation would not have the benefit of their unbiased judgment, as self-interest would prompt them to prefer their own advantage to that of the company. *San Diego* v. *San Diego & L. A. R. Co.* 44 Cal. 106; *Shakespear* v. *Smith*, 77 Cal. 638; *Finch* v. *Riverside & A. R. Co.* 87 Cal. 597; *Wickersham* v. *Crittenden*, 93 Cal. 29; *Capron* v. *Hitchcock*, 98 Cal. 427; Dill. Mun. Corp. § 444. The rule embodied in the foregoing decisions, and which has the support of a host of others which might be mentioned, is not an arbitrary one. In other words, it is founded in reason, and is not to be indiscriminately applied irrespective of the circumstances of the case. Morawetz, Priv. Corp. § 521.

It would seem that the circumstances of the present case bring it within the exceptions for the following reasons: (1) The authority to transact the business of the municipal corporation of the city of Sacramento, to procure supplies therefor, and to audit and allow claims against the city, is vested in the board of trustees; and B. U. Steinman, as mayor of the city, has not, so far as appears from the record, any authority in the premises. (2) The gas furnished to the city was not supplied under or pursuant to any express contract with the respondent corporation, of which Steinman is president, and the right to recover the reasonable value thereof is based upon the implied promise which the law raises. (3) Under section 629 of the Civil Code, the respondent was bound, upon proper demand, to furnish gas to the city, and, upon refusal so to do, was liable to a penalty of $50 as liquidated damages, and $5 a day as liquidated damages for each day such refusal or neglect continues thereafter. Under the operation of this law, the gas company was not a free agent with power to contract or refuse to do so, but it became its duty upon demand to furnish gas to the city, irrespective of the status of its president. This duty to furnish gas to the city devolved upon the respondent, not by virtue of any contract, but by operation of law; and hence the laws governing ordinary contracts resting in the volition of the parties thereto has no application. Where the law affixes a penalty for the nonperformance of an act, its performance should not be adjudged illegal, or subject the party performing to the implication of having violated a duty. Had the city of Sacramento been in need of the land of its mayor pursuant to some public use, and had it, by proceedings for the condemnation thereof, under the law of eminent domain, succeeded to the title, the proceeding would have been so far an adversary one that there would have been no liability on the part of such mayor for a violation of section 211 of the city charter, hereinbefore quoted. The case at bar does not differ essentially in principle from the one supposed. Section 211 of the city charter, which inhibits its officers from being interested in any contracts or sales to the city involving the payment of money from its treasury, or from being interested in any franchise, right, or privilege granted by the city while they are in office, is, except as to the penalty imposed thereby, in substance a declaration of the common law as it previously existed, and is founded in wisdom and justice. It is intended as a shield to the city against the selfishness and greed of officials, but was not intended and may not be used as a medium by which the city can take the property of others without their consent, under the form of law, and then refuse to pay therefor its reasonable worth, because an officer of the city is interested in such property. We hold that section 211 of the city charter has no application to a case like the present, where the gas company is required by positive law to furnish gas to the city upon demand, and, having furnished the commodity, has presented its bill for the reasonable value thereof, although the mayor of the city owns stock in the gas company and is president thereof. The city, having received and

used the gas pursuant to a right which it enjoyed independent of the volition of respondent, is, in equity and conscience, bound to pay the reasonable value thereof. The judgment appealed from should be affirmed.

We concur: **Vanclief**, *C.*; **Haynes**, *C.*

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment appealed from is affirmed.*

KANSAS SUPREME COURT.

ATCHISON, TOPEKA & SANTA FÈ R. CO., *Plff. in Err.*,
v.
W. T. HENRY.

(.....Kan.....)

*1. **The contract of a common carrier with a passenger** requires the carrier to protect the passenger against interference or injury arising from the negligence or willful misconduct of its servants while engaged in performing the duties which the carrier owes to the passenger; and, where a passenger upon a railroad train is unjustifiably assaulted and beaten by an employé who owed him the duty of protection, the railroad company is responsible for his acts and liable for the injury suffered.

2. **A railroad company which is carrying passengers** is liable for an illegal arrest and the false imprisonment of a passenger caused to be made by the conductor in charge of the train on which the passenger is riding, while acting in the line of his employment.

3. **The testimony examined,** and it is *held* that the damages awarded are not so excessive as to warrant the disturbance of the verdict.

(October 5, 1895.)

ERROR to the District Court for Sumner County to review a judgment in favor of plaintiff in an action brought to recover damages for the alleged wrongful assault upon and false imprisonment of plaintiff by defendant's employés. *Affirmed.*

Statement by **Johnston**, *J.*:

W. T. Henry brought an action against the Atchison, Topeka & Santa Fé Railroad Company to recover damages for injuries sustained by him on account of the alleged wrongdoing of the company, and in his petition alleged that on January 9, 1890, he boarded a train of the railroad company at Kansas City, Mo., for the purpose of riding over the Southern Kansas Division of that railroad to Wellington, Kan.; that he was provided with a ticket or stock contract entitling him to ride over the road between the points named; and that the conductor in charge of the train refused to accept his ticket or stock contract, and required him to pay in cash the sum of $7.50 for his transportation to Wellington. In the second count of his petition, he alleges that, while he was riding as a passenger and deporting himself in a proper and orderly manner, the agents and servants of the company, in the pretended exercise of authority to preserve order on the train, wrongfully and wantonly assaulted him by striking him on the head and body several times, with great force and violence, with a heavy lantern, thereby causing him to suffer great injury in body and mind. In the third count it is alleged that, while he was conducting himself in a quiet and proper manner, the defendant, by its agents and servants, in the pretended exercise of authority, and to preserve order in and about the train, at Ottawa, did arrest him, without any warrant or authority of law, and did forcibly remove him to the common jail of the county, where he was detained for twelve hours without any reasonable or probable cause, by reason of which he suffered great physical injuries, and that he was also greatly humiliated and injured in his circumstances and credit. For all these things he prayed damages in the sum of $10,000. The answer of the defendant was a general denial. Henry finally withdrew any claim for the amount he paid out for railroad fare from Kansas City to Wellington, and the case was finally submitted upon the claims in the second and third counts of the petition. In answer to special interrogatories which were submitted, the following findings of fact were made: "(1) On what train of cars did plaintiff take passage from Kansas City, Mo., on the 9th day of January, 1890, and over what road did the same run? *A.* On Santa Fé train, on Santa Fé road, southern Kansas division. (2) In what car on said train did plaintiff first take passage? *A.* Smoking car. (3) How long did he remain in such car in interrogatory No. 2 mentioned, before going into the ladies' car. *A.* A very short time; say, a few minutes. (4) Did plaintiff go to sleep soon after taking a seat in the ladies' car? *A.* He did. (5) If you answer interrogatory No. 4, 'Yes,' state whether he remained asleep until the conductor waked him up to collect his fare. *A.* According to evidence, yes. (6) How

*Headnotes by JOHNSTON, *J.*

NOTE.—For carrier's liability to a passenger for an assault upon him, see *note* to Davis v. Houghtelin (Neb.) 14 L. R. A. 787; also the late case of Baltimore & O. R. Co. v. Barger (Md.) 26 L. R. A. 220.

As to liability for false imprisonment of a passenger, see *note* to Mulligan v. New York & R. R. R. Co. (N. Y.) 14 L. R. A. 791; also Gillingham v. Ohio River R. Co. (W. Va.) 14 L. R. A. 798; Palmeri v. Manhattan R. Co. (N. Y.) 16 L. R. A. 128; Central R. Co. v. Brewer (Md.) 27 L. R. A. 62.

See also 31 L. R. A. 702; 44 L. R. A. 673.

many times did the conductor wake the plaintiff up, and state to him in regard to producing his ticket or paying his fare, before plaintiff paid the same? *A.* Either two or three times; asked him for ticket three times. (7) What was the name of the conductor on the train January 9, 1890? *A.* Eli Parsons. (8) Upon the payment of plaintiff's fare, did the conductor give him a receipt therefor? *A.* Yes. (9) Was not the plaintiff under the influence of intoxicating liquors when he entered the train at Kansas City? *A.* To a certain extent, yes. (10) After plaintiff had paid his fare, did he not, at several times thereafter, use profane and vulgar language while in the ladies' car? *A.* The evidence on this question is contradictory. We think, however, that he used profane words a few times. (11) If you answer interrogatory No. 10, 'Yes,' then please state whether or not there were any ladies present in the car at the time. *A.* Yes. (12) Is it not a fact that, while in the ladies' car, the plaintiff made threats of doing the conductor personal injury and violence? *A.* The preponderance of evidence is, we think, against such a conclusion. (13) If you answer interrogatory No. 12, 'Yes,' please state if such threats were communicated to the conductor by any of the passengers in said car. *A.* . . . (14) Was not the plaintiff drunk and boisterous while in the ladies' car on said train? *A.* No. (15) Is it not a fact that the conductor removed the plaintiff from the ladies' car to the smoker on account of his being drunk and disorderly? *A.* No." "(18) While in the smoking car, did not the plaintiff have an open knife in his hands, and was not such knife and the blade thereof long and thin? *A.* Yes. (19) Did not the plaintiff while in the smoking car threaten to do the conductor personal violence and injury? *A.* No; we think not." "(21) When the conductor and brakeman came into the smoking car, did the plaintiff have the knife above referred to in his hands, and was the same open? *A.* Yes. (22) Did not some of the passengers in the smoking car, when the conductor and brakeman came in, say, 'Look out! he [meaning the plaintiff] has got a knife?' *A.* Yes. (23) Did not the brakeman order the plaintiff to drop the knife before striking him with the lantern? *A.* Yes. (24) How many times did the brakeman order the plaintiff to drop the knife? *A.* Once. (25) How many times did the brakeman strike the plaintiff with a lantern? *A.* Three times. (26) Did not the brakeman, after striking the plaintiff with the lantern the last time, say to him, 'If you make such a pass at me again, you will be carried out of this car a corpse,' or words to that effect? *A.* Yes. (27) During all the time the plaintiff was on the train of cars, what was the treatment and demeanor of the conductor to him? *A.* His treatment of and demeanor towards the plaintiff was good, with the exception of his action in causing the arrest of said plaintiff." The jury returned a general verdict in favor of Henry, and assessing damages against the railroad company at $3,000. Motions to set aside the verdict and for a new trial were overruled, and judgment was awarded for the amount named in the verdict. The railroad company alleges error.

Messrs. **A. A. Hurd, O. J. Wood,** and **W. Littlefield,** for plaintiff in error:

The plaintiff cannot recover for any injuries received as the result of his drunken and disorderly conduct.

Atchison, T. & S. F. R. Co. v. *Weber*, 33 Kan. 543, 52 Am. Rep. 543; *Hendricks* v. *Sixth Ave. R. Co.* 12 Jones & S. 8; *Railway Co.* v. *Valleley*, 32 Ohio St. 345, 30 Am. Rep. 601; *Sullivan* v. *Old Colony R. Co.* 1 L. R. A. 513, 148 Mass. 119; *New Orleans, St. L. & C. R. Co.* v. *Burke*, 53 Miss. 200, 24 Am. Rep. 689; *Louisville & N. R. Co.* v. *Logan*, 2 L. R. A. 80, 86 Ky. 232; *Peavy* v. *Georgia R. & Bkg. Co.* 81 Ga. 485; *Vinton* v. *Middlesex R. Co.* 11 Allen, 304, 87 Am. Dec. 714; *People* v. *Caryl*, 3 Park. Crim. Rep. 326; *King* v. *Ohio & M. R. Co.* 22 Fed. Rep. 413; *Pittsburgh, Ft. W. & C. R. Co.* v. *Hinds*, 53 Pa. 512, 91 Am. Dec. 224.

There can be no question, under the evidence, but that the conductor and brakeman both had reasonable grounds for believing that the plaintiff would make an attempt to carry out the threats which he had previously made, and that, acting on that belief, they had a right to defend themselves, and would not be required to wait until the plaintiff actually inflicted personal injury upon them.

21 Am. & Eng. Encyclop. Law, p. 1060, *note; Williams* v. *State* (Ala.) 15 So. Rep. 662; *Atchison, T. & S. F. R. Co.* v. *Gants*, 38 Kan. 609; *Moore* v. *Columbia & T. R. Co.* 38 S. C. 1.

The company is not liable for the alleged false imprisonment of the plaintiff.

Hopkins v. *Crowe*, 7 Car. & P. 373; *Burns* v. *Erben*, 1 Robt. 555; *Brown* v. *Chadsey*, 39 Barb. 253; *Veneman* v. *Jones*, 118 Ind. 41; *Lark* v. *Bande*, 4 Mo. App. 186; Newell, Malicious Prosecution, § 96, p. 211; *Southern Pac. Co.* v. *Hamilton*, 7 U. S. App. 626, 54 Fed. Rep. 468; *Jardine* v. *Cornell*, 50 N. J. L. 485; *Central R. Co.* v. *Brewer*, 27 L. R. A. 63, 78 Md. 394; *Pratt* v. *Brown*, 80 Tex. 608; *Rich* v. *McInery* (Ala.) 15 So. Rep. 663; *Teal* v. *Fissel*, 28 Fed. Rep. 351; *Tolchester Beach Imp. Co.* v. *Steinmeier*, 8 L. R. A. 846, 72 Md. 313; *Cunningham* v. *Seattle Electric Railway & Power Co.* 3 Wash. 471.

The damages awarded by the jury were excessive.

Woodward v. *Glidden*, 33 Minn. 108; *Ogg* v. *Murdock*, 25 W. Va. 139; *Cunningham* v. *Seattle Electric Railway & Power Co.* and *Brown* v. *Chadsey*, *supra*.

Mr. **J. E. Halsell** for defendant in error.

Johnston, J., delivered the opinion of the court:

At the trial the plaintiff below, W. T. Henry, relied upon two grounds of recovery: One for the alleged assault made upon him by the brakeman while Henry was a passenger on the train of the railroad company, and the other for the unlawful arrest alleged to have been made at the instance of the railroad company while he was a passenger upon the train, and his illegal imprisonment for about twelve hours in the jail of Franklin county. Henry was a farmer and stock ship-

per, who made a shipment of cattle from Wellington to Kansas City in January, 1890, and who, in consideration of the shipment, received a ticket or stock pass entitling him, not only to accompany the cattle to Kansas City, but to a return passage from that place to Wellington. On the return trip he was unable to find his stock pass, and was required by the conductor to pay a cash fare. Some difficulty arose between him and the conductor concerning the collection of the fare, in which it was contended by the employés of the company that Henry became profane, violent, and abusive, and threatened violence to the conductor. It is claimed that the threats were communicated to the conductor, who, when passing through the train, accompanied by a brakeman, found Henry with an open knife in his hand in a threatening attitude; that the brakeman approached him, and demanded that he should throw the knife down, but Henry refused, when the brakeman struck him three times upon the head with a lantern. The theory of the railroad company was that Henry was drunk, abusive, and violent; that he had become enraged because of the collection of his fare, and had threatened the lives of the employés of the company; and that with an open knife he was endeavoring to carry out his threats at the time he was attacked by the brakeman; and that therefore the conductor and brakeman were justified in committing the assault upon Henry and inflicting upon him the punishment which they did. On the other hand, Henry claims that he was not drunk nor disorderly; that while he complained of the collection of the fare, and the failure to return it after his stock pass had been found, he made no threats against the conductor, nor any attempt to attack him with a knife or in any other manner. He claimed that he was using his knife to cut a chew from a plug of tobacco which he held in his hand. The jury have specially found, upon conflicting evidence, that, while Henry used some profane language on the train, he was not drunk or boisterous; that he made no threats of doing personal injury or violence to the conductor upon either of the cars on which he rode. There was a further finding that the brakeman struck Henry twice after he had dropped the knife.

According to the testimony which was accepted by the jury, the action of the brakeman in assaulting Henry was a gross violation of the duty of the railroad company towards a passenger. As the relation of carrier and passenger existed, he was entitled to the highest degree of care and protection against violence or interference by others so long as he conducted himself in a proper manner. If, through the negligence of the company in affording him the care and protection to which he was entitled, the passenger had suffered an injury, the company would be liable; and certainly the liability is no less where the injury is intentionally inflicted by an employé of the company who was required to exercise care and protection towards the passenger. It is true, if Henry was drunk and disorderly, and his conduct such as to render his presence offensive or dangerous, they would have been justified in excluding him from the train; and it is also true, as contended by the company, that the brakeman and conductor might repress acts of violence on his part, and under certain circumstances defend themselves or repel a threatened attack. The finding of the jury, however, makes the brakeman the aggressor, and his attack upon the passenger unjustifiable. *Stewart* v. *Brooklyn & C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185; Ray, Negligence of Imposed Duties, §§ 106, 107.

It is next contended that the company is not liable for the illegal arrest and false imprisonment of Henry. The arrest was made without a warrant, and the imprisonment continued for about twelve hours in the county jail of Franklin county. It occurred about one half an hour after the termination of the difficulty on the train at a time when Henry was quiet and orderly. When the train reached Ottawa, the conductor reported the occurrence of the difficulty to a superintendent, who advised that Henry should be taken from the train. The conductor inquired for an officer, and, when one was found, they went together into the train, where the conductor pointed out Henry, who was at once arrested by the officer, and taken to prison. Under these circumstances, there can be but little doubt that the conductor procured the false arrest to be made while in the line of his employment, and at a time when the relation of passenger and carrier existed between the company and Henry. It is well settled that when one in charge of a train, and engaged in the business which has been intrusted to him by the company, causes the arrest of a passenger, the company for which he is acting cannot escape liability. According to the testimony which the jury believed, Henry was arrested at midnight, when he was quietly seated in a car; and, without process or any information as to the cause of his arrest, he was hurried from the train, and placed in jail, where he was searched, and shut up until about noon the next day. The action of the conductor, who must be held to have been acting for the company, was clearly a breach of the contract between the carrier and the passenger, which required that Henry should be carried in safety to his destination, and protected from interference by strangers or against the misconduct of the company's servants. Where the relation of carrier and passenger exists, it is held that no matter what the motive is which causes a servant of the carrier to commit an unlawful act, or to wongfully inflict an injury upon a passenger, the carrier is responsible for the act and its natural and legitimate consequences. *Dwinelle* v. *New York Cent. & H. R. R. Co.* 120 N. Y. 122, 8 L. R. A. 224; *Hamel* v. *Brooklyn & N. Y. Ferry Co.* 1 Silv. Sup. Ct. 584; *Palmeri* v. *Manhattan R. Co.* 133 N. Y. 261, 16 L. R. A. 136; *Gillingham* v. *Ohio River R. Co.* 35 W. Va. 588, 14 L. R. A. 798; Ray, Negligence of Imposed Duties, § 109.

There is some testimony tending to show that the officer who made the arrest was employed by and received compensation from the railroad company. Some testimony of an

objectionable nature in regard to his authority, as well as in regard to the authority of the superintendent, was received; but in view of the conclusion that has been reached, that the conductor, acting in the line of his employment, caused the arrest to be made, the objectionable testimony with respect to the authority of the police officer and of the superintendent becomes immaterial. The final complaint is that the damages awarded by the jury are excessive, but the view which the jury has taken of the facts would justify the allowance of punitive damages against the company, and, looking at all the circumstances of the case, we cannot say that the award of $3,000 is so excessive as to indicate passion or prejudice in the jury, or justify the court in disturbing the verdict.

The judgment of the District Court will be affirmed.

All the Justices concur.

MICHIGAN SUPREME COURT.

George L. BURROWS, *Plff. in Err.*,
v.
DELTA TRANSPORTATION CO.

(.....Mich.....)

1. **Comment upon the testimony by the court,** to the effect that there is nothing to show that lumber was set on fire by sparks from a boat, when there is no attempt to prove any other cause of the fire, and several witnesses have sworn to seeing sparks from the boat falling upon the lumber, although the court allows the case to go to the jury, requires reversal of a judgment on a verdict for the defendant.

2. **A state statute requiring all vessels using wood for fuel** while navigating waters of the state to be provided with suitable fire screens does not conflict with acts of congress or regulations of supervising inspectors, and is not an interference with interstate commerce.

3. **It is for the jury to determine which of various screens** described by witnesses would comply with the requirements of a statute, and therefore an instruction that there could be no liability for the fire alleged to have been caused by want of a screen, if one of the screens described in the testimony would not have prevented the fire, is erroneous.

4. **The jury must determine the facts** in the case from testimony given by witnesses, and not from their own judgment or experience or knowledge.

5. **A provision for recovery of damages occasioned by neglect to provide fire screens** for vessels as required by statute is sufficiently expressed in the title, "An act to compel steam vessels . . . to provide fire screens . . . and to provide a penalty for its violation."

6. **The courts cannot declare a statute unconstitutional and void** solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of a citizen, unless such injustice is prohibited or such rights guaranteed or protected by the constitution.

7. **A statute requiring screens** "of the best approved kind shown by experience to be proper and suitable for protection from fire" to be used on vessels burning wood is not unreasonable, and imposes no greater burden than the common-law rule in most states imposes in the case of railroad locomotives.

8. **The mere omission of the word "steam" before the word "vessel"** in a section of an act requiring fire screens, the title of which relates to steam vessels, does not render the act repugnant in its terms, as the provisions apply only to steam vessels.

(October 1, 1895.)

ERROR to the Circuit Court for Bay County to review a judgment in favor of defendant in an action brought to recover damages for the loss of lumber alleged to have been wrongfully set on fire by one of defendant's boats. *Reversed.*

The facts are stated in the opinion.

Messrs. **Hanchett & Hanchett,** for plaintiff in error:

The statements of the circuit judge are errors of law.

McDuff v. *Detroit Evening Journal Co.* 84 Mich. 1; *Wheeler* v. *Wallace,* 53 Mich. 355; *Cronkhite* v. *Dickerson,* 51 Mich. 177; *People* v. *Hare,* 57 Mich. 505.

The state may exercise its power to make regulations for the protection of the health, the lives, and the property of the people of the state against the dangers arising under interstate transportation and commerce concurrent with laws passed by congress in the exercise of the jurisdiction of congress over the same subjects, and the laws of the state are valid and may be enforced so long as they do not conflict with the provisions of the federal legislation.

King v. *American Transp. Co.* 1 Flipp. 1; *New York* v. *Miln,* 36 U. S. 11 Pet. 102, 9 L. ed. 648, 12 Curt. Dec. 357; *Goodrich Transp. Co.* v. *Gagnon,* 36 Fed. Rep. 128; *Johnson* v. *Chicago & P. Elevator Co.* 119 U. S. 388, 30 L. ed. 447; *Parkersburg & O. R. Transp. Co.* v. *Parkersburg,* 107 U. S. 691, 27 L. ed. 584; *Mobile County* v. *Kimball,* 102 U. S. 691, 26 L. ed. 238; *Huse* v. *Glover,* 119 U. S. 543, 30 L. ed. 487; *Sands* v. *Manistee River Imp. Co.* 123 U.

NOTE.—The relation of state police power to interstate commerce is sharply presented in the above case. For a few of the important cases illustrating this subject, see Com. v. Harmel (Pa.) 27 L. R. A. 386, and *Re* Spain (C. C. R. D. N. C.) 14 L. R. A. 97, with *note* (on peddling); Frere v. Van Schoeler (La.) 27 L. R. A. 414, and *note* (licensing tugboats); Grimes v. Eddy (Mo.) 26 L. R. A. 688, and *note* (transporting infected cattle); State v. Gorham (N. C.) 25 L. R. A. 810 (sale of lightning rods); Burdick v. People (Ill.) 24 L. R. A. 152, and *note* (ticket scalping); State v. Gladson (Minn.) 24 L. R. A. 502 (stopping trains); State v. Geer (Conn.) 13 L. R. A. 204, and *note* (game laws); State v. Winters (Kan.) 10 L. R. A. 616, and *note;* *Re* Van Vliet (C. C. R. D. Ark.) 10 L. R. A. 451; Com. v. Zelt (Pa.) 11 L. R. A. 402 (intoxicating liquors).

S. 268, 31 L. ed. 149; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. ed. 819; *Harrigan* v. *Connecticut River Lumber Co.* 129 Mass. 580, 37 Am. Rep. 387; *People* v. *Jenkins*, 1 Hill, 469; *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804.

The various states have enacted statutes requiring specific precautions to be taken in running trains, for the purpose of protecting life and property in the state against the dangers arising from the operating of the railroads. These statutory regulations are upheld.

Smith v. *Alabama, supra; Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238; *Union Pac. R. Co.* v. *De Busk*, 3 L.R. A. 350, 12 Colo. 294; *McCandless* v. *Richmond & D. R. Co.* 18 L. R. A. 440, 38 S. C. 108; *Hennington* v. *State*, 4 Inters. Com. Rep. 418, 90 Ga. 396; *Western U. Teleg. Co.* v. *Tyler*, 4 Inters. Com. Rep. 481, 90 Va. 297.

Statutes are upheld which impose an absolute liability for damages caused by fires set in the operation of railroads.

Ross v. *Boston & W. R. Co.* 6 Allen, 87; *West* v. *Chicago & N. W. R. Co.* 77 Iowa, 659; *Martin* v. *New York & N. E. R. Co.* 62 Conn. 331; *Denver, T. & G. R. Co.* v. *De Graff*, 2 Colo. App. 42; *Union Pac. R. Co.* v. *Arthur*, 2 Colo. App. 159; *McCandless* v. *Richmond & D. R. Co. supra.*

Such provisions are an exercise of the police powers of the states.

Minneapolis & St. L. R. Co. v. *Emmons*, 149 U. S. 364, 37 L. ed. 769; *Hayes* v. *Michigan Cent. R. Co.* 111 U. S. 228, 28 L. ed. 410.

If the title of the statute expresses a general purpose, all matters fairly and reasonably connected with that purpose, and all measures which are convenient or appropriate or fairly calculated to facilitate the accomplishment of that purpose, are properly parts of the statute.

Grand Rapids v. *Burlingame*, 93 Mich. 472; *Van Husan* v. *Heames*, 96 Mich. 504; *Hall* v. *Burlingame*, 88 Mich. 488; *Kurtz* v. *People*, 33 Mich. 279; *People* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People* v. *Wands*, 23 Mich. 385; *People* v. *State Ins. Co.* 19 Mich. 392; *People* v. *Mahaney*, 13 Mich. 481.

If the statute does not contravene any provisions of the constitution of the state, or of the Constitution or laws of the United States, it is to be upheld by the courts.

Cooley, Const. Lim. 1st ed. pp. 164, 167, 169; 6th ed. pp. 197, 200–202; *Sears* v. *Cottrell*, 5 Mich. 251; *People* v. *Gallagher*, 4 Mich. 244; *People* v. *Blodgett*, 13 Mich. 127; *People* v. *Mahaney*, 13 Mich. 501; *Tyler* v. *People*, 8 Mich. 320; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Hedderich* v. *State*, 101 Ind. 564, 51 Am. Rep. 768; *Sharpless* v. *Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759.

The requirement that the screens "shall be of the best approved kind, shown by experience to be proper and suitable for protection from fire," is neither more exacting nor more difficult to comply with than are the requirements imposed by the courts to guard against danger arising to property and life by the operations of business which create such dangers.

Hoyt v. *Jeffers*, 30 Mich. 181; *Jackson* v. *Chicago & N. W. R. Co.* 31 Iowa, 176, 7 Am. Rep. 120; *Metzger* v. *Chicago, M. & St. P. R. Co.* 76 Iowa, 387; *Steinweg* v. *Erie Railway*, 43 N. Y. 126, 3 Am. Rep. 673; *Spaulding* v. *Chicago & N. W. R. Co.* 30 Wis. 110, 11 Am. Rep. 550; *Toledo, P. & W. R. Co.* v. *Pindar*, 53 Ill. 447, 5 Am. Rep. 57; 3 Wood, Railway Law, § 326, pp. 1575–1577.

The rule of construction of statutes requires a reasonable interpretation to be given to the language used in the provisions so as to accomplish the object sought to be reached by the statute.

Sutherland, Stat. Constr. §§ 237–241, 246, 260; Endlich, Interpretation of Statutes, § 295, pp. 399–401; *People* v. *Saginaw County Cir. Ct. Judge*, 26 Mich. 342; *Taggart* v. *Perkins*, 78 Mich. 308; *Caldwell* v. *Ward*, 88 Mich. 18; *Detroit Comrs. of Parks and Boulevards* v. *Michigan Cent. R. Co.* 90 Mich. 385; *Armstrong* v. *Western Mfrs. Mut. Ins. Co.* 95 Mich. 137; *Detroit* v. *Wabash, St. L. & P. R. Co.* 63 Mich. 712.

Messrs. **Simonson, Gillett & Courtright** for defendant in error.

Long, J., delivered the opinion of the court:

This action is brought under Act No. 188, Pub. Acts 1881, entitled "An act to compel steam vessels navigating the waters of the state to provide fire screens for smokestacks, and to provide a penalty for its violation," being sections 2033 and 2034, How. Anno. Stat. On November 25, 1890, the plaintiff and Amasa Rust, since deceased, owned and had piled on the dock on the east bank of the Sheboygan river, at Sheboygan, a large quantity of pine lumber, of the value of $50,000 and upward. The lumber had stood upon the docks during the summer, and had become seasoned and dry. The defendant owned and operated a steamboat called the Minnie M., which was run between Sheboygan and Sault Ste. Marie, carrying freight and passengers, and which used wood for fuel, and had no fire screen of any kind attached to her smokestack. On the morning of November 25, 1890, the boat lay at McArthur's dock, on the west side of the river, some 1,200 feet above the lumber in question; and, about 5 o'clock in the morning of that day, she was fired up with pine slabs, left the dock, and passed down the river on her course and by the lumber in question. The river at this point was about 220 feet wide. At the time of her passing, a strong wind was blowing from the west, and, about fifteen or twenty minutes after the boat passed down, the lumber was seen to be on fire. It was entirely consumed.

The plaintiff, to establish his claim, called several witnesses, who testified substantially as follows:

Charles J. Kitchen: That he was master of the tug C. B. Strohn, which lay on the east side of the river, above the Minnie M.; that he saw the Minnie M. winding at McArthur's dock; that his attention was attracted to her by fire coming out of her smokestack; that there was a large volume of sparks escaping from the stack going across the river, eastward; that he watched her until she got

around with her stern pretty well up the river, watched her five or six minutes, may be longer; that there were lots of sparks coming from the Minnie M. at that time, more than there ordinarily are when they are starting up the fire; and that there were more sparks than he ever saw coming out of the smokestack of a steamboat.

Paul Verette: That he was a policeman for nearly six years in Sheboygan, and while on his watch, about half past 4 o'clock on that morning, he was standing on the bridge which was above where the Minnie M. lay; that he saw her as she was just leaving McArthur's dock, and saw her four or five minutes; that the sparks coming out of her smokestack drew his attention; that there was a lot of them, and there was a pretty high wind right across the river from the northwest towards the southeast; that the sparks coming out of the stack were going across the river among the lumber piles on the east side of the river; that, when he last saw the boat, she was passing Nelson's mill (Nelson's mill and the Sheboygan Lumber Company's mill are the same), and was throwing sparks at that time which were going towards the lumber piles. The sparks were coming out very thick, just the full of the smokestack.

Reuben H. Mosher: That he was the captain of the tug Cuyler; that the tug passed down the river before the Minnie M., and came back, and tied up to the dock on the east side of the river, about 1,200 feet below the point where the fire broke out. He was lying down in the tug Cuyler when the Minnie M. went by him. About fifteen minutes after the Minnie M. passed, he was called by Jarvis, who was aboard of the tug, and got up, and saw the fire in the first pile next to the mill. It had just started, and was about 12 feet above the dock, and about 4 or 5 feet down from the top of the pile nearest to the front of the dock towards the river.

James Taunt: That he was fireman on the tug Cuyler, and that, while she lay at the dock below the lumber, he came up on deck, and saw the Minnie M. go down the river as he came up. She was somewhere about abreast of the Sheboygan Lumber Company's mill. Sparks were coming out of her smokestack about the full of the smokestack. He called the attention of Mr. Harrington, who also looked out. Taunt continued to look at the Minnie M. until she passed the Cuyler. The sparks which he saw coming from the smokestack were going right into the lumber on the east side of the river, into the two piles below the mill.

Dewitt C. Harrington, the engineer of the tug Cuyler, testified that Mr. Taunt called him out to see sparks coming out of the Minnie M. He went on deck, and saw sparks coming out of the smokestack of the Minnie M., an unusual amount coming out,—some big ones and some little ones. They were going across the river to the east side. He continued to watch the boat until she got past the Cuyler. The sparks continued to come out of her during the whole time she was going down the river. As the sparks went to the east side of the river, some of them went onto the piles, some of them went into them, and some over them. Some ten or fifteen minutes afterwards the alarm was given. He went on deck to see the fire. He saw sparks going in at about the place where the fire was in the lumber.

George Adams, who was engineer on the city waterworks, and was on watch at the waterworks at the time, testified that he saw the Minnie M. going down the river; saw her after she left the dock until she got out to the end of the lumber piles going out of the river; and saw her throwing fire out of her smokestack, quite a good deal of it, during the whole time he saw her. About fifteen or twenty minutes after the Minnie M. went down the river, he saw the fire in the lumber piles. The sparks, as he saw them coming out of the stack, were going across the river towards the lumber piles.

After the above witnesses had testified, the plaintiff called Thomas McGarraty, who had had twelve years' experience as captain of a tug, who testified to the use of fire screens to prevent the escape of fire, and on the subject of the different kinds of screens used. At this point the court interposed, and the following took place: "The court: Have you got any more testimony as to the cause of the fire? Counsel: Oh, yes, sir. The court: I went down on the bridge here [in Bay City] last night, and I looked up towards Twenty-Third street bridge. It is less than a mile and a half, and it seemed to me that the evidence in on that subject is too uncertain to base a verdict on it,—the evidence as to the setting of the fire to the lumber by the Minnie M. Counsel: We except to the statement of the court. The court: It appears that the night, while not intensely dark, was not a moonlight night, cloudy, and the sky full of scuds, and a heavy wind. I don't think that anybody from either the upper part of the river, or where his tug laid, as marked on the map, can tell with any degree or even probability that the Minnie M. set that fire, from the testimony in. Counsel: We have offered such direct testimony upon that subject as we have. The court: Have you offered it all? Counsel: We have not offered it all, but it is all of the same kind. There isn't any other testimony that we have that will bring it closer than that. We have evidence of other witnesses relatively in the same position that the witnesses who have sworn were to the same occurrences. If that is your honor's view, our testimony could only be made stronger by having more witnesses to the occurrences. Counsel: We except to the statement of the court. The court: What have you to say about the right of the jury to base a verdict on what there is of it? Counsel: We simply say we think it is sufficient to show the cause of the fire absolutely and conclusively. The court: Under the statement of counsel, I shall feel compelled— I don't think it would be doing my duty to allow a verdict on the testimony to stand in favor of the plaintiff, if one was obtained. You can take such course about it as you are a mind to with that intimation. I shall feel in duty bound to instruct the jury as to the totally unsatisfactory species of evidence as to the cause of the fire.

If boats on this river can be held liable upon such proof, there is no use of boats entering the Saginaw river. It would absolutely banish commerce upon this stream. Tugs are running around here, from here to the mouth of the river, and they never did, as a general thing, use spark arresters. The larger vessels never use them at all. They lie right here by the lumber dock, load lumber for days and weeks, and are passing up and down the stream every day; and I should want the most conclusive and direct proof of the fact of setting the fire, in order to allow a verdict in such case. Counsel: We except to the statement of the court. The court: It appears from the testimony that the cut in the harbor is something more than a mile and a half. Counsel: Not over a mile. The court: Very well. Twenty-Third street bridge is about a mile and sixty rods from the Third street bridge here. No mortal man can go onto the Third-street bridge, and tell anything about the setting of fire up there, from the mere fact that sparks are escaping. Counsel: Don't understand us to concede that the witnesses were a mile away from the place. The court. The first witness was on a bridge which was some nine hundred feet from the mill, and that was some four hundred feet from the place where the fire commenced. Counsel: No; one hundred and fifty feet. The court: I think it is some fourteen hundred from where the fire started. It is one hundred and fifty feet beyond the slip leading from the rear of the mill. He was looking down that way. The other witness,— that was on the Strohn,— he saw the Cuyler pass him, and watched her outside. He noticed the boat when she was considerably,— this fire casting out a great many sparks; and she went out of the harbor throwing out more or less sparks. Now, it is a fact that, while all coal don't make sparks like soft wood or pine slabs, there is fire there, and occasional fires are caught from coal sparks. Still, there is no proof that this boat emitted a spark within five hundred feet of the place where the fire caught in the lumber at all in either direction. It is totally lacking in definiteness and certainty. I don't see anything certain about it. It may have been so, and that is all you can say about it. Counsel: Under this statement, the only thing that is left for us to do is to put our testimony in shape to save the question, for, after what your honor has said to the jury, it would be useless for us to go to them on the question of fact. The court: You can put your offer or your claim in any shape you are a mind to, and I will pass on it. I cannot try another case to day unless the parties are ready. If you desire it, you can have time for conference together until later in the day. It may be that my experience with boats influences my judgment, but in my mind there is nothing to indicate that this boat set that fire. Counsel: Note an exception to the statement of the court. Counsel to witness: Where do I understand that you have used these spark screens on your tugs? *A.* At Muskegon, and in the Muskegon lake. Spark screens on tugs are generally used at Muskegon; used on the smokestacks or in the smokestacks."

Several witnesses were thereafter called, who testified to having seen sparks from this boat falling upon the lumber; but this testimony was no more direct as to the origin of the fire than that above quoted. No evidence was given nor attempt made to account for the setting of the fire other than by sparks from this boat. The only other boat passing down the river that morning was the tug Cuyler, which was burning coal for fuel, and which, plaintiff's testimony showed, did not throw sparks on that occasion.

Counsel for plaintiff then offered to show further, by several witnesses, that sparks were seen coming from the stack of the Minnie M., and passing over and upon the lumber, when the court remarked: "Another witness testified here that he saw the sparks going into or on the lumber, but his position was such that I don't regard it as of any consequence." Defendant then offered testimony tending to contradict plaintiff's testimony, and to show that no sparks were coming out of the stack on the Minnie M. on that occasion, and to show that she was equipped with a damper and flue cap, which were in order; that the damper was closed, and the fire cap open, when she passed down the river; and that, when in that condition, dangerous sparks would not escape from the smokestack. Although the court had so commented upon the testimony of the witnesses for plaintiff, he finally concluded there was some evidence which the jury might consider as to the origin of the fire, and stated to counsel that he would so submit it.

The plaintiff's case was so greatly prejudiced by these and other remarks of the court below that a new trial should be granted upon this branch of the case alone; and, in view of a new trial, we shall pass upon the other assignments of error.

The manager of the defendant company was called as a witness, and was permitted to testify that the Minnie M. ran in connection with the Detroit & Cleveland Steam Navigation Company (running from Detroit to Sheboygan and Mackinaw), the Northern Michigan Line, the Grummond Line (from Toledo, Cleveland, and Detroit), the Grand Rapids & Indiana Railroad (running from Indiana to Mackinaw), and the Michigan Central Railroad; that an arrangement for joint tariff had been arranged with the Grand Rapids & Indiana Railroad for carrying freight; that the Minnie M. carried freight and passengers on its line destined for points outside of Michigan, and from outside of the state destined for points along the line of its route in this state; also, that it had arrangements with each of these transportation lines in regard to carrying freight and passengers. This evidence was taken under the objection of plaintiff's counsel, and was introduced for the purpose of showing that the Minnie M. was engaged in interstate commerce, and therefore no recovery could be had.

This question was settled in *Sheboygan Lumber Co.* v. *Delta Transp. Co.*, 100 Mich. 16. In that case evidence was given upon the same point, and the following requests presented by the defendant: "The Minnie M., on the day alleged in the declaration,

being engaged in interstate commerce, is not liable for any damages she may have caused by reason of not having a fire screen attached to her smokestack, as required by Act No. 188 of the Laws of 1881, such act being an attempted regulation of interstate commerce; and the plaintiff cannot therefore recover." Also: "The laws and regulations passed by congress regulating steam vessels contain no provisions regarding fire screens to be attached to the smokestacks of steam vessels; and, the Minnie M. on the date alleged in the information being engaged in interstate commerce, her owners, and masters were not bound to have such an appliance on its smokestacks." These requests were refused, and this court, in considering that question, held that the fact that the boat was engaged in interstate commerce, and that it was enrolled and equipped and provided with all the machinery and mechanical appliances required by the act of congress and the regulations adopted thereunder by the board of supervising inspectors, did not relieve the owners of the vessel from their liability, under the common law, for injuries done by fire escaping from the smokestack of the vessel; and that they would be liable for such injury, arising from a failure to use a fire screen in the smokestack, although such fire screen was not required by the laws of congress or the rules of the supervising inspectors, if reasonable care at the common law required the use of such fire screens. After considering the provisions of the act of congress, it was said: "We cannot therefore hold that the act of congress relieves the defendant from its liability at the common law and its duty to use appliances which experience has shown to be required by common prudence for the protection of property on the banks of the public highways traversed by its boats." The principle in that case was that the legislation of congress had not excluded the application of the common law upon this subject in reference to the operation of steamboats; that the common law existing in this state continues in force, notwithstanding the legislation of congress, so long as the law enacted by congress and the law of the state do not conflict.

That case, however, was brought upon the common-law liability of the defendant to answer for its negligence in setting the fire. In the present case suit is brought upon the statute, which provides:

"Section 1. That all vessels using wood for fuel, navigating any of the waters of this state, shall be provided with suitable fire screens attached to the smokestack of such vessels to prevent the escape of fire. Such fire screens shall be of the best approved kind shown by experience to be proper and suitable for protection from fire.

"Sec. 2. That the owner or owners and master of any steam vessel navigating the waters of this state who shall neglect to provide his or their vessel with the fire screens attached to the smokestacks of said vessels, as mentioned in section one of this act, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be punished by a fine of one hundred dollars, or by confinement in the county jail not exceeding thirty days, or by both such fine and imprisonment in the discretion of the court. . . . The owner of such vessels shall also, when any person is injured in person or property by reason of fire occasioned by the neglect of such owner of such vessels to comply with the provisions of section 1 of this Act, be liable to the amount of damages sustained to the person so injured, to be recovered in any court of competent jurisdiction in this state."

But the common law is no more and no less a particular law of the state than this act of the legislature; and, if the omission to employ means for the protection of property which are required by the common law creates a liability, the omission to employ the same means or like means required by the provisions of the statute of the state would create a like liability, since the statute is no more in conflict with the law of congress than is the common law of the state in conflict with it. The common law of the state and a statute of the state are in the same sense laws of the state. *Smith* v. *Alabama*, 124 U. S. 475, 31 L. ed. 511. The principle has received abundant adjudication that the state may exercise its power to make regulations for the protection of the health, the lives, and the property of the people of the state against the dangers arising under interstate transportation and commerce, concurrent with the laws passed by congress in the exercise of the jurisdiction of congress over the same subjects, and that the laws of the state are valid and may be enforced so long as they do not conflict with the provisions of federal legislation. *King* v. *American Transp. Co.* 1 Flipp. 1, Fed. Cas. No. 7,787; *New York* v. *Miln*, 36 U. S. 11 Pet. 102, 9 L. ed. 648, 12 Curt. Dec. 357; *Goodrich Transp. Co.* v. *Gagnon*, 36 Fed. Rep. 123; *Johnson* v. *Chicago & P. Elevator Co.* 119 U. S. 388, 399, 400, 30 L. ed. 447, 451; *Parkersburg & O. R. Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 700–707, 27 L. ed. 584, 588–590; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Huse* v. *Glover*, 119 U. S. 543, 30 L. ed. 487; *Sands* v. *Manistee River Imp. Co.* 123 U. S. 288, 31 L. ed. 149; *Morgan's L. & T. R. & S. S. Co.* v. *Louisville Board of Health*, 118 U. S. 455, 30 L. ed. 237; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. ed. 819; *Harrigan* v. *Connecticut River Lumber Co.* 129 Mass. 580, 37 Am. Rep. 387; *People* v. *Jenkins*, 1 Hill, 469; *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804.

It was held in *Sheboygan Lumber Co.* v. *Delta Transp. Co.*, *supra*, that, by the common law of this state, appliances should be used which experience has shown to be reasonably effective in avoiding danger, and that it is apparent that none of the provisions of the act of congress show any intent to legislate upon or provide for the protection of persons or property on land. It was said: "If we look to the regulations adopted by the board of inspectors, the same purpose is manifest. Nothing enumerated in the certificate of inspectors conflicts with the common-law rule as to the duty which is imposed by the common law in regard to the

protection of persons and property upon shore and within the jurisdiction of the respective states. It would seem, therefore, to be a reasonable conclusion that it was not the intention of congress to abrogate all the rules of the common law relative to liability for injuries inflicted by the negligence of vessel owners in not supplying their vessels with appliances which common experience has shown to be requisite for the proper protection of persons and property upon shore, and the use of which would not endanger the safety of persons and property on board." The act under which the present suit is brought was passed nearly fifteen years ago, and with the provisions of which, it is apparent, many vessels navigating the waters of the state have complied, and we find nothing in the acts of congress or the regulations of the supervising inspectors in conflict therewith; and what was said in *Sheboygan Lumber Co.* v. *Delta Transp. Co.* is equally applicable to the present case, though the action is brought under the statute, and not in reliance upon the common-law liability. Railroad companies running their trains are as much engaged in interstate commerce as is the defendant in running this steamboat between Sheboygan and Sault Ste. Marie. The various states have enacted statutes requiring specific precautions to be taken in running trains, for the purpose of protecting life and property in the state against dangers arising from the operation of railroads. These statutory regulations are upheld against the objections made that the railroads affected by such regulations are engaged in interstate commerce. *Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238; *Union Pac. R. Co.* v. *De Busk*, 12 Colo. 294, 3 L. R. A. 350; *McCandless* v. *Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 440; *Hennington* v. *State*, 90 Ga. 396, 4 Inters. Com. Rep. 418; *Western U. Teleg. Co.* v. *Tyler*, 90 Va. 297, 4 Inters. Com. Rep. 481. The court was therefore in error in permitting this testimony, as it was wholly irrelevant and incompetent. It had no place in the case. There is nothing in the fact that the boat was engaged in interstate commerce which in any manner affected the question of the defendant's liability.

The plaintiff requested the court to charge as follows: "Third. It is admitted in this case by the defendant that on the 25th day of November, 1890, the defendant was the owner of the vessel called the Minnie M.; that she was then operated by the defendant and was engaged in navigating the Sheboygan river; and that her route extended from Sheboygan to Sault Ste. Marie, in the state of Michigan, and on that route carried freight and passengers, stopping also at intermediate points in the state. It is further admitted by the defendant that she had no fire screen attached to the smokestack of the vessel to prevent the escape of fire. The evidence in this case is undisputed that on the morning of November 25, 1890, she left McArthur's dock, in Sheboygan, passing down the Sheboygan river on her route, going by the place where the plaintiff's lumber was situated, and that, after she had passed by the lumber, fire was discovered in the lumber, which spread and consumed the lumber. If the jury find that by reason of the neglect of the defendant to provide the said vessel with a suitable fire screen attached to her smokestack, to prevent the escape of fire, fire or sparks escaped from the smokestack of the vessel, and fell upon the lumber, and caused it to be set on fire and to be burned and destroyed, the defendant is liable to the plaintiff to the amount of the damage thereby sustained by the plaintiff." The court declined to give the request as presented, but gave it with this additional qualification: "It appears from the testimony that this fire screen that is approved of by these masters who have testified about it has a mesh of iron three eighths to half an inch square. If a fire screen of that kind would totally prevent this fire, I give you that request. But, if this fire should be set by the smaller sparks, I could not give it to you, because the statute says that the injury must be occasioned by the lack of the fire screen, and, if the fire screen did not prevent the small sparks shown by the testimony, there would be no liability."

The testimony on the part of plaintiff in respect to the spark screens which were used on vessels, and the size of the mesh of those screens, was given by Charles J. Kitchen, who describes the butterfly screen as a screen placed inside of the smokestack, and opened and closed by a lever, the size of the mesh used being a quarter of an inch; Thomas McGarraty, who testified to the use of a bonnet screen, gives the size of the mesh as a quarter of an inch; James Smith, who testified in relation to the butterfly screen, gave the size of the mesh as a quarter of an inch; Charles Robinson gave the size of the mesh of the same kind of screen as about a quarter of an inch; and Albert Todd and John McLaughlin also testified as to the use of the butterfly screen, but did not give the size of the mesh,—from which evidence on the part of the plaintiff it will be seen that there was no foundation on the part of the court for the statement that "it appears from the testimony that this fire screen that is approved of by these masters who have testified about it has a mesh of iron three eighths to half an inch square." The request should not have been qualified by any such statement. The jury had no right to consider whether the fire would have been prevented by using a screen with a mesh half an inch square.

The latter statement of the court that, "if this fire should be set by the smaller sparks, I could not give it to you, because the statute says the injury must be occasioned by the lack of the fire screen, and, if the fire screen did not prevent the small sparks shown by the testimony, there would be no liability," taken in connection with the statement that the fire screen that had been approved by the masters who had testified had a mesh half an inch square, and, if a fire screen of that kind would totally prevent the fire, he would give the request, conveyed to the jury the idea that, if a fire screen having a mesh half an

inch square did not prevent the escape of small sparks, there would be no liability on the part of the defendant, and put the case to them so they were required to find, not whether the fire was set by large sparks or small ones, but whether the use of a fire screen having a mesh half an inch square did or did not prevent small sparks from escaping. The request as framed covered correctly the question, and should have been submitted to the jury. The evidence describes two different kinds of screens,—the butterfly screen and the bonnet screen. It described screens having a mesh not exceeding one quarter inch, and also tended to show that by the use of such screens all dangerous sparks were prevented from escaping. The statute under which the action is brought required that vessels should be provided with screens that "shall be of the best approved kind shown by experience to be proper and suitable for protection from fire." It was for the jury to determine from the evidence which of the various screens shown to have been used was the best approved kind, proper and suitable for protection from fire.

After describing to the jury the size of the meshes of the screen which they were to take into account, the court charged the jury as follows: "Now, if from your judgment and experience and knowledge, or better understanding of the testimony, you can say that there were large sparks that ought to have been arrested by the spark catcher, you can find a verdict for the plaintiff; otherwise, you will find that there is no cause of action. The whole right to recover depends on this fire happening, being occasioned by sparks that would have been checked by this spark arrester." This charge is a direction to the jury that they may determine the question of fact involved as to whether the employment of a screen upon the smokestack would have prevented the fire, by acting on their own judgment and experience and knowledge. They should have been directed that they were to determine the facts in the case, not from their judgment or experience or knowledge, but from the testimony given by the witnesses on the trial of the case.

The court also charged the jury: "You will also consider in that connection the evidence in regard to the Cuyler. She went down the river, and she had banked up her fires in the evening before. She had put fresh coal on, and shut the damper. According to this expert from Milwaukee, the effect of that was to coke the coal, which rendered it light and easy for it to fly, to be burned and thrown up in sparks, and that these sparks would last a long time,—longer than wood, I think he stated." This evidence referred to as given by the expert from Milwaukee is in the testimony of the defendant's witness John V. Tuttle, the whole of which is as follows: "*Q.* Suppose a furnace has the fires banked in it,—a coal fire,—and it is allowed to remain banked for some hours, and then the fires are raked out upon the grates. What is the character of sparks that would be driven through the flues and out of the smokestack? *A.* The sparks in such a case would be in the nature of coke, or very much the same as charcoal; a little heavier than charcoal sparks when the fire is first started. When the fire is first raked down, probably for fifteen or twenty minutes, the sparks escaping from the stack, if there should any escape, would be in the nature of coke, light, much lighter than ordinary coal sparks. *Q.* Can you tell whether sparks of that character retain fire for any length of time? *A.* They do. In fact, so that I have known them sometimes to burn little spots on the deck of a boat where they came out of a stack and fell down. They would blow away from the boat if there was a high wind, and they would retain their heat longer than a wood spark." The only apparent object in referring to this testimony in the charge was to indicate to the jury that they might find from this that the fire was set by the tug Cuyler, and not by the Minnie M. The testimony in reference to the tug shows that her fires were banked down, and, when she started out on that morning, the fire was raked down, some fresh coal put on, and that no sparks were going out of her stack while on the way down. Several witnesses were called who testified positively that there were no sparks coming out of her stack. The court was in error in this statement, as it was unwarranted by the testimony in the case.

Counsel for defendant do not attempt in their brief to answer any of the errors claimed by the plaintiff and here discussed, but content themselves with a discussion of the provisions of the statute under which the action is brought, which they claim is unconstitutional, and for that reason no action could be maintained upon it.

1. It is contended that the act contravenes section 20, article 4, of the Constitution of this state, which provides: "No law shall embrace more than one object, which shall be expressed in its title." It has been uniformly held in applying this provision of the constitution that, if the title of the statute expresses a general purpose, all matters fairly and reasonably connected with that purpose, and all measures which are convenient or appropriate or fairly calculated to facilitate the accomplishment of that purpose, are properly parts of the statute. As was said in *Kuriz* v. *People*, 33 Mich. 282: "It is a very wise and wholesome provision, intended to prevent legislators from being entrapped into the careless passage of bills on matters foreign to the ostensible purpose of the statute as entitled; but it is not designed to require the body of the bill to be a mere repetition of the title. Neither is it intended to prevent including in the bill such means as are reasonably adapted to secure the object indicated by the title." It is contended, however, that no person reading the title to this act would expect to find provisions for recovery of damages occasioned for neglect to provide fire screens for smokestacks. But the title to Act No. 206, Pub. Acts 1893, was no more specific. The title specified several specific and particular acts to be done, to wit, to assess property, to levy taxes, to collect the same, to make them a lien, to establish and continue such lien, to provide for the sale and conveyance of the

lands, and to provide for the inspection and disposition of lands bid off to the state. By section 185 it is provided that no deed shall be recorded until a certificate is furnished showing the payment of all taxes; and further: "A violation of the provisions of this section by the register of deeds shall be deemed a misdemeanor, and, upon conviction thereof, he shall be fined not to exceed one hundred dollars, and he shall be further liable to the grantee of any instrument so recorded for the amount of damages sustained, to be recovered in an action for debt in any court of this state." This act was under consideration in *Van Husan* v. *Heames*, 96 Mich. 504, and the objection made that it contravened this provision of the constitution. The act was upheld. We think the act in the present case is not void upon the ground stated. The following cases also sustain this principle: *Grand Rapids* v. *Burlingame*, 93 Mich. 472; *Hall* v. *Burlingame*, 88 Mich. 488, 440; *People* v. *Hurlbut*, 24 Mich. 44, 57, 9 Am. Rep. 103; *People* v. *Wands*, 28 Mich. 385, 389; *People* v. *State Ins. Co.* 19 Mich. 392, 398; *People* v. *Mahaney*, 13 Mich. 481, 495.

But it is said the object of the act is to compel the use of fire screens by steam vessels, and to provide a penalty for the violation of that requirement, and that the term "penalty," as used in this title, excludes the idea of the imposition of damages to be paid to the party injured. The term "penalty," as used in the title, is intended to include the liability to be imposed for damages, as well as the liability for fine and imprisonment. As was said in *Grover* v. *Huckins*, 26 Mich. 476: "The term 'penalty' is used very loosely in statutes in some cases, and might without much strain of its meaning be held to embrace all the consequences visited by law upon the heads of those who violate police regulations." The term "penalty" is used as covering and including the imposition of damages, in Act No. 313, Pub. Acts 1887, cited in *Robison* v. *Miner*, 68 Mich. 549, where, by section 20 of the Act, it is provided that persons violating certain provisions of the act "shall, in addition to all other penalties provided for by this act, be liable for both actual and exemplary damages therefor," etc. See also *Hartford F. Ins. Co.* v. *Raymond*, 70 Mich. 499, in which it is said: "An act to regulate a business must of necessity visit some sort of punishment or penalty for violation of its provisions, as the penalty is the only lever that could give practical effect to the law."

2. The objection to the act that it is repugnant to the acts of congress on the same subject has been fully discussed, and need not be further referred to; and the objection that fire screens endanger the vessel was disposed of in *Sheboygan Lumber Co.* v. *Delta Transp. Co.*, *supra*, in which it was said: "Of course, the first duty of a vessel owner is the protection of those on board and who are directly under his care. It follows that any device, appliance, or equipment which endangers them cannot be required by law, no matter how great the protection it would furnish to the property on shore. When the dangerous character of such devices is in issue, and the evidence is conflicting, the jury should be very carefully and clearly instructed in the direction above indicated. They should be distinctly told that if they find the device, upon the use or absence of which negligence is based, is dangerous to the boat and to the property and persons on board, the law does not require it." The requirements of this statute are no more imperative than the common law, and may be enforced under the rule laid down in the foregoing case, unless it appears as a fact, found in the case, that the use of fire screens endangers the vessel or the property or persons on board.

3. It is further contended that the act requiring a spark screen is unreasonable, and therefore void. The argument is that the requirement of the statute that the screens "shall be of the best approved kind shown by experience to be proper and suitable for protection from fire" is unreasonable, because the question whether the kind employed upon the boat, in the endeavor to comply with the statute, was such a screen, must be determined by a jury, and the owner could not beforehand determine how the jury would decide upon that subject; also, if a definite screen were specified, other states might require different screens, and thus the vessel owner be put to inconvenience in complying with the different regulations. Most of the cases referred to by counsel for defendant in support of this contention relate to city ordinances. Whether the ordinances of a city are valid or not involves the question of whether they are by the courts regarded as reasonable. This rule is applicable only to ordinances. 1 Dill. Mun. Corp. 3d ed. § 319. The courts cannot, however, declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution. Cooley, Const. Lim. 6th ed. p. 199. The learned author says further, at page 200: "The rule of law upon this subject appears to be that, except where the constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people of the state, except as those rights are secured by constitutional provision, which comes within the judicial cognizance. The protection against unwise or oppressive legislation within constitutional bounds is by an appeal to the justice and patriotism of the representatives of the people." This doctrine is upheld in numerous cases cited in the note to page 201. The rule of the statute, however, is no more onerous than the rule of the common law, nor more difficult to comply with than are the requirements imposed by the courts to guard against danger arising to life and property by the operations of business which create such dangers.

In *Hoyt* v. *Jeffers*, 30 Mich. 181, the suit was against the owner of a sawmill for failure to have a spark screen upon the smokestack or chimney of his mill. After referring to the fact that the mill stood in the midst of a city, and contiguous to wooden buildings, and that the degree of care required depended upon the surrounding circumstances, it was said: "In fact, I think the true rule is that the defendant, in adopting means to check the flow of sparks and to avert the danger in question, under the circumstances of this case, was bound, not only to adopt means calculated to avert the danger, but the means which in the progress of science and improvement have been shown by experience to be the best, unless, indeed, it be some invention so recently made as not to be generally known, or which the defendant, by reasonable inquiry for the best means, might not fairly be supposed to have obtained a knowledge of."

In *Jackson* v. *Chicago & N. W. R. Co.*, 31 Iowa, 176, 7 Am. Rep. 120, the suit was brought for damages caused by fire set by a railroad engine. On the subject of the care required by the company to guard against fire, the court said: "Ordinary care and prudence required the use of the best contrivance known, and, unless such are used, it will be considered negligence. One who fails to use the best means within his reach to prevent the destruction of property does not exercise the care of a man of common prudence." The same rule is laid down in *Metzgar* v. *Chicago, M. & St. P. R. Co.* 76 Iowa, 887; *Steinweg* v. *Erie Railway*, 43 N. Y. 126, 3 Am. Rep. 678; *Spaulding* v. *Chicago & N. W. R. Co.* 30 Wis. 121, 11 Am. Rep. 550; *Toledo, P. & W. R. Co.* v. *Pindar*, 53 Ill. 447, 5 Am. Rep. 57.

In some of the states statutes have been enacted imposing absolute liability for damages arising from fires set by locomotives, and such statutes have been upheld. *Ross* v. *Boston & W. R. Co.* 6 Allen, 87; *Martin* v. *New York & N. E. R. Co.* 62 Conn. 331; *Denver, T. & G. R. Co.* v. *De Graff*, 2 Colo. App. 42; *McCandless* v. *Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 440. The legislature of this state, in the enactment of the statute under consideration, has imposed no greater burden upon the vessel owners navigating the waters of this state than the common-law rule imposes in most of the states upon railroad companies in reference to means to prevent damages to life and property by fires.

4. The objection further made by counsel is that the title of the act provides that steam vessels shall provide fire screens, etc., while section 1 of the body of the Act provides that all vessels shall have fire screens, etc., and that, therefore, the act is repugnant in its terms. The rule of construction of statutes requires that a reasonable interpretation be given to the language used in the provisions so as to accomplish the object sought to be reached. The aim and purpose of this statute are to compel steam vessels navigating the waters of this state to be provided with fire screens for smokestacks, and to provide a penalty for violation of this requirement. The object is clear, and the mere omission of the word "steam" before the word "vessels," in section 1 of the Act, does not render the act repugnant in its terms. Clearly, it means all steam vessels.

For the errors pointed out, *the judgment must be reversed*, and a new trial ordered.

The other Justices concur.

PENNSYLVANIA SUPREME COURT.

Augustus KRECKER *et al.*, *Appts.*,
v.
Jonas H. SHIREY *et al.*

(168 Pa. 584.)

1. **The duty to fix a time and place for holding the general conference of a religious organization** is administrative when the laws of the organization provide for the holding of such conferences at regular intervals, and name the bodies which shall fix the day and place at which they shall be held.
2. **The administrative duties** of the supreme power of a religious organization may be delegated.
3. **The appointment of the place of meeting of the next general conference of a religious organization,** and giving notice thereof to the annual conferences in time for them to select delegates to represent them in the general conference, by a standing board of the general conference to which the duty was delegated by the conference, is a fixing of such place according to laws of the organization which place the duty upon the general conference, so as to prevent action by the oldest annual conference, upon which the duty is devolved in case the general conference fails to act.
4. **Adherents to a general conference** of a religious organization held at a time and place designated by an annual conference without authority after another time and place had been regularly designated under the laws of the organization place themselves outside of the organization, and, although in the majority, have no title to the property of the organization as against persons claiming under the regularly appointed general conference.
5. **The laws of an ecclesiastical body will be recognized** and enforced by the civil courts when not in conflict with the constitution and laws of the state.
6. **Decisions of ecclesiastical courts** which plainly violate the law they profess to administer, or are in conflict with the laws of the land, will not be followed by the civil courts.
7. **Congregations or parts of congregations of a religious body** which has adopted

NOTE.—In connection with the above case on the constitutional law of religious bodies, see the decisions respecting the similar organization of United Brethren in Philomath College v. Wyatt (Or.) 26 L. R. A. 66 and other cases cited in *footnote* thereto.

See also 30 L. R. A. 838; 31 L. R. A. 141; 32 L. R. A. 838.

as part of its polity the itinerant plan for pastoral supply of the churches, who refuse to accept the supply sent by authority of the regular ecclesiastical agencies acting in accord with the general conference, cease to adhere to the organization.

8. **An exposition by the supreme judicial tribunal** of a religious association of a provision of the discipline, to the effect that under it a second trial after one acquittal upon substantially the same charges is illegal, is binding upon the members of the association, and must be respected by the civil courts.

9. **The question of the regularity and legal effect of the organization** of an annual conference of a religious organization, after forcibly intercepting the entrance of the bishop appointed to preside over it because of his alleged suspension from his office under the discipline of the organization, raises an ecclesiastical question upon which the decision of the highest tribunal of the order is binding on the civil courts.

10. **Appointments of preachers by an annual conference** of a religious organization, which has been pronounced by the highest tribunal of the order to have been illegally organized, confer no rights and impose no duties in respect to members or congregations still holding their allegiance to the old organization.

11. **An annual conference of the Evangelical Association organized by a bishop with less than a quorum** of those entitled to sit as members in the conference is, under the discipline of that denomination, irregular and illegal, and its appointment of preachers will confer no authority and impose no duty on the churches.

12. **The minority members of the annual conference of a religious denomination when confronted with a revolt** from the association of a majority of the members of the conference, for which condition the discipline makes no provision, may provide temporarily for the religious care of those adhering to the minority, which action may subsequently be ratified by the highest tribunal of the denomination; but neither alone nor both combined can give the action of the minority regularity which will make it binding upon the revolting members.

13. **Ecclesiastical standing, and not numbers,** determines the title to, and the right of control over, property held for the use of a religious denomination.

(October 1, 1894.)

APPEAL by plaintiffs from a decree of the Court of Common Pleas for Berks County dismissing a bill filed to enjoin defendants from asserting authority over or interfering with the property of Immanuel Church in the city of Reading. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **Cyrus G. Derr, Edward Harvey, Augustus S. Sassaman,** and **Ritchie & Echer,** for appellants:

The Buffalo general conference (1887) had power, under the discipline, to refer to the board of publication the selection of a place for the session of 1891.

State v. *Esher*, 6 Ohio C. Ct. Rep. 312; *Auracher* v. *Yerger*, 25 Chicago Legal News, 197; *Schweicker* v. *Husser*, 44 Ill. App. 566, 146 Ill. 399.

The usage of both general and annual conferences favors such a construction of the powers of general conference in this matter.

McGinnis v. *Watson*, 41 Pa. 14; *State* v. *Farris*, 45 Mo. 196; *Smith* v. *Swormstedt*, 57 U. S. 16 How. 308, 14 L. ed. 950; *Gibson* v. *Armstrong*, 8 B. Mon. 510; Endlich, Interpretation of Statutes, § 527; *Marshall Field & Co.* v. *Clark*, 143 U. S. 691, 36 L. ed. 309; *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 57, 28 L. ed. 351; *Pollock* v. *Bridgeport S. B. Co.* 114 U. S. 415, 29 L. ed. 148.

The entire church construed this as a lawful exercise of power on the part of the Buffalo conference until disputes arose, which suggested to those interested that their interests would be best served by a different construction.

Schweiker v. *Husser*, 146 Ill. 427.

The act of fixing the place for the general conference session was not one which, in its nature, was incapable of delegation.

The rule invalidating an act performed in a mode different from that prescribed is not applicable here.

Schweiker v. *Husser*, 146 Ill. 421.

The general conference "combines within itself all the branches which constitute the elements of a complete government, viz., executive, legislative, and judicial."

Com. v. *Green*, 4 Whart. 531; *State* v. *Farris*, 45 Mo. 183.

A constitution is to be interpreted so as to carry out the great principles of the government, not to defeat them; and to that end, its commands as to the time or manner of performing an act are to be construed as merely directory, whenever it is not said that the acts shall be performed at the time and in the manner prescribed, and no other.

Com. v. *Clark*, 7 Watts & S. 133; *Schlichter* v. *Keiter*, 22 L. R. A. 161, 156 Pa. 119.

If a law be, in its provisions, constitutional the courts will not inquire whether the special forms of procedure prescribed in the constitution for its enactment have been complied with.

Miller v. *State*, 3 Ohio St. 475; *Kilgore* v. *Magee*, 85 Pa. 401.

The grant of a power to do a certain thing carries with it the power to use all the appropriate means for the performance of the act.

Huston v. *Clark*, 112 Ill. 344; *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 421, 4 L. ed. 605; *Knox* v. *Lee*, 79 U. S. 12 Wall. 532, 20 L. ed. 306; *Baldwin* v. *Franks*, 120 U. S. 678, 30 L. ed. 766; *United States* v. *Reese*, 92 U. S. 253, 23 L. ed. 577; *Bladen* v. *Philadelphia*, 60 Pa. 464; *Pittsburg* v. *Coursin*, 74 Pa. 400; Cooley, Const. Lim. 82.

Fixing a place was a mere matter of "temporal economy."

The Buffalo conference was not interfering with anything in the nature of a vested right of the "oldest" conference when it undertook to refer the selection of a place to the board of publication.

Schweiker v. *Husser*, 146 Ill. 418; *Auracher* v. *Yerger*, 25 Chicago Legal News, 198; *State* v. *Esher*, 6 Ohio C. Ct. Rep. 312.

The action of the Buffalo conference was a construction of its own disciplinary powers in a manner and upon a matter that is conclusive upon the civil courts.

Schweiker v. *Husser*, 146 Ill. 428; *App.* v.

United Lutheran & German Reformed Cong. of Selinsgrove, 6 Pa. 201; *German Reformed Church* v. *Com.* 3 Pa. 282; *McGinnis* v. *Watson*, 41 Pa. 9; *Schlichter* v. *Keiter*, 22 L. R. A. 161, 156 Pa. 119; *Watson* v. *Jones*, 80 U. S. 13 Wall. 679, 20 L. ed. 666; *Smith* v. *Swormsted*, 57 U. S. 16 How. 308, 14 L. ed. 950; 1 High, Inj. §§ 810, 814; Potter, Corp. pp. 710, 711.

The annual conferences over which bishops Esher and Bowman presided in 1890 and 1891 might lawfully elect delegates to general conference, even though those bishops were lawfully suspended.

The Indianapolis conference lawfully passed upon the alleged suspensions of the bishops.

Sampsell v. *Esher*, 26 Ohio L. J. 162.

The defendants repudiate the entire authority of the Indianapolis conference to act, as such, on this or any other matter.

They refused to be represented at Indianapolis by their own delegates who might have corrected or sought to correct irregularities on the part of that conference. They have no standing in court on that issue.

Kerr's App. 89 Pa. 112; *Roshi's App.* 69 Pa. 470, 8 Am. Rep. 275; *Com.* v. *German Soc. for Mutual Support and Assistance*, 15 Pa. 251.

The Indianapolis conference had full power to decide as it did as to the invalidity of the several assemblies assuming to be annual conferences, and as to the appointments of preachers and presiding elders thereat.

Prince v. *Skillin*, 71 Me. 361, 36 Am. Rep. 325.

The Indianapolis conference's action in regard to "seceding ministers" was valid.

Roshi's App. 69 Pa. 465, 8 Am. Rep. 275; *Den* v. *Bolton*, 12 N. J. L. 236; *Brooke* v. *Shacklett*, 13 Gratt. 326; *Burt* v. *Oneida Community*, 19 L. R. A. 297, 137 N. Y. 346; *Henderson* v. *Hunter*, 59 Pa. 335.

The decision of the Indianapolis conference as to the bishops' trials is binding upon the civil courts.

The Indianapolis conference had a quorum.

Whether or not the published list was correct, so as to make the prima facie title finally good, could not appear until the conference came to examine the proceedings of the annual conferences.

Until that moment arrived every man whose name appeared in said list was entitled to sit.

Kerr v. *Trego*, 47 Pa. 296; 2 Dill. Mun. Corp. § 892; Cushing's Legislative Assemblies, § 240; *Opinion of the Justices*, 35 Me. 565.

The Philadelphia body was not a lawful conference.

If plaintiff Krecker was appointed in due conformity to the discipline, he may not lawfully be excluded by a majority of this congregation notwithstanding the Act of April 26, 1855.

Thompson v. *Swoope*, 24 Pa. 474; *Evangelical Asso's App.* 35 Pa. 316; *First Methodist Protestant Church of Scrantom's App.* 16 W. N. C. 245.

Every religious society, for its own internal order and for the mode in which it fulfills its functions, is a law unto itself provided it keeps within the bounds of social order and morality.

McGinnis v. *Watson*, 41 Pa. 14; *Sutter* v. *First Reformed Dutch Church Trustees*, 42 Pa. 509; *Roshi's App.* 69 Pa. 462, 8 Am. Rep. 275; *Watson* v. *Jones*, 80 U. S. 13 Wall. 680, 20 L. ed. 666; *Com.* v. *Green*, 4 Whart. 603; *German Reformed Church* v. *Com.* 3 Pa. 282; *Henderson* v. *Hunter*, 59 Pa. 343; *Harmon* v. *Dreher*, 1 Speers, Eq. 87; *Shannon* v. *Frost*, 3 B. Mon. 253; *Chase* v. *Cheney*, 58 Ill. 509, 11 Am. Rep. 95; *Walker* v. *Wainwright*, 16 Barb. 486; *First Baptist Church in Hartford Trustees* v. *Witherell*, 3 Paige, 296, 3 L. ed. 159; *McIlvain* v. *Church*, 2 Woodw. Dec. 293; *Winebrenner* v. *Colder*, 43 Pa. 244; *Locke's App.* 72 Pa. 491, 13 Am. Rep. 716; *Com.* v. *Pittsburgh*, 14 Pa. 177; *Bagaley* v. *Pittsburgh & L. S. Iron Co.* 146 Pa. 478; *Moers* v. *Reading*, 21 Pa. 188; *Smith* v. *McCarthy*, 56 Pa. 359; *Com.* v. *Lebanon County Quarter Sessions Judges*, 8 Pa. 391; *Cincinnati, W. & Z. R. Co.* v. *Clinton County Comrs.* 1 Ohio St. 77; *Hitchcock* v. *Galveston*, 96 U. S. 347, 24 L. ed. 660; *Burrill* v. *Nahant Bank*, 2 Met. 163, 35 Am. Dec. 395; *Hoyt* v. *Thompson*, 19 N. Y. 207; *Kramrath* v. *Albany*, 127 N. Y. 575.

By denying their connectional relation with the judicatories of the church—by organizing other and antagonistic conferences—they have "as result of their acts" withdrawn from the association, and "have no title to the property" held prior to 1891.

Schlichter v. *Keiter*, 22 L. R. A. 161, 156 Pa. 147; *Jones* v. *Wadsworth*, 11 Phila. 227; *Skilton* v. *Webster*, Bright. (Pa.) 246; *Trustees* v. *Sturgeon*, 9 Pa. 321; *Sarver's App.* 81* Pa. 183; *Com.* v. *Cornish*, 13 Pa. 288; *Whitecar* v. *Michenor*, 37 N. J. Eq. 6; *Woodside's App.* 4 Pennyp. 124; *McAuley's App.* 77 Pa. 397; *Schnorr's App.* 67 Pa. 138, 5 Am. Rep. 415; *Winebrenner* v. *Colder*, 43 Pa. 244; *Ramsey's App.* 88 Pa. 60; *Landis's App.* 102 Pa. 467; *Sawer* v. *Gosser*, 1 W. N. C. 56; *Trexler* v. *Mennig*, 2 W. N. C. 680; *Field* v. *Field*, 9 Wend. 394.

Messrs. Jefferson Snyder and **George F. Baer**, for appellees:

The conference which convened at Allentown in February, 1891, presided over by Mr. Haman, was the legal East Pennsylvania annual conference.

A majority of all present in obedience to a call constitute a quorum.

St. Mary's Church Corporation, 7 Serg. & R. 517; *Craig* v. *First Presby. Church of Pittsburgh*, 88 Pa. 42, 32 Am. Rep. 417; *Com.* v. *Green*, 4 Whart. 531; *Presbyterian Cong.* v. *Johnston*, 1 Watts & S. 38.

The Indianapolis conference could not and did not, by the due exercise of any lawful authority, constitute the Bowman Allentown conference the legal and regular East Pennsylvania conference.

Kerr's App. 89 Pa. 112; *McGinnis* v. *Watson*, 41 Pa. 14; *Sutter* v. *First Reformed Dutch Church Trustees*, 42 Pa. 512; *Com.* v. *Green* and *McAuley's App. supra*; *Williamson* v. *Berry*, 49 U. S. 8 How. 495, 12 L. ed. 1170; *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 467, 21 L. ed. 901; *Kilbourn* v. *Thompson*, 103 U. S. 168, 26 L. ed. 377; *Schlichter* v. *Keiter*, 22 L. R. A. 161, 156 Pa. 137; *App* v. *United Lutheran & German Reformed Cong. of Selinsgrove*, 6 Pa. 201; *Cincinnati, W. & Z. R. Co.* v. *Clinton County Comrs.* 1 Ohio St. 77; Cooley, Const. Lim. 3d ed. 22; Hoffman's N. Y. Ecclesiastical Law, 276; *O'Hara* v. *Stack*, 90

Pa. 490; *Jones* v. *State*, 7 L. R. A. 325, 28 Neb. 495; *Smith* v. *Nelson*, 18 Vt. 511.

The Indianapolis assemblage was not the legal general conference, owing to the invalidity of its call.

Broom, Legal Maxims, 842; *Hawley* v. *James*, 5 Paige, 487, 3 L. ed. 798; *Re Speight*, L. R. 22 Ch. Div. 727; Morawetz, Priv. Corp. 2d ed. 535.

The majority of a congregation must be permitted to determine for themselves whither they will go when a denomination divides on matters not relating to faith or worship.

Lutheran Cong. of Pine Hill Trustees v. *St. Michael's Evangelical Church of Pine Hill*, 48 Pa. 20; *Methodist Church* v. *Remington*, 1 Watts, 218, 26 Am. Dec. 61; *Presbyterian Cong.* v. *Johnston*, 1 Watts & S. 40.

Williams, J., delivered the opinion of the court:

The legal questions involved in this case are interesting and important, but they are no longer open in this state. The labor which it has been necessary to expend upon the case in the court below and in this court has been over the facts and the inferences that ought to be drawn from them. This labor is made no less burdensome by the character of the facts to be passed upon. The conduct of the parties and their sympathizers on both sides seems to have been hasty, uncharitable, and ill-tempered. It affords a travesty, rather than an illustration of the precepts of the religion of peace for the support and diffusion of which the church was organized and the parties on both sides profess to have devoted their energies and their lives. But our concern is with the legal aspects of the case presented to us, and to them we turn, leaving the moral side of the controversy to the consciences of the combatants. The Evangelical Association of North America is a religious body that had its origin early in the present century. Its history presents a rapid growth and a career of usefulness. Its statistics for the year 1891 showed a membership of about 150,000. These were gathered into more than 2,000 churches, and under the pastoral care of about 1,250 preachers. Its ecclesiastical organization rests on the individual church or congregation. A convenient number of these form a quarterly conference, the sessions of which are presided over by a presiding elder. Several quarterly conferences grouped together by the action of the general conference form an annual conference, of which there were twenty-five in existence in 1891. The annual conferences elect delegates, according to a ratio previously fixed upon, to represent them in the general conference, which meets once in four years, and which is the highest body, legislative and judicial, in the denomination. The bishops, of whom there were three in 1891, and certain executive officers, are *ex officio* members of the general conference. The powers of this body are defined by the book of discipline. Paragraph 74, p. 57, declares it to be "the supreme court of law in the church." It has appellate jurisdiction of cases heard in the lower church tribunals, and original jurisdiction over all controversies to which the annual conferences are parties or that affect the legality or regularity of their action. It has jurisdiction over the bishops to try, suspend, depose, and expel them. Paragraph 73, p. 56, declares it to be the supreme legislative body in the church, subject, however, to two limitations upon its power. It cannot disturb the articles of faith. It cannot abandon the itinerancy or change the forms of church discipline. It also possesses general administrative powers which are recognized in several paragraphs of the book of discipline, among which are Nos. 72, 73, 76, and 93. It fixes the number of bishops needed, elects them and directs and supervises their work. It organizes and fixes the boundaries and names of the annual conferences. It conducts, through boards and committees, the publication and missionary enterprises of the denomination. In 1887 this denominational body, with all its religious and ecclesiastical machinery, was in harmonious and successful operation. Its general conference was in session in Buffalo, N. Y., and the several annual conferences were represented therein. In 1891 there were two bodies in session at the same time, in different portions of the country, each claiming to be the general conference of the Evangelical Association. Each elected bishops and claimed jurisdiction over the annual conferences and publication and missionary boards of the church. The litigants in this case are adherents of these rival bodies; the plaintiffs claiming title under one of them, and the defendants under the other. The first and the controlling question in this case is thus seen to be one of ecclesiastical identity. Which of these contending bodies is the general conference of the Evangelical Association? The next question is, Which of the parties now before us adheres to and derives title under the body found to be the general conference? Now it must be borne in mind that the organization of a denominational body or church involves the adoption of a religious creed and an ecclesiastical polity. Adherence to a particular body requires, therefore, adherence to both the creed and the polity. To abandon or repudiate either is to abandon or secede from the body whose authority is thus disregarded. In this case both parties claim to adhere to the creed of the Evangelical Association, and it seems to be conceded that no question of religious belief enters into the controversy. The points of difference arose under the polity of the church and rested on conflicting interpretations of provisions of the book of discipline. The first of these was over the meaning of paragraph 71, p. 56, which provides for fixing the time and place of meeting of the general conference. This paragraph empowers the bishops in attendance upon the general conference to name the time and place for the next meeting of the body, subject to the approval or disapproval of the body itself. If the first suggestion of the bishop is not approved, they should make and submit another, and so on until an agreement is arrived at. If the bishops are not present, the general conference proceeds to fix the time and place in the first instance. If, for any reason, the time and place are not

fixed in either of these ways, and the conference adjourns without action on the subject, then the duty falls upon the oldest annual conference, and must be discharged, and the necessary notices given to the other conferences, so as to prevent a failure of the session of general conference during the proper year. The questions raised upon this paragraph were: First. What is the nature of the duty imposed by it? Is it legislative or administrative? Second. If administrative, what shall amount to a performance? The laws of the church provided for a meeting of the general conference once in four years; but they did not, because they could not, fix in advance the particular day and place at which these quadrennial meetings should be held. But the laws could and did make provision for the fixing of both time and place, by naming the instrumentalities by which these details should be settled from time to time as the circumstances then existing might seem to require. It devolved the duty of naming the time and place, first, on the bishops and the general conference; next, on the general conference alone; lastly, in case neither of these instrumentalities discharged it, on the oldest annual conference. The act had the same character by whichever of these bodies it was performed. It was a settlement of a matter of detail necessary to the administration of the polity or ecclesiastical system of the church. It was, therefore, an act of administration, not of legislation. The general rule is that the power to perform such acts may be delegated, and that the acts, when properly done by the appointee, are valid as the acts of the principal.

We proceed, therefore, to inquire what the board of publication did under the authority given it by the bishops and the general conference of 1887. It appears that a usage exists in this denomination that prevails in most, if not all, religious bodies. It is to receive invitations from towns and churches willing to entertain the body, and then select from the list of places offered that which is most desirable. In 1887, when this order of business was reached, the general conference had no offer of entertainment before it. It seemed best, under the circumstances, to the bishops and to the conference, to authorize the board of publication to receive offers of entertainment after the adjournment, and to correspond with the annual conferences upon the subject; and, after full consideration, to decide upon the place for the next session. This board was one of the permanent executive agencies of the church. It included all the bishops in its membership, and eight other persons, each of whom was selected from one of the eight districts into which the whole church was divided for this purpose. After considerable inquiry and correspondence, this board named Indianapolis as the place, and gave notice of this fact to the annual conferences. This was a complete discharge of the duty imposed upon the board of publication. It fixed definitely the place for the holding of the next general conference, with the same effect as though the place had been named by the conference itself, and it afforded ample opportunity to all the annual conferences to be represented therein. Several months later, the annual conference of East Pennsylvania met in Ebenezer Church in the city of Allentown. Without pausing to inquire into the regularity of its organization, or its power, under the book of discipline, to perform the proper work of an annual conference, but treating this body as being what it claimed to be, we will consider its action. It was a subordinate tribunal, whose judgments were removable by appeal to the general conference, but it assumed the right to review and sit in judgment upon the action of its superior. It pronounced the action of the general conference of 1887, in relation to the place of its next meeting, to be a violation of the discipline and therefore absolutely null and void. It then proceeded, as the oldest annual conference, to fix upon Philadelphia as the place, and gave notice of its action to the several annual conferences. This action was unnecessary. The time and place had been fixed by, or under the authority of, the general conference. The annual conferences had been notified in ample time to enable them to arrange for the attendance of their delegates. The place had not been objected to as unsuitable or inconvenient. If the delegation of the power to fix the place to the board of publication had been questionable, it had been unanimously acquiesced in at the time it was made, and under the circumstances seemed the only practicable thing to do. It worked no injury to the ecclesiastical body and affected injuriously no interest or enterprise of the church. But this action was not only unnecessary, it was disrespectful, irregular, and insubordinate. It put the judgment of the annual conference of East Pennsylvania against that of the supreme judicatory of the denomination upon a question affecting the construction of certain provisions in the discipline. It not only overruled its ecclesiastical superior, but it proceeded to act upon its own interpretation of the discipline in opposition to the action of its superior, and to call upon the other annual conferences to accept its decision, and reject that of the supreme court of law of the church upon the same subject. This was not revolution within, but rebellion against the ecclesiastical organization. Most of the annual conferences seem to have regarded the subject in this light, for eighteen of them sent undivided delegations to Indianapolis, while but two sent undivided delegations to Philadelphia. The remaining five were divided in opinion, and sent delegates to each place. The general conference meeting in Indianapolis had not only a quorum, but a decided majority, of all the delegates to which the annual conferences were entitled. It had also the two acting bishops and the other *ex officio* members of the body. The alleged general conference that met in Philadelphia did not have a quorum of those entitled to sit in general conference, and, as the master has well found, was incompetent, under the book of discipline, to transact business. It nevertheless assumed to set aside the authority of the body that met in Indianapolis, and to exercise the powers and functions of a lawful general con-

ference. In fact it claimed to be the lawful successor of the general conference of 1887, and the supreme authority in the church. This, as we have said, was an open revolt. The churches and conferences that participated in it have, from that time, kept up an independent organization, and refused obedience to the conference that represented the majority, and maintained the ecclesiastical organization of the denomination. The result has been a divided body, and, what is to be more regretted, divided local congregations, creating discord, litigation, and personal bitterness, throughout the East Pennsylvania and several other annual conferences, in which the general Philadelphia general conference had its supporters. It follows necessarily that those who adhere to the Indianapolis general conference constitute the Evangelical Association. Those that adhere to the hostile body that met in Philadelphia are, by their own acts, put on the outside of the ecclesiastical organization, and must remain there until they recognize once more the authority of the body from which they have separated. *Winebrenner* v. *Colder*, 43 Pa. 244; *Kerr* v. *Trego*, 47 Pa. 292; *Roshi's App.* 69 Pa. 462, 8 Am. Rep. 275.

The title to the church property of a congregation that is divided is in that part of the congregation that is in harmony with its own laws, usages, and customs as accepted by the body before the division took place, and who adhere to the regular organization. *McGinnis* v. *Watson*, 41 Pa. 9; *McAuley's App.* 77 Pa. 397; *Landis's App.* 103 Pa. 467. It does not matter that a majority of any given congregation or annual conference is with those who dissent. The power of the majority is bound by the discipline, and so are all the tribunals of the church, from the lowest to the highest. *McAuley's App. supra; Sutter* v. *First Reformed Dutch Church Trustees*, 42 Pa. 503; *O'Hara* v. *Stack*, 90 Pa. 477; *Schlichter* v. *Keiter*, 156 Pa. 119, 22 L. R. A. 161.

The laws of the ecclesiastical body will be recognized and enforced by the civil courts when not in conflict with the constitution and laws of the state. A sufficient reason for this is that they have been made or assented to by the parties, who have agreed with each other, by the act of uniting with the body, to be governed by its laws and usages. *Tuigg* v. *Treacy*, 104 Pa. 493. An independent congregation may be governed by the majority of its own membership, but a congregation connected with any given denomination must submit to the system of discipline peculiar to the body with which it is connected. *Ehrenfeldt's App.* 101 Pa. 186; *Fernstler* v. *Seibert*, 114 Pa. 196.

Upon questions arising under the discipline, as upon those arising under the articles of faith, the decisions of the ecclesiastical courts are ordinarily final, and they will be respected and enforced by the courts of law. *German Reformed Church* v. *Com.* 8 Pa. 282; *O'Hara* v. *Stack*, 90 Pa. 477; *Schlichter* v. *Keiter*, 156 Pa. 119, 22 L. R. A. 161. But if such decisions plainly violate the law they profess to administer, or are in conflict with the laws of the land, they will not be followed. *Com.* v. *Cornish*, 13 Pa. 288; *O'Hara* v. *Stack*, *supra*.

Now, the itinerant plan for pastoral supply of the churches is a distinguishing feature of the polity of the Evangelical Association. The individual congregation cannot select for itself, but is bound to accept, the ministerial supply provided for it by the proper authorities under the discipline. Their action in this regard affords a distinct test of obedience and of adherence to the ecclesiastical organization. *Henderson* v. *Hunter*, 59 Pa. 335. Those congregations, or parts of congregations, that refuse the supply sent them by authority of the regular ecclesiastical agencies acting in accord with the general conference, and receive a supply sent under the authority of an irregular minority body, do not adhere to the organization, but put themselves in open revolt against it. By such action, they subject themselves, as individuals, to suspension or expulsion from the church; as congregations and annual conferences they expose themselves to punishment by excision from the body with which they have ceased to be in harmony, and against the authority of which they have arrayed themselves. Upon the facts as they appear in the evidence, the learned master should have found that the general conference meeting at Indianapolis in 1891 was the regular and the duly constituted general conference of the Evangelical Association of North America, and that the body which met the same year in the city of Philadelphia was an irregular and hostile body, having no ecclesiastical authority whatever under the provisions of the book of discipline. He should then have found that those who adhere to the regular, general conference, and submit to its authority, constitute the Evangelical Association. He should also have found that those who adhere to the irregular and hostile body have by their own conduct placed themselves outside the denomination whose authority they reject. These conclusions we reach independently of the various questions which relate to the trials of the bishops and the organizations of the East Pennsylvania conference in 1891. But these questions are fairly before us, and we have no disposition to decline an examination of them; indeed, the reasons for the conclusions already reached will be made the more apparent by a brief discussion of these questions. Bishop Dubbs was tried before a properly constituted trial conference, found guilty, and sentenced to suspension from office until the next general conference. He denied the justice, but not the validity, of his conviction; and he acquiesced in the sentence pronounced upon him. No question affecting this trial and sentence is presented by this record, and an examination into the subject is unnecessary and irrelevant. The charges on which Bishop Dubbs was tried were formulated in November and December, 1889. The trial took place in February, 1890. In December, 1889, Bishops Esher and Bowman were separately examined by three elders on charges that had been made in certain religious periodicals, and brought to the attention of the examining elders by one who acted as a prosecutor. The examining elders

found the charges to be without foundation in each case, and prepared a certificate showing the nature of the charges, the examination made by them, and their finding acquitting the accused thereon, and delivered a copy of such finding to each of the bishops. A few weeks later substantially the same charges were made by another prosecutor. Another examination was made by three elders summoned by him. This examination resulted in a finding that the charges were well founded, and the calling of a trial conference for the trial of each of the bishops upon them. From the beginning of this second proceeding, both Bishop Esher and Bishop Bowman set up the former examination and acquittal as a conclusive bar against it, and insisted that the second board of examiners, and the trial conference convened by their direction, were without jurisdiction. The examining elders, however, and the respective trial conferences called by them, promptly overruled the point raised by the bishops, asserted their jurisdiction, and proceeded with the trial. The bishops declined to appear, but in their absence, and with full knowledge of the previous examination and acquittal of each on substantially the same charges, the trial conferences heard testimony, found the accused guilty, and sentenced each to suspension from the episcopal office until the next general conference. Neither of the bishops acquiesced in the sentence. On the contrary, each insisted that his second examination, and the proceedings of the trial conference following it, were illegal and void; that the sentences were without authority, and might properly be disregarded by them and by the whole church. The decision of the question thus raised by the bishops depended upon the proper interpretation of certain provisions of the book of discipline. It was, therefore, a question of ecclesiastical law, to be decided by the highest ecclesiastical tribunal in the denomination. The trial conferences took the responsibility of deciding it in favor of their own jurisdiction. The bishops took the responsibility of deciding it the other way. The trial conferences knew that if the general conference overruled them upon this point all their proceedings must, necessarily, be held to be illegal and oppressive. The bishops knew that if the general conference did not sustain their point, their conduct in refusing to appear, and in disregarding the sentence pronounced upon them, must be held to be insubordinate, and their subsequent official acts to be invalid. Both sides were willing to take the risks, and to act upon their own interpretation of the discipline. The result was wide-spread discussion throughout the church, diverse conclusions, bitter dissensions, and finally, as we have seen, a disruption of the ecclesiastical body. For these unhappy consequences, which a more conciliatory course might have avoided, an impartial public will hold both the bishops and the trial conferences responsible. When the general conference met in 1891, it took notice of the dissensions and divisions that had grown up in the annual conferences, and in the congregations of which they were composed, and made inquiry into the cause that had led to such unhappy consequences. The result was an exposition of the discipline in accordance with the contention of the bishops, an indorsement of their conduct in disregarding the sentences imposed upon them, and an authoritative deliverance that the second examination, the trial, conviction, and sentence of each of the bishops were irregular, illegal, and void. This validated all the official acts of both the bishops, and invalidated the acts of the annual conferences and others, done on the theory that the convictions and sentences were legal. We have before us. therefore, the decision of the supreme court of law of the Evangelical Association upon the meaning and effect of one of the provisions of the book of discipline. This decision cannot be said to violate the constitution or the law of the land. It does not violate any law or usage of the ecclesiastical body. It is therefore binding on the Evangelical Association and its membership, and it must be respected by this court.

Whether the general conference disposed of this question in the wisest manner is not now for consideration. Its decision settled the law for the Evangelical Association, and we must recognize and apply it in this case. Here, again, the body that met in Philadelphia in 1891 put itself in open rebellion against the authority of the Evangelical Association. It decided that a charge preferred against a bishop, an examination into its truth by three elders, and an acquittal by them, had no significance whatever; but that the charge might be renewed and the examination repeated as often as a prosecutor could be found, or until a conviction and sentence could be obtained. It then approved the conviction and sentence of Bishops Esher and Bowman, and expelled both from the association. At the same time, it reversed the proceedings in the case of Bishop Dubbs, which had been approved by the Indianapolis general conference, relieved him from the sentence, and re-elected him to the office of bishop. In what manner the Philadelphia body could have made its antagonism to the general conference more open and pronounced, it is not easy to see.

It only remains to consider briefly the claims of the rival East Pennsylvania conferences. The time and place for the meeting of the annual conference of East Pennsylvania in 1891 had been regularly fixed. The place was Ebenezer Church, in the city of Allentown. The time was the 26th of February. This was about one year after the trial and sentence of Bishop Bowman, and after his position, and that of a large part of the church, upon the question of the legality of his suspension, were well known. Bishop Bowman came to Allentown to preside over the conference. The board of trustees of the Ebenezer Church, although without any ecclesiastical jurisdiction over the subject, met and decided that Bishop Bowman was incompetent to preside over the conference, because of his suspension by the trial conference. They then undertook to enforce the sentence of suspension by pre-

venting him from entering the church edifice. A majority of the members of the conference was in active sympathy with this action, and co-operated with the trustees for the purpose of carrying it into effect. They signed a paper denying his right to preside, and by a committee from their number presented this paper and a copy of the action taken by the trustees, to the bishop. At the hour fixed for the meeting of the conference, the bishop approached the doors of Ebenezer Church. He was intercepted by the trustees and others, and prevented, by the use of force, from entering. Meantime the members of conference assembled in the building, and a majority of them, well knowing that the bishop was at the door and prevented, by force, from entering, treated him as absent and organized the conference by the election of a president to discharge his duties. They were well aware of the point raised by him affecting the legality of his sentence, and of the fact that a considerable portion of the whole church concurred with him in opinion. They knew also that the general conference would be in session within a few months, and that the question could then be decided. Notwithstanding all this, these persons acted, as the trial conferences had done, on their own exposition of the discipline, and took the risk of being overruled by the general conference. They deliberately staked their official action and their ecclesiastical position upon their own decision of a question that was not within their jurisdiction, and they lost. The general conference sustained the point taken by the bishops, held their sentence and conviction illegal, and the action of the conference of East Pennsylvania to be disorderly and in violation of the book of discipline. The organization effected by the forcible exclusion of the bishop was declared to be illegal, and the body itself, while so organized, to be without ecclesiastical character or authority. It is clear that the regularity and legal effect of the organization of the conference in the manner in which it was accomplished, raised an ecclesiastical question. Its decision depended upon an exposition of certain provisions of the discipline which it was the duty of the general conference to make. The decision actually made does not violate the laws of the state or of the church, and is conclusive upon the ecclesiastical body of which the general conference is the chief tribunal. For this reason it should be followed by the civil courts. Whatever authority may be conceded to the action of the East Pennsylvania conference by those who adhere to it, the judgment of the general conference leaves it without authority in the body with which it had been formerly connected. Its appointments, therefore, confer no right and impose no duty on preachers, church members, or congregations adhering to the general conference, and we cannot recognize a title derived like that of the defendants in this case, from the action of that body, as good against the general conference or its adherents. On the other hand, the action of Bishop Bowman and a few friends in organizing a rival conference was wholly unauthorized by the discipline, and the body so organized, not having a quorum of those entitled to sit as members of the East Pennsylvania conference, was an irregular body, without authority or ecclesiastical character under the discipline. The annual conference may sit without a bishop, and its acts be valid in all respects. A bishop cannot sit with less than a quorum, and make, by his presence, a legal conference out of that which would not have been such in his absence. If present, he presides, but he is not a necessary part of the body; and his presence, therefore, with those who, without him, would be without authority, can add nothing to them. If there had been no division in the conference, the presence of the bishop could not have given to a few of its members the character and power of a quorum. His conduct and that of his friends in suspending and expelling presiding elders and others, was a clear usurpation of power, and the sentences so pronounced had no force or effect.

The situation in Allentown in February, 1891, was certainly remarkable. A majority of the members of the annual conference was in one place, refusing the bishop admission, and proceeding upon the assumption that he was absent. The bishop and a handful of adherents were in another place, assuming the powers of a quorum, and fulminating their orders and judgments with the utmost complacency and in plain disregard of the discipline. The appointments made by this body gave no legal right to the appointees, and imposed no legal duty on the congregations concerned. But the meeting presided over by the bishop was a meeting of those who adhered to the ecclesiastical body whose legislative and judicial head was the general conference. Its members were confronted by a state of things for which the discipline made no provisions, viz., the revolt of a majority of the members of the conference with which they were connected. They were compelled to choose between adherence to the bishop and the body with which they had been connected, and adherence to the annual conference of East Pennsylvania, which had undertaken to put itself in an attitude of independence and hostility to that body. They chose the former. They were, as a consequence, practically outside of the annual conference to which they had belonged, and compelled to seek recognition in some capacity from the general conference. Their organization was therefore necessarily provisional. Their authority depended, in the first instance, on their own consent and that of the congregation, and individual members whom they represented, and their only appropriate business was to provide temporarily for the religious and ecclesiastical care of those who adhered to the organization until the general conference could meet and take appropriate action. The general conference met in October of the same year at Indianapolis. Its attention was drawn to the condition of the church in the East Pennsylvania conference, and to the action of the rival bodies claiming jurisdiction over the congregations within its bounds. It made a thorough investigation into the action and attitude of the majority body, and was led to recognize

the revolt made by it as an accomplished fact. The Philadelphia conference, called by the East Pennsylvania annual conference, it recognized as a rival and hostile body, and declared officially that it was "a gross offense against our church," and that the persons engaged in holding and sustaining it had "thereby thrown off their allegiance to our church, and disentitled themselves to any of the privileges of membership therein." So far the action of the general conference seems to have been regular, but when it came to consider the provisional gathering of its adherents it exceeded its powers under the discipline. It declared the minority body under the presidency of Bishop Bowman to be the only lawful and regular conference of the Evangelical Association and for the conference district of East Pennsylvania for 1891, and pronounced all its acts and proceedings regular and lawful. In so far as these acts related to the temporary care and supply of the congregations represented in the body, they were, as we have already seen, justified by the necessities of the situation; and their ratification by the general conference cured their original want of authority under the discipline, and clothed them with the authority of the general conference. But in so far as these acts dealt with the ecclesiastical positions or functions of those not members of the provisional body, or with congregations not represented therein, they were unauthorized assumptions of power that the general conference could not ratify, because, like the annual conferences, it was bound by the frame of government contained in the book of discipline. Out of the provisional body, the general conference could create an annual conference, assign its boundaries, and give it a name, and thereafter it would become one of the regularly constituted church tribunals. But until this was done it was a body for which the polity of the church had made no provision, which had no legislative or judicial power, and no ecclesiastical standing. Its assumption of authority over those represented in the body could be ratified and affirmed by the general conference. Its assumption of authority over those not represented in the body was incapable of ratification and affirmance. As to such persons and congregations, the want of jurisdiction was apparent and incurable.

We formulate our conclusions as follows:

1. The general conference that met at Indianapolis in 1891 was the regular successor of that of 1887, and was the general conference of the Evangelical Association of North America.

2. The alleged general conference that met in Philadelphia in 1891 was an unauthorized body, and its assumption of ecclesiastical authority was an act of rebellion against the organization with which its members had been connected, and whose name it adopted.

3. Those annual conferences, congregations, and individual church members that adhere to the general conference constitute the Evangelical Association.

4. Those annual conferences, congregations, and individual church members that adhere to the Philadelphia body are not within the Evangelical Association, but have become by their own acts an independent and hostile association.

5. The property which, prior to 1891, belonged to the Evangelical Association now belongs to, and must be controlled by, those who still constitute that organization.

6. The assignment of the plaintiff Krecker to the pastorate of the Immanuel Church in the city of Reading, having been made by a provisional body of adherents, without ecclesiastical authority, gave him no title capable of enforcement under the law of the church or the law of the land; but the subsequent ratification and adoption of the assignment by the general conference gave him a title from and after that date, good under the law of the church, and therefore good under the law of the land.

7. The assignment of the defendant Shirey to the same pastorate by the illegally organized annual conference of East Pennsylvania, or by the president of that body sitting without right, and the presiding elders, conferred no title upon him under the discipline and laws of the church as expounded by its court of last resort. He has shown, therefore, no title capable of enforcement under the law of the land against the Evangelical Association or its adherents.

8. The question is thus seen to be, not, Where is the majority of Immanuel Church or of the East Pennsylvania conferences? but, Which of the parties to this litigation adheres to the general conference? Ecclesiastical standing, and not numbers, determines the title to and the right of control over property held for the use of the Evangelical Association.

The decree of the court below is reversed, and it is now ordered, adjudged, and decreed that an injunction be issued to restrain the defendants from exercising control over the church edifice of the Immanuel Church in the city of Reading and from excluding the plaintiff, or any other person appointed to the pastorate of said church, under the discipline of the Evangelical Association and the decision of the general conference, from the pulpit to the said church, and from the exercise of his pastoral functions therein. It is further ordered that the defendants pay the costs accrued in this case.

Per Curiam:

Petition for a modification of final decree filed in this case on the 1st day of October last, so far as it relates to costs. And now, November 5, 1894, the decree of this court, filed on the first day of October last, is modified as to costs by adding to said decree the words: "And the said Immanuel Church of the Evangelical Association of the city of Reading, a corporation, under whose direction the individual defendants acted, shall be primarily liable therefor, without any right of contribution against Jonas H. Shirey, the accepted pastor, or the trustees, or other officers or employés, acting on its behalf, and joined as codefendants."

ILLINOIS SUPREME COURT.

CHICAGO, BURLINGTON & QUINCY R. CO., *Plff. in Err.*,
v.
WEST CHICAGO STREET R. CO.

(156 Ill. 255.)

1. The facts that the tracks of a railroad company are laid across city streets, and its freight and passenger cars are permitted by the city to pass over such streets upon such tracks, give the company no exclusive use of the crossing, but only a use to be enjoyed in common with the public.

2. The permission to a street railway company to lay its tracks in a street already appropriated to public use is not a grant of the right to appropriate an addi-

NOTE.—*Right of railroad company to compensation for laying street railway across railroad track on a street crossing.*

The main case was followed by the same court in Pittsburgh, C. & St. L. R. Co. v. West Chicago Street R. Co. 156 Ill. 385.

The question presented in these cases as to right of a railroad company to compensation when its track is crossed by a street railway within a public street has been directly decided only in a few very recent cases.

A direct precedent is found in Indiana where it is held that there is no taking of property of a railroad company and no right to compensation created by reason of the necessary hindrance and burden imposed by the crossing of its tracks by a street railway, which, in exercising its franchise in enjoyment of the public easement, is laying its tracks along the street. Chicago & C. Terminal R. Co. v. Whiting, H. & R. C. Street R. Co. 26 L. R. A. 337, 139 Ind. 297.

Compensation to a railroad company for the inconvenience to it is also held not to be a necessary condition to the crossing of its tracks at grade by an electric street railway under legislative authority, in New York, N. H. & H. R. Co. v. Bridgeport Traction Co. (Conn.) *ante*, 367.

The right of a street railway company to extend its road along a turnpike to cross a railroad which intersects the turnpike is sustained in Elizabethtown, L. & B. S. R. Co. v. Ashland & C. Street R. Co., 16 Ky. L. Rep. 42, without making any compensation to the railroad company, even if the street railway imposes an additional servitude on the land of the turnpike company.

A steam-railway company which does not own the land in a highway, but has merely the right to operate its road across the highway at grade, does not suffer any such special damage by the establishment of a street railway operated by electricity along the highways across the railroad as will give the railroad company any right to an injunction against making such crossing. Morris & E. R. Co. v. Newark Pass. R. Co. 51 N. J. Eq. 379. The question of compensation does not seem to have been considered in this case.

The right of a street railroad company to cross a railroad was sustained, and an injunction denied without any discussion of the right to compensation, in Old Colony R. Co. v. Rockland & A. Street R. Co., 161 Mass. 416.

The constitutionality of the Pennsylvania Act of May 14, 1889, authorizing street railways to cross other railroads notwithstanding the fact that no right to compensation is given by the statute, is sustained in Delaware, L. & W. R. Co. v. Wilkes Barre & W. S. R. Co., 1 Pa. Dist. Rep. 627; but this question does not seem to have been directly raised and passed upon in the supreme court of the state.

Without expressly presenting any question as to compensation, it was held in Pennsylvania R. Co. v. Braddock Electric R. Co., 152 Pa. 116, that express authority "to cross at grade, diagonally or transversely, any railroad operated by steam or otherwise," given by the Pennsylvania Act of May 14, 1889, to an electric street railway company, does not defeat the power of the court, under the Act of June 19, 1871, to regulate grade crossings and prevent them when reasonably practicable.

Again the right of an electric street railway company to lay tracks across a railroad at a highway crossing is also sustained by denial of a preliminary injunction in Du Bois Traction Pass. R. Co. v. Buffalo, R. & P. R. Co., 149 Pa. 1, although the court said that on final hearing it might perhaps be its duty to require gates, watchmen, or other means to be provided for the protection of life at the crossing, at the expense of one or the other of the parties.

Under the same Pennsylvania Act of May 14, 1889, an injunction was refused against the connection of the tracks of a street railway on two streets by a track on a third street for 165 feet, although the latter street was occupied by another street railroad. Braddock & T. C. R. Co. v. Braddock Electric R. Co. 1 Pa. Dist. Rep. 44.

It is also held that the crossing at grade of the tracks of one street railroad company by those of another company in a curved line, and then running along a street parallel with the tracks of the former 220 feet to a street branching from the other street, is permitted by Pennsylvania Act of May 14, 1889, Pub. Laws, 211, authorizing both a diagonal and a transverse crossing at grade. Citizens Pass. R. Co. v. East Harrisburg Pass. Railway, 164 Pa. 274.

In New York a surface street railroad company is treated in a special term decision of the supreme court in People's R. Co. of Syracuse v. Syracuse, B. & N. Y. R. Co., 22 Abb. N. C. 427, as on the same footing as a steam railroad company with respect to its right to cross the track of another steam railroad, under N. Y. Laws 1880, chap. 583. The court said: "I have been unable to find any authority suggesting an exemption of street railroads from the requirements of the above statutory provisions, since the Act of 1880, or at any time, relating to the crossing of steam railroads by a horse railroad." It was therefore held that such crossing could not be made without consent of the steam railroad unless the question of compensation and the manner of crossing had been first determined in proceedings under the statute. This decision was affirmed by the general term.

Again, the proceeding to fix the manner of intersection of two railroads where this is not agreed upon, provided by N. Y. Laws 1882, chap. 676, art. 1, § 12, is held in Buffalo, B. & L. R. Co. v. New York, L. E. & W. R. Co., 72 Hun, 583, to be applicable to street surface railroads.

And under N. Y. Laws 1883, chap. 239, the similar provision for the crossing by a street surface railroad of any railroad operated by electric, steam, or other power, which is laid across or upon the surface of any street in towns having less than 500,000 inhabitants, when agreement cannot be reached, upon executing a bond or undertaking conditioned for performance of all conditions and requirements which may be imposed by commissioners and affirmed by the court in respect to the lines, grades, and manner of crossing, and the amount of compensation, is sustained in Buffalo, B. & L. R. Co. v. New York, L. E. & W. R. Co., 72 Hun, 587. But it does not seem that either of the above cases

See also 29 L. R. A. 367; 30 L. R. A. 508; 34 L. R. A. 572; 36 L. R. A. 839; 44 L. R. A. 269.

tional easement in the soil of the street, but the construction of such road is merely a mode of facilitating existing travel, and of modifying or changing the existing public use, adding an additional mode of conveyance to those already upon the street, and inflicting no damage upon the owner of the fee of the street.

3. Erections upon a public street impose no additional servitude where they aid and facilitate its use for the purposes of travel and transportation.

4. The question whether a new method of using a street for public travel results in the imposition of an additional burden upon the fee must be determined by the use which such method makes of the street,

necessarily determines the right of a steam railroad company to any compensation for the crossing by the street railroad, as the decision did not turn on that question.

So in *Re* Saratoga Electric R. Co., 58 Hun, 287, the rights of an electric street railway company to cross another railroad was considered as depending on the fact of its having acquired the consent of adjoining property owners and local authorities to build the road, but in this case the necessity of compensating the railroad company to be crossed was not discussed.

A similar question arises when a street railroad has been first built and a railroad company seeks to acquire a crossing. In such a case, in denying an injunction to a street railroad company against a railroad crossing it, it was said in Lynn & B. R. Co. v. Boston & L. L. Corp., 114 Mass. 88, that where a railroad by public authority is built across a highway it necessarily modifies to some extent the general use of the highway, but neither those who have occasion to travel over it, nor a street railway corporation which has a right to use it in common, can object. They hold their rights to use it in subordination to the power of the public authorities to determine what other use of it is demanded by public necessity.

The general right, under the constitution and laws of Missouri, of other railroad companies to intersect, connect with, or cross any other railroad, is held, in St. Louis Transfer R. Co. v. St. Louis Merchants Bridge Terminal R. Co., 111 Mo. 666, to extend to the crossing of the track of a city railroad laid in the streets but operated for the transfer of both property and persons between different parts of the city, especially for the transfer of cars between mercantile establishments and other railroads and ferries, where another company, which seems to have been organized for the same kind of business, had obtained municipal consent to lay its track in the streets. Here, again, the contest was as to the right to cross and not on the question of compensation.

In a Georgia case where no opinion was written it is stated by the court in the headnote that one railroad company cannot cross another even in a street without compensation. Georgia Midland & G. R. Co. v. Columbus Southern R. Co. 89 Ga. 205. But here the road was not a mere street railway for passengers, and no attempt is made in this note to answer the question as to the right of one street railroad company which has a track laid in a street to compensation for the crossing of the track in the street by another steam railroad which is not a mere passenger street railway company.

It is obvious that the street railroads of our cities and the trunk lines of railroad are constantly becoming more alike, and with the enlargement of the business of street railroads to include transportation of mails, baggage, freight, toward which a beginning has already been made in some places, the distinction between the two kinds of railroads may become much less than it is at present. But in this note only the right of a street railway company in the ordinary meaning of that term, when occupying the line of the street for its road to intersect other railroads which may cross the street, is considered.

But as closely analogous to the present question, and as apparently based on the same reasoning that is adopted in the main case of CHICAGO, R. & Q. R. Co. v. WEST CHICAGO STREET R. Co., several other decisions about street railway crossings where both roads were ordinary street railways may be properly referred to in this connection. Thus in Brooklyn Cent. & J. R. Co. v. Brooklyn City R. Co., 38 Barb. 420, it was held that no injunction against crossing one street railroad by another would be granted, as the franchise of a street railway company was not exclusive. The court said: "The street was still to remain a public highway for public travel and public uses, and so long as the railroad company was not impeded or interrupted in running its cars and operating the road, it could not complain." It was also said "that the crossing of plaintiff's track by the rails and cars of the defendants is not an appropriation of the property of the former to the use of the latter, but a mode of exercising the public right of transit over the highway."

This case was followed in New York & H. R. Co. v. Forty-Second Street & G. Street Ferry R. Co., 50 Barb. 309, affirming 50 Barb. 285, 26 How. Pr. 68, in which it was said: "This crossing became necessary in an authorized use of the streets, the same as the crossing by ordinary carts. It is true that at the point of crossing the rail of the track which is crossed will be subject to some damage by wear and tear; but that is one of the damages which is necessarily incident in laying rails in a street, the concurrent use of which appertains to others."

In a Pennsylvania case also it is held that charter power to one street railway company to cross the track of another was to be exercised only when such crossing was necessary. Market Street Pass. R. Co. v. Union Pass. R. Co. 10 Phila. 43.

In Omaha Horse R. Co. v. Cable Tram-Way Co. of Omaha, 32 Fed. Rep. 727, where a horse railroad was crossed by a cable road, it was held that no damage was found by the commissioners to have been sustained, and the question was not discussed by the court.

In Market Street R. Co. v. Central R. Co., 51 Cal. 583, it is also held that the right of a street railway company to use a highway "does not exclude the public from the use of the street, nor does it prevent the crossing of its track by another railroad maintained for the same purpose, providing the crossing is effected with as little damage as may be."

In the Illinois case reported above the fact that the railroad company owned the fee of the street across which its track was laid made it necessary to decide the additional question whether or not a railway laid in the street at such place was an additional servitude upon the fee. On this question see *note* to Western Railway of Alabama v. Alabama Grand Trunk R. Co. (Ala.) 17 L. R. A. 475.

While there is not an entire agreement among the decisions on the doctrine that a street railway is not an additional servitude on the fee, this is the doctrine adopted to most states.

Excluding from the case the element of the railroad ownership of the fee of the street, the decision in the main case would seem to be unopposed by any direct decision yet made by any court, but supported by several cases and entirely in harmony also with the principles laid down in case of the crossing of one street railway by another.

B. A. R.

and not by the motive power which it employs in such use.

5. **A railroad company owning the fee of the street at the point where the street is crossed by its tracks** is not entitled to compensation as for an additional burden, upon the construction of street railway tracks along the street under permission of the city, where its own tracks are not injured.

6. **The interest of a street railway company in the street upon which its tracks are laid,** although a valuable one, is part of the public easement in the streets, accessory and ancillary to the existing right in the public of passing over the street.

7. **A railroad company which by city ordinances has acquired a permanent easement in streets** crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway laid along the street under permission from the city, as such easement is in subordination to the right of the public to pass along the streets, and the propelling of street-cars is only a form of the exercise by the public of such right of passage, and does not operate as an infringement upon such easement.

8. **An injunction will not lie at the suit of an abutting owner** who does not own the fee, to restrain the laying of a street railway in the street, as the damages which he may suffer are merely consequential.

(May 15, 1895.)

ERROR to the Appellate Court, First District, to review a judgment affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to enjoin the construction of street railway tracks along a public street over the tracks of complainant. *Affirmed.*

The facts are stated in the opinion.

Statement by **Magruder**, *J.*:

This is a bill filed by plaintiff in error, a steam railroad company, to enjoin the defendant in error, a street railroad company, from laying the tracks of the latter across the tracks of the former upon Ashland and Western avenues in the city of Chicago. The defendant company answered the bill admitting some of its allegations and denying others. Replication was filed to the answer. A preliminary injunction was granted upon the filing of the bill. The cause came on to be heard in the lower court upon motion by the defendant to dissolve the injunction on bill, answer, and replication, and a decree was entered dissolving the injunction theretofore entered, and dismissing the bill for want of equity. This decree has been affirmed by the appellate court, and it is here sought to review such judgment of affirmance by writ of error.

The bill alleges that plaintiff in error, a corporation organized under the laws of Illinois, operates the main line of its railroad from Chicago westward across the Mississippi river to Colorado and Wyoming, and southward into Missouri, and northward into Minnesota, and owns or controls branch lines in Illinois; that, under an ordinance passed by the common council of the city of Chicago on December 15, 1862, it was given permission to lay tracks on a certain alley, and on such lands south thereof, and of any continuation thereof, as it might thereafter acquire, westward from the south branch of the Chicago river to the city limits, "with the right to cross all intervening streets," that said ordinance was accepted by it, and thereunder in 1864 and prior thereto it constructed its main line from said branch to said limits and from time to time additional tracks, side-tracks, and switches; that among the streets crossed were Ashland and Western avenues, across which it has constructed and now operates two main passenger tracks and two main freight tracks, one of which tracks has been in use ever since 1864; that the West Chicago Street Railroad Company, a corporation organized under the laws of Illinois to operate street railways in the west division of said city, owns and operates, by cable and horse power, a system of street railways in said division; that the city council of said city, on March 10, 1892, passed an ordinance giving permission to said street railroad company to lay down and operate a single or double track street railroad in, along, and across certain streets in said city, among which are Ashland and Western avenues, including those portions of said avenues crossed by the tracks of plaintiff in error; that, by said ordinance, and another passed on the same day, said street railroad company was authorized to operate its cars with animal or cable or electric power, or such other noiseless motor or power as should be approved by certain of the city authorities; that, at the place where the tracks of plaintiff in error cross said avenues, the fee of the land in said avenues to the centre of the street is in plaintiff in error for a number of feet of the frontage on both sides, and for a certain other portion of the frontage on one side only; that the only right or title of the city or public in those portions of the avenues adjoining the land of plaintiff in error is "an easement to use the same as a street, acquired by dedication at common law, or by an alleged condemnation, and not under the statute;" that said street railway company threatens to lay its tracks across the railway tracks of plaintiff in error on said avenues without making compensation and without proceedings to condemn, and thereby to take and damage the property of plaintiff in error without just compensation, and for that purpose to tear up, displace, and disconnect the tracks of plaintiff in error; that plaintiff in error has private property rights in said avenues at the points of said crossings; that the laying of the tracks of defendant in error at said crossings will damage the business of plaintiff in error, and make the operation of its road more expensive and increase the danger to its employés and passengers and to the general public.

The answer does not admit the extent of business done on the tracks of plaintiff in error as alleged in the bill; it admits the passage of the Ordinance of March 10, 1892, and the authority thereby conferred as alleged; it does not admit the title of plaintiff in error in said avenues as alleged, but avers that whether the title of the city to the land in said avenues at said crossing is an easement or a title in fee, said avenues are public streets under the control of the city council; that said control of the

council, and its right to grant permission to use said streets for a street railway, are not limited by the nature of such title; that defendant claims the right to lay its tracks under said Ordinance of 1892, and intends to lay its tracks and operate its street railroad cars by animal power on and along said avenues, including the portions thereof where complainant's tracks cross the same, but denies that it intends to take or damage complainant's property, or that it threatens to tear up, displace, or disconnect complainant's tracks, and avers that it intends to so lay its tracks and operate its cars as not to increase the danger in the public use of said avenues at said crossings, and that it has attempted to make an amicable arrangement with complainant, and has offered to construct said crossings at its own expense without disturbing complainant's tracks, and to keep the same in repair, and, at its own expense, to employ the necessary flagmen and policemen to guard said crossings so as to render them safe, but complainant refused to accept said offer or to make any agreement; the answer admits that complainant acquired a license to lay its tracks across said avenues under ordinances of said city, but denies that it has acquired any private rights therein, or that it will suffer any such damage in its business or property by the construction of said crossings as will compel defendant to make compensation therefor, or that complainant by its said license acquired the right to exclude defendant from crossing its tracks under proper authority granted by the city council, or that any exclusive use of said streets was granted to or vested in complainant; and avers that complainant's right in said streets is a right of use in common with the public, and subordinate to the use of the public, and subject to the control of the common council.

Messrs. **Herrick, Allen & Boyesen** for plaintiff in error.

Messrs. **Egbert Jamieson** and **George Hunt,** for defendant in error:

Permission given by city ordinance to lay railroad tracks in the street is a license and not a franchise.

Chicago City R. Co. v. *People,* 78 Ill. 541.

While city authorities may grant the use of a street to a railroad company to lay its tracks and run its cars thereon, such authorities cannot thereby grant to a railroad company the exclusive use of the street. They cannot authorize such use of the street as will destroy it as a public thoroughfare.

No such grant, therefore, can imply that it is to be enjoyed at the unlimited discretion of the railroad company, but only that it shall be enjoyed with reference to the co-existing rights of others in the streets, and in subordination to the public welfare.

Ligare v. *Chicago,* 139 Ill. 46.

The right granted to a railroad company to lay tracks in a street does not grant an exclusive use, but one to be enjoyed in common with the public.

Pittsburgh, Ft. W. & C. R. Co. v. *Reich,* 101 Ill. 157; *Chicago Dock & Canal Co.* v. *Garrity,* 115 Ill. 155; *Middlesex R. Co.* v. *Wakefield,* 103 Mass. 263; *Lynn & B. R. Co.* v. *Boston & L. R. Corp.* 114 Mass. 91; *Market Street R. Co.* v. *Central R. Co.* 51 Cal. 583; *St. Louis, A. & T. H. R. Co.* v. *Belleville,* 20 Ill. App. 580.

When complainants laid their railroad tracks across Robey street, Ashland avenue, and Western avenue, they did so with notice that the growth of the city would increase the ordinary public uses of those streets. They took the right, subject to all the rights of the public to the use of the streets, among which is the right of defendant, under authority from the city council, to lay its tracks in the streets, and use its cars thereon. Mere priority of use or occupancy gives no priority of right to that which is free to all.

Chicago & A. R. Co. v. *Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799; *Lake Shore & M. S. R. Co.* v. *Cincinnati, S. & C. R. Co.* 80 Ohio St. 604; *Massachusetts Cent. R. Co.* v. *Boston, C. & F. R. Co.* 121 Mass. 125; *Du Bois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co.* 149 Pa. 1.

A railroad company cannot object to the cars of another company crossing with its tracks, where a highway crosses.

Brooklyn Cent. & J. R. Co. v. *Brooklyn City R. Co.* 33 Barb. 420; *New York & H. R. Co.* v. *Forty-Second Street & G. Street Ferry R. Co.* 50 Barb. 309; *Market Street R. Co.* v. *Central R. Co.* 51 Cal. 583; *Highland Ave. & Belt R. Co.* v. *Birmingham Union R. Co.* 93 Ala. 505; 23 Am. & Eng. Encyclop. Law, p. 995.

Unless complainants have the exclusive right to the use of the several streets mentioned, at the points where their tracks cross such streets, they have no property rights to condemn, and no damages can be recovered on the facts shown by the bills and answers.

Chicago & N. W. R. Co. v. *Chicago,* 140 Ill. 309; *Peoria & P. U. R. Co.* v. *Peoria & F. R. Co.* 105 Ill. 110; *Du Bois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co., Brooklyn Cent. & J. R. Co.* v. *Brooklyn City R. Co., New York & H. R. Co.* v. *Forty-Second Street & G. Street Ferry R. Co.,* and *Chicago & A. R. Co.* v. *Joliet, L. & A. R. Co. supra.*

The construction of a horse railway in a street is a legitimate use of the highway, and an exercise of the right of public travel. It is generally held, therefore, that no additional burden is imposed and the owner of the land, even though he own the fee of the street, cannot recover.

Atty-Gen. v. *Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Du Bois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co. supra; Jersey City & B. R. Co.* v. *Jersey City & H. Horse R. Co.* 20 N. J. Eq. 61; *Texas & P. R. Co.* v. *Rosedale Street R. Co.* 64 Tex. 80, 53 Am. Rep. 739; 23 Am. & Eng. Encyclop. Law, p. 945, and cases cited; Elliott, Roads & Streets, p. 558; 2 Dill. Mun. Corp. § 725; Cooley, Const. Lim. 4th ed. 556; *Eichels* v. *Evansville Street R. Co.* 78 Ind. 267, 41 Am. Rep. 561; Pierce, Railroads, p. 232.

The test as to the character of the railroad is not the motive power employed, but the traffic in which the road is engaged.

23 Am. & Eng. Encyclop. Law, p. 958; *Briggs* v. *Lewiston & A. Horse R. Co.* 79 Me. 367; *Williams* v. *City Electric Street R. Co.* 41 Fed. Rep. 557.

Magruder, J., delivered the opinion of the court:

By permission of the common council of Chicago embodied in an ordinance passed in 1862, the plaintiff in error, a steam railroad company carrying both passengers and freight, laid its tracks across Ashland and Western avenues in 1864, and has been operating its trains over said tracks ever since. It claims that the city owns a mere easement in those avenues or streets at the points where its tracks cross the same, and that it owns the fee subject to the easement in favor of the public. The defendant in error, a street railway company, under and by virtue of an ordinance of the common council of Chicago passed in 1892, has laid its tracks upon and along said avenues, and seeks to extend its tracks along said avenues across the tracks of plaintiff in error for the purpose of propelling its street railroad cars thereon by animal power. It appears, from the allegations of the bill, that Ashland and Western avenues were public streets under the control of the city of Chicago prior to 1862, and have been used as such public streets ever since that time. Plaintiff in error claims that, by reason of its alleged ownership of the fee, the crossing of its tracks by those of the defendant in error will impose an additional servitude which entitles it to compensation.

It is not contended, nor alleged in the bill, that the laying of the tracks of the street railroad company across those of plaintiff in error will injure the property of plaintiff in error which abuts upon the streets, or will cause it any damage as an abutting owner in the way of shutting out light or air or preventing ingress or egress. The contention is, that plaintiff in error will suffer damage as owner of the fee of the street itself by reason of the imbedding of the street-car tracks into the ground of the street. Counsel for plaintiff in error base the claim to damages upon two decisions heretofore rendered by this court, to wit: *Indianapolis, B. & W. R. Co.* v. *Hartley*, 67 Ill. 439, 16 Am. Rep. 624, and *Board of Trade Teleg. Co.* v. *Barnett*, 107 Ill. 507, 47 Am. Rep. 458.

In the first case, the action was trespass against a steam railroad company, which constructed its road, under the authority of an ordinance of the city of Bloomington, diagonally across Front street in that city within six inches or a foot of plaintiffs' enclosure at one corner, and upon land the fee of which was in plaintiffs if they owned to the center of Front street, which had been an old highway before the limits of the city were extended so as to include it; in constructing the road-bed, the street was excavated four or five feet, necessitating the removal of a large amount of earth and the lowering of the grade in front of the enclosure of the plaintiffs, so as to leave their premises much higher than the grade, and rendering ingress and egress therefrom more difficult; it did not appear that the city owned the fee of the street, and the ownership by the plaintiffs of the fee of the land to the center of the old highway was not contested; the trespasses there complained of were committed before the adoption of the Constitution of 1870, and the right to recover was not affected by the provisions of that constitution. A distinction was there drawn between cases where the fee of the street is in the city, and cases where the fee of the street is in the adjoining proprietor and the city has only an easement; and it was held that, in the former cases, the owner of abutting property cannot enjoin the laying of railroad tracks in the street if the city authorities having control thereof have granted permission to do so, and that such owner cannot recover any damage or compensation for the use of streets so occupied; but that, in the latter cases, the railroad company, if, in laying its tracks, it causes a private injury to him who owns the fee in the adjoining premises, must make good the damages sustained. While the decision in the *Hartley Case* was based mainly upon the ground that the adjoining proprietor owned the fee of the street subject to the easement, yet the facts show that the injury sustained was not so much an injury to the land under the street, as to the land abutting upon the street, which was damaged by the lowering of the grade and by the consequent difficulty of ingress thereto and egress therefrom.

But, while the *Hartley Case* differs from the case at bar, in the fact that there then was damage to the abutting property, while here no damage to abutting property is claimed, yet the main distinction lies in the character of the railroad constructed in or across the street. The railroad constructed diagonally across Front street in the case cited was a railroad for the passage of steam cars carrying freight and passengers, while here the tracks proposed to be constructed across the tracks of plaintiff in error are those of an ordinary street railroad. Ashland and Western avenues, being public streets under the control of the city, are subject to use by the public. The facts that the tracks of plaintiff in error are laid across said streets, and that its freight and passenger cars are permitted by the city to pass over the same upon said tracks, give plaintiff in error no exclusive use of the crossing, but only a use to be enjoyed in common with the public. *Pittsburgh, Ft. W. & C. R. Co.* v. *Reich*, 101 Ill. 157. A city has no right to authorize railroad tracks to be laid upon streets so as to exclude the other public uses of a street. *Ligare* v. *Chicago*, 139 Ill. 46. It will not be denied that pedestrians, and carriages, and wagons, and omnibuses, and other vehicles have a right to pass along these streets over and across the tracks of plaintiff in error. A street-car, running upon rails laid upon the surface of the street and used in the ordinary way under the regulations of the city authorities is merely another sort of carriage. The use of a street for a horse railway is such a use as falls within the purposes for which streets are dedicated, or acquired by condemnation. 2 Dill. Mun. Corp. 4th ed. § 722. The proprietor, when he dedicates the street or is paid for property to be so used, will be presumed to have contemplated such improved and convenient modes of use as are reasonably consistent with the use of the street for

ordinary vehicles and in the usual modes. *Ibid.*

The weight of authority is in favor of the position that "a street railway is not an additional servitude even where the fee of the street is in the abutting owner." 2 Dill. Mun. Corp. 4th ed. § 723 (574), and cases cited in *note 3*. It is otherwise in the case of the construction of a steam railroad in a public street; a steam railway is regarded as an additional servitude. Id. § 725 (576). In his work on Municipal Corporations, *Judge* Dillon thus clearly states the distinction here indicated: "The weight of judicial authority undoubtedly is that, where the public have only an easement in streets, and the fee is retained by the adjacent owner, the legislature cannot, under the constitutional guaranty of private property, authorize an ordinary steam railroad to be constructed thereon, against the will of the adjoining owner, without compensation to him. In other words, such a railway, as usually constructed and operated, is an additional servitude. As to street railroads, constructed in the usual manner and operated under municipal regulation so as not to exclude the free passage of ordinary vehicles, the almost general, and, in the author's judgment, the sound, judicial view is, that they do not create a new burden upon the land, and hence the legislature, no matter whether the fee is in the abutter or in the public, is not bound to, although it may, provide for compensation to the adjoining proprietor." 2 Dill. Mun. Corp. 4th ed. § 725 (576). The courts of most of the states, except those of New York, hold that a street surface passenger railway, constructed at street grade in the usual manner, is not a new servitude upon the land for which the owners of the fee are entitled to compensation. Booth, Street Railway Law, § 82. The use of the street by such a street railway company being within the purposes for which streets are laid out and maintained, the abutting owner can recover no compensation for the damages resulting from such use, whether the fee is in him or in the city, provided the right of ingress and egress and of passage and of repassage is left reasonably free to him. Lewis, Em. Dom. § 124; Elliott, Roads & Streets, pp. 528, 529, 558. Streets are laid out in order that the public may enjoy the right of free passage in vehicles as well as on foot, and such vehicles may be carriages running on grooved tracks, or operated in the modes, or by the forces, which an advanced civilization may require for the general convenience. Pierce, Railroads, § 234; Cooley, Const. Lim. 6th ed. p. 683. The laying of a street railway in the streets of a city, and the running of cars thereon for the transportation of passengers, must be regarded as among the uses contemplated when the street was laid out; hence, the owner of abutting land, even though he owns the fee of the street, can only recover damages for such special and material injury as may be shown to have resulted to his property from the construction and operation of such railway. 23 Am. & Eng. Encyclop. Law, p. 954.

It appears here that the defendant in error intended to lay its tracks and operate its cars by animal power only, although it had the right, under the Ordinance of 1892, to use cable or electric power or other motive power. It also appears that the tracks of defendant in error were to be laid without injury to the tracks or property of plaintiff in error and without expense to it. Where the crossing is made in the manner specified in the answer in this case, the usefulness of the railroad crossed is not in any manner impaired. *Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 309. "For the crossing of tracks at grade, without material injury, compensation is not allowed." Booth, Street Railway Law, § 114. Damages are not allowable for increased danger or delay in crossing. Damages must be real, tangible, and proximate, and not conjectural or speculative. *Peoria & P. U. R. Co.* v. *Peoria & F. R. Co.* 105 Ill. 110; *Chicago, B. & Q. R. Co.* v. *Chicago*, 149 Ill. 457.

It is to be remembered that when the Ordinance of 1892 was passed granting to the street railway company permission to lay its tracks and operate its cars across the tracks of the steam railway company, Ashland and Western avenues, upon which the street-car tracks were thus to be laid, already existed as public streets and had been used by the public for many years. Under its charter, the city of Chicago had the right to regulate the use of these streets, and to permit the construction of horse railroads therein, and to change the grade of railroad crossings. Rev. Stat. chap. 24, art. 5, pars. 9, 24, 25. The permission to a street railway company to lay its tracks in a street already appropriated to public use is not the grant of a right to appropriate an additional easement in the soil of the street, but the construction of the street railroad is merely a mode of facilitating existing travel, and of modifying or changing the existing public use. There is thereby added an additional mode of conveyance to those already in use upon the street, and, when the street railroad is properly constructed, it inflicts no damage upon the adjoining proprietor who owns the fee of the street. *Atty-Gen.* v. *Metropolitan R. Co.* 125 Mass. 515, 28 Am. Rep. 264; *Texas & P. R. Co.* v. *Rosedale Street R. Co.* 64 Tex. 80, 53 Am. Rep. 739. The street-car carries along the street such passengers as would otherwise be obliged to pass over it on foot or in other vehicles, and, therefore, the burden imposed upon the land under the street is the same in kind as was originally imposed on it when the street was opened. A steam railroad, as ordinarily operated, adds a new servitude to the street, because it prevents the use of the street in the usual modes and interferes with and embarrasses the usual modes of travel, whereas the ordinary street railway furthers the original uses of the street by relieving the pressure of local travel. *Taggart* v. *Newport Street R. Co.* 16 R. I. 669, 7 L. R. A. 205; *Halsey* v. *Rapid Transit Street R. Co.* 47 N. J. Eq. 380; *DuBois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co.* 149 Pa. 1.

It will not be denied that, whether the fee of a street is in the city or in the abutting owner, the city may, in the exercise of its

power to control such street and regulate its use, lay gas and water pipes therein, construct drains and sewers therein, and dig reservoirs and cisterns therein. 24 Am. & Eng. Encyclop. Law, pp. 34, 114. Such uses more sensibly disturb the soil than the laying of street railway tracks. And yet it will not be said that a city cannot make improvements of this kind in a street, the fee of which is in the abutting owner, without a condemnation proceeding and the making of compensation to such owner.

The other case relied upon by counsel, *Board of Trade Teleg. Co.* v. *Barnett*, 107 Ill. 507, 47 Am. Rep. 453, was an action of trespass, brought by an adjoining owner against a telegraph company to recover damages caused by the erection of telegraph poles upon an ordinary public highway, the fee of the highway being in the plaintiff subject to the easement of the public; the poles were erected under permission from the county board; it was held that the right to erect them was not a part of the public easement in the highway, but was a new and additional burden upon the fee, for which the owner of the fee might maintain an action. We think that the *Barnett Case*, like the *Hartley Case*, is clearly distinguishable from the case at bar. Telegraph poles erected upon a highway serve no useful purpose in regard to the highway, and telegraph and telephone poles erected upon a street are not directly ancillary to the use of the street as such; for this reason they are held to be an additional servitude in the street. But it is otherwise where such erections aid and facilitate the use of a public street for the purposes of travel and transportation. In the latter case they impose no additional servitude.

In *Taggart* v. *Newport Street R. Co.*, *supra*, a bill was filed by owners of property abutting on certain streets in the city of Newport to enjoin a street railway company from erecting in the streets in front of their property certain poles and wires, the poles being erected to support the wires over the tracks or rails of the company for the purpose of conducting the electricity to be used as a motor for the passenger cars traversing said tracks; in that case it was contended that the use of electricity for the operation of the street railway, and the erection of the poles as ancillary thereto, could not be sustained upon the alleged ground that an additional servitude was thereby imposed upon the streets without providing for compensation to the owners of the fee of the streets; but the supreme court of Rhode Island there states the doctrine as being sustained by the greater weight of decision, that a railroad constructed in a street, and operated by steam in the usual manner, imposes a new servitude and entitles the owner of the fee to compensation, but that a street railway operated by horse power in the usual way does not impose a new servitude, or entitle the owner of the fee to additional compensation; and the court there extends the doctrine so as to apply what is said in regard to street railways operated by horse power to street railways operated by electricity. It was there held that a street railway operated by electricity was not an additional servitude, and that, although telegraph and telephone poles and wires erected on streets and highways might constitute an additional servitude entitling the owners of the fee to additional compensation, yet such was not the case as to poles and wires erected and used for the service of a street railway for the reason already stated, namely, that the former are not, and the latter are, "directly ancillary to the uses of the streets as such, in that they communicate the power by which the street-cars are propelled."

The ruling upon this subject in Rhode Island has been adopted in New Jersey in the case of *Halsey* v. *Rapid Transit Street R. Co.*, 47 N. J. Eq. 380, where it was held that the placing of poles and wires in the street for the purpose of propelling cars by electricity did not impose a new servitude upon the land for the reasons, that the ownership by the abutting owner of the fee in the street, being subject to the public easement, is without beneficial interest; that, with respect to lands over which streets have been laid, the ownership for all substantial purposes is in the public; that, when lands are acquired for a public street, they are acquired for the purpose of providing a means of free passage common to all the people, and may be rightfully used in any way that will subserve that purpose, including such means as the improvements of the age and new wants, arising out of an increase in population or an enlargement of business, may render necessary; that the poles and wires, used to operate the street railway by electricity, form part of the means by which a new power, to be substituted for animal power, is to be supplied for the propulsion of street-cars; that such poles and wires are placed in the street "to aid the public in exercising their right of free passage over the street," and therefore impose no new burden on the land.

The same doctrine has been held by the supreme court of Pennsylvania in the recent case of *Du Bois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co. supra.*

Under the reasoning in the case last cited, the question whether a new method of using a street for public travel results in the imposition of an additional burden on the land or not, must be determined by the use which the new method makes of the street, and not by the motive power which it employs in such use. The question depends more upon the effect that is produced than on the power that is used. "Perhaps the true distinction in these cases is not to be found in the motive power of the railway, or in the question whether the fee simple or a mere easement was taken in the original appropriation, but depends upon the question whether the railway constitutes a thoroughfare, or, on the other hand, is a mere local convenience." Cooley, Const. Lim. 6th ed. p. 688.

In view of what has been said, we are inclined to hold that, whether the power to be made use of by defendant in error in propelling its cars across the tracks of plaintiff in error was horse power as alleged in the answer, or whether it was any other of the powers authorized to be used by the Ordinance of 1892, in either case the principles here

discussed are applicable, and authorize the crossing of the tracks of plaintiff in error by the defendant in error, provided the crossing is made without injury to the tracks so crossed as stated in the answer herein.

The language used in *Moses* v. *Pittsburgh, Ft. W. & C. R. Co.*, 21 Ill. 523, intimating that an injunction would lie against the laying of a street railroad, if it would lie against the laying of a steam railroad, in the streets of a city, was merely by way of argument, and was not necessary to the decision of that case, and, hence, cannot be regarded as controlling the disposition of this case.

Counsel for plaintiff in error refer to certain decisions of this court, holding that, where a street railway company lays its tracks in a public street under an ordinance of the city, it has an interest in the street which can be sold and conveyed and made subject to the burden of special assessment, and that, therefore, a grant to the street railway company of this interest is a taking of the property of plaintiff in error as owner of the fee. Under the authorities already discussed, the interest of the street railway company, although a valuable one, is a part of the easement of the public in the street; it is carved out of such easement; it is accessory and ancillary to the existing right, vested in the public, of passing over the street; by the granting of it no new easement is imposed upon the property of the owner of the fee, but the old easement, to which such property was already subject, is merely changed so as to be adapted to an improved mode of passage; "it is," as was said by the vice-chancellor in *Halsey* v. *Rapid Transit Street R. Co.*, *supra*, "simply a user of a right already vested in the public, and consequently, by its exercise, nothing is taken from the abutting owners which can be made the basis of additional compensation."

It is also contended, on behalf of plaintiff in error, that, by the Ordinance of 1862 and its action under it, plaintiff in error acquired a perpetual easement in those parts of Ashland and Western avenues crossed by its tracks of which it did not own the fee, and that the crossing of its tracks by defendant in error will be an infringement upon the easement of plaintiff in error, which entitles it to compensation. This contention is disposed of by what has already been said. The plaintiff in error accepted the Ordinance of 1862, and laid its tracks across the avenues thereunder, in subordination to the right of the public to pass along the avenues and over those parts thereof where its tracks crossed them. Its rights to the crossing are, and always have been, subject to the public easement in the streets and subject to the right of public passage over the same. The propelling of street-cars over the crossing was only a form of the exercise by the public of its right of passage, and, therefore, did not operate as any infringement upon the rights of plaintiff in error, or entitle it to any additional compensation. The case of *Chicago & W. I. R. Co.* v. *Englewood Connecting R. Co.*, 115 Ill. 375, has no application here. In that case there was a condemnation proceeding instituted by one steam railroad company against another to secure for the former the privilege of crossing the tracks of the latter, and the institution and prosecution of the proceeding admitted the right of the defending company to at least nominal damages, if no more.

Where the fee of the street is in the city, such damages as the abutting owner may suffer from the laying of a railroad track in the street are merely consequential, so far at least as they affect the property abutting on the street. In such case, as there is no physical taking of the land, injunction will not lie to enjoin the taking, the remedy being an action at law for damages. *Stetson* v. *Chicago & E. R. Co.* 75 Ill. 74; *Parker* v. *Catholic Bishop of Chicago*, 146 Ill. 158.

The judgment of the Appellate Court is affirmed.

David M. HART, *Plff. in Err.*,
v.
WASHINGTON PARK CLUB.

(157 Ill. 9.)

1. **Grounds on which a public exhibition of horse racing is given,** to which the public are invited, must be kept in a reasonably safe and suitable condition for the spectators.
2. **Negligence of the person conducting a public exhibition of horse racing** cannot be presumed from the mere fact that a spectator was injured by a runaway horse while within the place reserved for spectators.
3. **It is a matter of common knowledge that race-courses are visited by invited spectators,** who drive into the grounds in their own carriages or other vehicles under the control of themselves or their own drivers.
4. **A declaration does not sufficiently allege negligence of the person conducting a public exhibition of horse racing** by stating an invitation to the public, and that a spectator, while in the place set apart for such persons and without fault on his part, was struck and injured by a runaway horse, without further allegations as to the place of the injury or defendant's control over the immediate cause of it.

(April 1, 1895.)

ERROR to the Appellate Court, First District, to review a judgment affirming a judgment of the Circuit Court for Cook County in favor of defendant in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Rosenthal, Kurz & Hirschl,** for plaintiff in error:

The defendant has the burden of showing how it happened that the horse was allowed to

NOTE.—For presumption of negligence causing personal injury, see Barnowski v. Helson (Mich.) 15 L. R. A. 38, and *note* therewith.

For injuries on fair grounds and liability therefor, see also Dunn v. Brown County Agr. Soc. (Ohio) 1 L. R. A. 754; A'Hern v. Iowa State Agr. Soc. (Iowa) 24 L. R. A. 655.

See also 37 L. R. A. 258; 38 L. R. A. 156; 40 L. R. A. 345; 42 L. R. A. 277.

so run, and also to show that defendant had used all reasonable care to prevent such an occurrence.

The presumption of negligence is raised, subject, of course, to being overcome by the defendants "showing a cause consistent with due care."

Cooley, Torts (1880) 663, 664.

The fact is one which is not likely to occur in case the defendant has used all ordinary care. The knowledge of its cause and origin is peculiarly within the possession of the defendant.

Best, Ev. 5th ed. §§ 273, 274; *Cumins* v. *Wood*, 44 Ill. 416, 92 Am. Dec. 189; Cooley, Torts (1880) 665.

Plaintiff had the right to assume that due provision had been made by barriers, or posts with hitching straps or chains, or by a sufficient number of watchmen or guards, so that no horse would be apt to break loose and run among the spectators.

When such an occurrence does occur, the defendant most certainly should be required to show "a cause consistent with due care."

Illinois Cent. R. Co. v. *Phillips*, 49 Ill. 234; *North Chicago Street R. Co.* v. *Cotton*, 140 Ill. 486; *Hamilton* v. *The William Branfoot*, 48 Fed. Rep. 914; *Mullen* v. *St. John*, 57 N. Y. 568, 15 Am. Rep. 530; *Lyons* v. *Rosenthal*, 11 Hun, 46; *Smith* v. *British & North American Royal Mail Steam Packet Co.* 86 N. Y. 408; *Gerlach* v. *Edelmeyer*, 15 Jones & S. 292; *Briggs* v. *Oliver*, 4 Hurlst. & C. 403; *John Morris Co.* v. *Burgess*, 44 Ill. App. 27; *Payne* v. *Halstead*, Id. 97; *Volkmar* v. *Manhattan R. Co.* 134 N. Y. 418; *Simpson* v. *London General Omnibus Co.* L. R. 8 C. P. 390, 6 Moak, Eng. Rep. 173.

Negligence is presumed from a horse running unattended.

Strup v. *Edens*, 23 Wis. 482; *Hill* v. *Scott*, 38 Mo. App. 370; *Unger* v. *Forty-Second Street & G. Street Ferry R. Co.* 51 N. Y. 497.

The declaration charges that it was the defendant that made default in its said duty, and charges that it was the defendant that carelessly and negligently kept said grounds.

This, so long as not attacked by special demurrer, is a very good declaration.

Lake Shore & M. S. R. Co. v. *Johnson*, 35 Ill. App. 430, affirmed 135 Ill. 643; *Chicago, B. & Q. R. Co.* v. *Carter*, 20 Ill. 390.

It may be true that some other person was also negligent or suffered an accident, but we would then have an instance of negligence of the defendant concurrent with negligence or accident on the part of some other person, in which case, under familiar instances, the defendant would still be liable.

Joliet v. *Verley*, 35 Ill. 58, 85 Am. Dec. 342; *Lacon* v. *Page*, 48 Ill. 499; *Joliet* v. *Shufelt*, 18 L. R. A. 750, 144 Ill. 403.

If this court believes, as it evidently does, that the plaintiff's declaration discloses merits and is defective merely in form, and such defects are not pointed out in the trial court, then there should still be given the plaintiff an opportunity to amend.

State v. *Baltimore & L. R. Co.* 77 Md. 489; *Boise City* v *Artesian Hot & Cold Water Co.* (Idaho) 39 Pac. Rep. 567; *Buckley* v. *Osburn*, 8 Ohio, 180; *Farley* v. *Kittson*, 27 Minn. 102; *Blood* v. *Fairbanks*, 48 Cal. 171; *Trippe* v. *Winter*, 88 Ga. 359; *Kennerly* v. *Wilson*, 2 Md. 245.

Messrs. **Cratty Bros., Jarvis & Cleveland,** for defendant in error:

To allow this narr. to stand would be in effect the entry of a judgment against defendant without a hearing, for that which he is not shown to be liable for aught that appears.

Buffalo v. *Holloway*, 7 N. Y. 473, 57 Am. Dec. 550; *Brown* v. *Mallett*, 5 C. B. 599, 17 L. J. C. P. 227.

A duty must be shown and the connection of cause and effect between the negligence and the injury.

Jennings v *Fitchburgh R. Co.* 146 Mass. 621; *Pike* v. *Chicago & A. R. Co.* 49 Fed. Rep. 754; *Montgomery* v. *Gilmer*, 33 Ala. 116, 70 Am. Dec. 462; *Weis* v. *Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Pittsburgh, C. & St. L. R. Co.* v. *Conn*, 104 Ind. 34.

Negligence is never presumed from the mere fact of an accident by which a person is injured.

Whart. Ev. § 359; *Baltimore & O. R. Co.* v. *Fitzpatrick*, 35 Md. 46; *Beaulieu* v. *Portland Co.* 48 Me. 291; Shearm. & Redf. Neg. § 59.

Magruder, J., delivered the opinion of the court:

The action below was trespass on the case, brought by plaintiff in error against defendant in error. The declaration avers as follows: "For that whereas, heretofore, on the day commonly known as 'Derby Day,' on, to wit, the 25th day of June, 1893, said defendant, in said county, on the certain racecourse then and there in its possession, gave and conducted a public exhibition of horse racing, and thereto invited the public at large, charging and receiving an admission fee. Plaintiff paid said fee, and attended said exhibition, and was then and there, and at all times thereabouts, in the exercise of all reasonable and ordinary care, and lawfully in and upon the ground in defendant's possession and control, set aside by defendant for the use of the spectators at said races. And plaintiff alleges that it then and there became and was the duty of defendant to use all reasonable and ordinary care to keep said grounds in a reasonably safe and suitable condition for the said spectators, and therein defendant made default, and so carelessly and negligently kept said grounds that a horse drawing a vehicle ran, unguarded, unattended, and unhindered, from a cause or causes which, upon diligent inquiry, plaintiff has not been able to learn, but which are to defendant well known, through and among the spectators, and in so doing ran upon and against the plaintiff, whereby he was violently thrown to the ground, and was thereby and then greatly bruised, hurt, and wounded," etc. The declaration was demurred to. The demurrer was sustained. Plaintiff stood by his declaration. Judgment was rendered for defendant, and has been affirmed by the appellate court. The present writ of error is sued out for the purpose of reviewing the judgment of the appellate court.

The question is whether the declaration was good on general demurrer. It is urged.

in favor of the sufficiency of the declaration, that proof of the injury as alleged will give rise to a presumption of negligence on the part of the defendant, and so establish a prima facie case, under the application of the maxim, *res ipsa loquitur*. It is claimed that the declaration avers all that is necessary, by stating that defendant invited plaintiff into its racing course, and accepted an admission fee from him, and that plaintiff was lawfully upon the ground set apart by the defendant for spectators, and, while there, was in the exercise of ordinary care, and that it was the duty of defendant to exercise reasonable care to keep the space set apart reasonably safe, and that plaintiff was struck by a horse and vehicle running unattended through such space. It is contended that the space reserved for spectators was not safe when a horse and vehicle thus ran through it, and that the fact of such running indicated negligence, and devolved upon the defendant the burden of showing how the accident happened, and that it had used all reasonable care to prevent such an occurrence. On the other hand, it is urged, against the sufficiency of the declaration, that it does not state facts sufficient, if proven, to create a reasonable presumption of negligence on the part of the defendant, or to justify an allegation that defendant owed a duty to plaintiff, or to support an averment that the defendant had knowledge of the cause or causes of the running away of the horse. It is claimed that the declaration is objectionable as not stating whether or not the plaintiff was in the grand stand, or in the space occupied by visitors in carriages or other vehicles drawn by horses, or in that occupied exclusively by pedestrians, and in not stating whether or not the horse which ran away belonged to the defendant, or was in the keeping of the defendant. It is contended, by the defendant in error, that the running away of a horse creates no presumption of negligence, except as against those whose duty it is to guard against such an occurrence, and that no fact is alleged in the declaration showing the duty of the defendant in this respect.

If an owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them, or in their use for the purpose for which the invitation was extended. *Lake Shore & M. S. R. Co.* v. *Bodemer*, 139 Ill. 596; Campbell, Neg. § 43; 16 Am. & Eng. Encyclop. Law, p. 413; *Davis* v. *Central Cong. Soc. of Jamaica Plains*, 129 Mass. 367, 37 Am. Rep. 368. In *Currier* v. *Boston Music Hall Asso.*, 135 Mass. 414, it was held that the proprietor of a hall to which the public is invited is bound to use ordinary care and diligence to put and keep the hall in a reasonably safe condition for persons attending in pursuance of such invitation, and if he neglects his duty in this respect, so that the hall is in fact unsafe, his knowledge or ignorance of the defect is immaterial. In the case at bar, the declaration avers that the defendant was in possession of the race-course, and conducted an exhibition of horse racing thereon, and invited the public at large to attend, and charged an admission fee, and that plaintiff paid the fee and attended the exhibition. These facts are sufficient to impose the same obligation upon defendant which rests upon any other owner or occupier of premises who invites people to come upon the same. Out of these facts necessarily arises the duty of the defendant to keep the grounds in a reasonably safe and suitable condition for the spectators. Counsel for defendant in error refer to a number of authorities in support of the proposition that a mere general allegation in the declaration, that it became the duty of the defendant to do that which the plaintiff complains of its omitting to do, is not sufficient, and that the sufficiency of the declaration in this regard will depend upon whether the facts stated show that the defendant was bound in law to do that which it is charged with having omitted to do. No fault can be found with the doctrine of the authorities thus referred to. Tested by the rule laid down in them, the declaration here, by averring defendant's occupany of the grounds, and its invitation to the plaintiff to come thereon, states such facts as give rise to the general duty which the defendant is charged with failing to perform.

The question next arises whether the declaration makes such averments as show a breach of the duty arising out of the facts stated; or, in other words, whether negligence can be presumed from the running away of the horse within the space reserved for spectators. There are cases where the maxim, *res ipsa loquitur*, is applicable. The meaning of this maxim is that, while negligence is not, as a general rule, to be presumed, yet the injury itself may afford a sufficient prima facie evidence of negligence, and the presumption of negligence may be created by the circumstances under which the injury occurred. Where negligence is thus presumed from the occurrence of the injury, the defendant is called upon to rebut the prima facie case by showing that he took reasonable care to prevent the happening of such injury. Cooley, Torts, *661, 662; 16 Am. & Eng. Encyclop. Law, p. 449. Perhaps it may be more accurate to say that the presumption of negligence arises, not exclusively from the fact that the accident happened, but that it happened under given conditions, and in connection with certain circumstances. 2 Thomp. Neg. p. 1228. Negligence has been presumed, so as to throw the burden of explanation upon the defendant, where a plaintiff was passing along a highway under a railway bridge, and a brick fell from one of the pilasters upon which an iron girder of the bridge rested, and injured him (*Kearney* v. *London, B. & S. C. R. Co.* L. R. 5 Q. B. 411, and 2 Thomp. Neg. 1220); where a plaintiff, walking in the street, was struck and injured by a barrel of flour falling from the window of a warehouse belonging to the defendant (*Byrne* v. *Boadle*, 2 Hurlst. & C. 722); where a building adjoining a street fell into the street, and injured a plaintiff upon the sidewalk (*Mullen* v. *St. John*,

57 N. Y. 567, 15 Am. Rep. 530); where the plaintiff, while making an inquiry at the door of a house in which the defendant had offices, received a push from the defendant's servant, who was watching a packing case, propped against the wall of the house and belonging to the defendant, and the packing case then fell upon and injured the plaintiff. *Briggs* v. *Oliver*, 4 Hurlst. & C. 403. In *Scott* v. *London & St. K. Docks Co.*, 3 Hurlst. & C. 596, it was said by the court: "There must be reasonable evidence of negligence. But when the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." This passage was quoted with approval in *North Chicago Street R. Co.* v. *Cotton*, 140 Ill. 486. In 1 Addison on Torts, § 83, the rule is thus stated: When the accident is one which would not, in all probability, happen if the person causing it was using due care, and the actual machine causing the accident is solely under the management of defendant, . . . the mere occurrence of the accident is sufficient prima facie proof of negligence to impose upon the defendant the onus of rebutting it." Upon the basis of these authorities the case of *The William Branfoot*, in 48 Fed. Rep. 914, holds that, "when an unusual and unexpected accident happens, and the thing causing the accident is in one's exclusive management, possession, or control, the accident speaks for itself, is itself a witness,—*res ipsa loquitur*,—and, in a suit by any one having an action therefor, the fact of the accident puts on the defendant the duty of showing that it was not occasioned by negligence on his part."

In the present case it sufficiently appears from the declaration that the race-course and the grounds connected therewith were under the exclusive management and control of the defendant. But it is not alleged that the "runaway" horse which caused the injury was under the management and control of the defendant or its servants. It is matter of common knowledge that these race-courses are visited by invited spectators, who drive into the grounds in their own carriages or other vehicles under the control of themselves or their own drivers. The averments of the declaration do not negative the idea that the injury may have occurred through the negligence of one of these spectators in failing to properly control his horse. It was the duty of the defendant to provide sufficient barriers and watchmen and hitching posts, but a performance of this duty might not in all cases prevent accidents arising from the carelessness of those coming into the grounds with teams of their own. Moreover, the declaration does not sufficiently specify in what place the plaintiff was when he was injured,—whether in the space reserved for pedestrians, on what is called the "grand stand," or in the space reserved for spectators visiting the race-course in their own vehicles. While the question of the sufficiency of the declaration is not altogether free from doubt, we are inclined to think that its allegations are not specific enough, either as to the place of the injury, or as to the defendant's control over the immediate cause of the injury. In *Conradt* v. *Clauve*, 93 Ind. 476, 47 Am. Rep. 388, there was a demurrer to the first paragraph of a complaint alleging that defendants were the owners and managers of inclosed fair-grounds, charging an admission fee, and while an agricultural fair was in progress, allotted a part of the grounds for shooting with a target gun, but gave no notice thereof to plaintiff, who attended the fair with his horse and buggy, and being ignorant of the location or existence of the gun, or that the portion of the ground reserved for target shooting had been so reserved, hitched his horse where others were hitched, and his horse was shot and killed. The demurrer was overruled; but it appeared from the complaint itself that the target shooting was a part of the exhibition or entertainment carried on at the fair, and so under the supervision and control of its managers, and that, although those engaged in the shooting were not strictly servants of the defendants, yet they were acting under the license and permission of the defendants, and bore such a relation to them as made the defendants liable for injuries resulting from their negligence in not properly controlling the management of that part of the exhibition. In *Unger* v. *Forty-Second Street & G. Street Ferry R. Co.*, 51 N. Y. 497, it appeared that the plaintiff was run over in a public street by a team of horses running away, with a pole and whiffletree attached to them, and that the horses had become detached from a street-car which they had been drawing, and it was there held that the fact that the horses were unattended and unfastened in the street was, unexplained, evidence of negligence against the defendant; but it also appeared that the horses belonged to the defendant, the street railroad company, and had broken away from one of its cars, while driven by one of its employés. In *Strup* v. *Edens*, 22 Wis. 482, plaintiff's daughter was injured by horses running away, and it was said that "the fact that the horses got loose and ran away is some evidence of negligence." But the horses belonged to the defendant, and there was evidence tending to show that they were not properly hitched. So also in *Hill* v. *Scott*, 38 Mo. App. 370, it appeared that the "runaway" horse causing the injury belonged to the defendant, and had been securely hitched before he ran away. It was there said that "a horse does not ordinarily get loose if carefully hitched." While, in the case at bar, it might be presumed that the horse injuring the plaintiff would not have run away if he had been carefully hitched, yet the declaration does not state such facts as would lead to the conclusion that the horse belonged to the defendant, or was under its control, or that, if it belonged to a visitor to the race-course, the defendant had neglected such precautions, in the way of hitching posts, or barriers, or watchmen, as would affect it with responsibility for the accident. The fact that a horse is running away unattended

affords some evidence that the horse has been left unfastened, or improperly and negligently secured, but does not necessarily indicate by whom he was so left, in the absence of proof as to what person had control of him. *Button* v. *Frink*, 51 Conn. 342, 50 Am. Rep. 24.

The judgment of the Appellate Court is affirmed.

Rehearing denied October 11, 1895.

GEORGIA SUPREME COURT.

John DAVIS, *Plff. in Err.*,
v.
DODSON & MOON.

(.....Ga.....)

*1. **It is not within the scope of the business of a law partnership** to collect choses in action without charging for services rendered in so doing. Therefore where one member of such a firm being the owner of a promissory note sold it to a third person, a part of the consideration of the sale being that the seller's firm would collect the note without charge, this contract was not binding upon another member of the firm. The seller had no power, by virtue of the partnership, to bind his partner by any such contract; and as to the latter it was also without consideration.

2. **The verdict was demanded by the evidence,** and the newly discovered evidence was not such as ought to change the result.

(April 1, 1895.)

ERROR to the Superior Court for Walker County to review a judgment in favor of defendants in an action by attachment to reach property of a nonresident law firm to enforce payment of damages for alleged breach of contract. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Copeland & Jackson** for plaintiff in error.

Messrs. **Payne & Walker** for defendants in error.

Lumpkin, J., delivered the opinion of the court:

The plaintiff below, Davis, as executor of Hall, sued out an attachment against Dodson & Moon, a nonresident firm of attorneys at law, which attachment was levied upon land in Walker county as the property of Moon, one of the defendants. The case made by the declaration in attachment as amended was, in substance, as follows:

The defendants, as attorneys at law, received for collection from the plaintiff's testator a promissory note, at the same time giving him a receipt in the following words: "Chattanooga, Tenn., Dec. 23rd. 1886. Received of S. P. Hall a note on Larkin Payne, payable to E. M. Dodson, and indorsed by him, for fifteen hundred dollars, dated the 7th day of March, 1886, and due 12 months after date, with interest at the rate of 7 per cent per annum from date, and secured by a deed of trust on 230 acres of land, the home place of said Payne, made to said Dodson as trustee, with power of sale. If said note is not paid at maturity we agree to foreclose the deed of trust by the first Tuesday in May, 1887, free of cost to Mr. Hall, and not to charge him any fees, this being the agreement under which he purchased said note and deed of trust. Dodson & Moon, Attys. at Law." The money due upon the note specified in the foregoing receipt was collected by the defendants, who failed and refused to pay the same over to the plaintiff. The defendant Moon pleaded, in substance, that he did not sign the receipt; that it was not signed by any one authorized by him; that neither he nor the firm of Dodson & Moon, as such, ever had the possession, custody, or control, for collection or otherwise, of any such note or paper as was described in this receipt; not did he or his firm, at any time or in any manner, collect or receive any money thereon, either as attorneys at law or otherwise; but that the giving of the receipt was the individual act of Dodson, for which neither Moon nor the firm was in any manner responsible. At the trial the plaintiff offered evidence to show that the receipt in question was signed by Dodson in the name of his firm, and that he afterwards collected the money due on the note, giving therefor receipts signed by him individually, and had failed to account for the money collected. No evidence whatever was introduced to show that Moon ever had any knowledge of the transaction, or had ever ratified the giving of the receipt to Hall. Nor was it shown that Moon ever had personal possession of the note, or recognized its possession by his firm, or that he took part in or knew of its collection by Dodson. On the contrary, as the receipt itself would seem to indicate, the truth of the matter probably was that Dodson traded to Hall a note payable to himself, and which he held in his individual capacity; and, as an inducement to Hall to purchase the same, undertook by the receipt to bind the firm of Dodson & Moon to collect the note free of charge. If the effect of giving the receipt was to obligate that firm to perform the service indicated, it is obvious that it would make no difference that Moon never took any active part in, or even knew of, the collection and misapplication of the money due on the note, for he would be responsible and liable for every act of Dodson while acting within the scope of his authority as a member of the partnership. Therefore the ques-

*Headnotes by LUMPKIN, J.

NOTE.—While the above case does not particularly discuss the subject of attachment, or the fact that the individual property of the innocent partner was that which was attached, it will be noticed that such an attachment was involved.

For such attachment on the ground of the copartners fraud, see *note* to Jaffray v. Jennings (Mich.) 25 L. R. A. 645.

tion presents itself whether Dodson, by virtue of his general authority to represent his firm, could, in a transaction such as that disclosed by the record now before us, make a contract binding alike upon his partner and himself as composing the firm of Dodson & Moon. We do not see how it can be seriously contended that it is within the scope of the authority of one member of a partnership, in a private transaction between himself and another, and in consideration of a benefit bestowed upon himself alone, and not shared in by his partner, to undertake to bind his firm to any agreement whatsoever. In a transaction of this kind, he would be acting solely in his individual capacity, and not as a member of his firm. We had thought it a very universally recognized fact that lawyers are in the habit of charging their clients for services, and that the main object of forming law partnerships was the avowed purpose of reaping a goodly harvest of fees. In fact, complaint has frequently been made that lawyers are sometimes too diligent and overzealous reapers. But in all seriousness it would defeat the very object for which a law partnership was formed if one of its several members were allowed, without the express assent of the others, to undertake to bind the firm to perform legal services without compensation either for the actual time and labor necessary to be expended or for the responsibility and liability the firm would incur by the undertaking. Certainly it is the right of an attorney, acting for himself alone, as a matter of charity or friendship, to collect a paper for another without charging a fee for his services; but the present case sufficiently demonstrates how serious and unjust a matter it would be if an attorney were permitted to thus bind his partner, without his consent, and with no remuneration for the risk incurred. We have yet to see the rare spectacle of an attorney at law, or a firm of them, rendering professional services gratuitously as a recognized and customary incident of the business in which they engage. We have long ago departed from the *honorarium* from which our ancient ancestors in this noble profession either wholly or partially derived their means of subsistence.

Under the facts shown on the trial, therefore, we have no hesitancy in saying the plaintiff failed utterly to make out a case. It was contended by counsel, however, that in the light of certain evidence, shown to have been discovered since the trial, a different result would be inevitable if a new trial were granted. The evidence relied on was a certain contract purporting to have been entered into between Dodson and Payne, and explaining how the former came into possession of the note sold to Hall, as follows: "This agreement made the 1st day of March, 1886, witnesseth: That Larkin Payne has this day given E. M. Dodson his note for the sum of fifteen hundred dollars, which is to become due one year after date, and has made a deed of trust on his lands in Dade Co., Ga., to secure the same. The agreement between us is that said Dodson is to negotiate said note to the best advantage possible, and for this purpose is to indorse the same, if necessary, and is to apply the proceeds of the note as follows: A judgment of about the sum of $350.00 in the superior court of Dade Co. in favor of the estate of E. W. Forester, dec'd, now controlled by M. A. B. Tatum; whatever interest may be found in settlement to be due from me (Payne) to Wm. Glass on the mortgage heretofore given to him, if any; any balance of fees that I may be owing to said Dodson or to Dodson & Moon; and the balance he will pay over to said Payne. Nothing will be paid to William Glass until further order from said Payne. This 1st of March, 1886. E. M. Dodson. Larkin Payne." Instead of being impressed that this paper would aid the plaintiff's case, we are the more strongly convinced that in no sense, either legally or morally, is Moon liable for the misapplication by Dodson of the money which the latter collected upon the note intrusted to him by the plaintiff's testator. Under this contract, it is plain that Dodson, in his individual capacity, became the trustee of Payne to raise money upon the note, and apply it as directed. Certainly, it was not an undertaking on the part of the firm of Dodson & Moon, and Payne could not have held that firm liable in the event Dodson violated the trust. The mere fact that Dodson & Moon were named among the beneficiaries thereunder amounts to nothing, for it might as well be said that either of the other beneficiaries named in the instrument thereby became responsible for Dodson's execution of the trust, simply because a benefit would be conferred upon him by its faithful performance on the part of Dodson. The only effect of this paper upon the present case is to show that Dodson, instead of owning absolutely and in his own right the note he traded to Hall, at that time simply held it in trust for Payne for the purpose of negotiation, etc. With the performance of the personal and private obligations of Dodson his firm had nothing to do; so we think the newly discovered evidence is favorable to the defendants rather than to the plaintiff, for it clears up the last doubt as to whether Dodson & Moon owned the note at the time it was traded to Hall, or had any interest in that transaction.

Judgment affirmed.

Atkinson, J., not presiding.

GEORGIA SUPREME COURT.

PULLMAN'S PALACE CAR CO., *Plff. in Err.*,
v.
Elise C. MARTIN.

(.....Ga.....)

*1. **Without reference to the law regulating the liability of a sleeping-car company for the loss of property** by a passenger, occasioned by the negligence of its employés, it is clear that in a case where the jury could reasonably infer from the evidence that the property lost by a passenger consisted of a sum of money and such articles as she might for her personal convenience and adornment have appropriately carried with her in the car, and that the same was stolen by an employé of the company while the passenger was under his protection, the company is liable.

2. **The verdict is supported by the evidence,** and the court did not abuse its discretion in refusing a new trial.

3. **Where a proper and complete brief of evidence was presented to the judge** for his approval, it was bad practice for him, on motion of the opposite party, to require a number of interrogatories and the answers to same, all of which were fully covered by the brief, to be attached to such brief; and, when it plainly appears that doing so was entirely unnecessary, the cost of bringing such superfluous matter to this court will be taxed against the party at whose instance it was added to the brief.

(January 28, 1895.)

ERROR to the City Court of Savannah to review a judgment in favor of plaintiff in an action brought to recover the value of certain jewelry and the amount of some money which had been stolen from plaintiff while a passenger in one of defendant's cars. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Barrow & Osborne** and **Jackson & Leftwich,** for plaintiff in error:

When the sleeping-car company has exercised a reasonable degree of watchfulness to guard the passenger against the danger of loss through theft or robbery, it has discharged its full duty under the law.

A sleeping-car company is neither a common carrier of passengers nor an innkeeper. The degree of diligence incumbent upon it is not the same as that on carriers and innkeepers.

Pullman Palace Car Co. v. *Lowe,* 6 L. R. A. 809, 28 Neb. 289; Hutchinson, Carr. 2d ed. § 617; *Carpenter* v. *New York, N. H. & H. R. Co.* 11 L. R. A. 759, 124 N. Y. 53; *Lewis* v. *New York Sleeping Car Co.* 143 Mass. 269, 58 Am. Rep. 135; *Clark* v. *Burns,* 118 Mass. 275, 19 Am. Rep. 456; *Pullman Palace Car Co.* v. *Gavin,* 21 L. R. A. 298, 93 Tenn. 53; 3 Wood, Railway Law, pp. 1703 *et seq.*

There is no presumption of negligence against a sleeping-car company from mere proof of loss.

Pullman Palace Car Co. v. *Lowe, supra.*

In this state, even a common carrier, who is held to the highest degree of care, is responsible only for the baggage actually placed in his custody.

Code, § 2071; *Dibble* v. *Brown,* 12 Ga. 217, 56 Am. Dec. 460.

The mere fact that money or valuables are in the clothing or the immediate belonging of a passenger, in a sleeping car, which are worn during the day and placed under his pillow or in his bed at night, does not make the sleeping-car company the custodian, and it will not be liable for the loss thereof, without some evidence of negligence.

Carpenter v. *New York, N. H. & H. R. Co.* and *Clark* v. *Burns, supra.*

The plaintiff is not to have a verdict for the loss of any money which he was not carrying as a passenger for the purpose of his journey.

Barrott v. *Pullman's Palace Car Co.* 51 Fed. Rep. 797.

By the public exhibition of the earrings, Miss Martin had led every dishonest passenger on the car into temptation, as well as the employés of the company. She was parading valuable jewelry which could not be of the slightest service to her as a passenger. She thus manifestly contributed to her loss.

3 Wood, Railway Law, § 369, p. 1703.

Messrs. **William D. Harden** and **West & McLaws,** for defendant in error:

A sleeping-car company is not liable either as carrier or as innkeeper for property stolen from a passenger.

Pullman Palace Car Co. v. *Smith,* 73 Ill. 360, 24 Am. Rep. 258.

A sleeping-car company is not responsible as carrier nor as innkeeper, but bound, however, to keep watch, and take reasonable care to prevent theft.

Blum v. *Southern Pullman Palace Car Co.* 3 Cent. L. J. 591.

A sleeping-car company is liable to a passenger who, while occupying a berth in its car, suffers a loss of his personal effects by theft owing to the company's neglect to maintain a reasonable watch.

Woodruff Sleeping & Parlor Coach Co. v. *Diehl,* 84 Ind. 474, 43 Am. Rep. 102.

The company must keep watch or it is liable.

Pullman Palace Car Co. v. *Gardner* (Pa.) 16 Am. & Eng. R. Cas. 324.

A corporation running sleeping coaches with sections separated from the aisle only by curtains must have an employé charged with the duty of carefully and continually watching the interior of the car while the berths are occupied by sleepers.

Carpenter v. *New York, N. H. & H. R. Co.* 124 N. Y. 53, 11 L. R. A. 759, and *note,* citing, *Lewis* v. *New York Sleeping Car Co.* 143 Mass. 267, 58 Am. Rep. 135; *Root* v. *New York Cent. Sleeping Car Co.* 28 Mo. App. 200; *Wilson* v. *Baltimore & O. R. Co.* 32 Mo. App. 682; *Pullman Palace Car Co.* v. *Gaylord,* 23 Am. L. Reg. N. S. 788.

Where theft occurs the jury are warranted in inferring the absence of the porter, or lack

*Headnotes by ATKINSON, J.

NOTE.—For liability to passengers on sleeping cars, see *note* to Mann-Boudoir Car Co. v. Dupre (C. C. App.) 21 L. R. A. 289.

See also 44 L. R. A. 790; 45 L. R. A. 767; 47 L. R. A. 286.

of watchfulness at his post, and the defendant must overcome this inference.

Bevis v. *Baltimore & O. R. Co.* 26 Mo. App. 19.

The Pullman's Palace Car Company is an innkeeper.

20 Am. L. Rev. p. 159; 18 Am. L. Rev. p. 174; 24 Am. L. Rev. p. 569; 27 Am. L. Rev. p. 24; *Pullman Palace Car Co.* v. *Lowe*, 6 L. R. A. 809, 28 Neb. 239.

Atkinson, J., delivered the opinion of the court:

1. According to the view we take of the questions made in this case, it is unnecessary for us to determine whether in Georgia a sleeping-car company should be held to the same degree of diligence as is imposed upon an innkeeper, or whether it shall be adjudged to be a common carrier; nor is it necessary specially to define its appropriate position among that class of persons denominated "bailees for hire." Whether we treat this defendant as a common carrier of passengers, or treat it as an innkeeper, or treat it as a simple lodging-house keeper, hiring its space, for an agreed consideration, for sleeping apartments for a determinate period, it would be responsible for personal jewels and belongings of a passenger, appropriate to his or her social position and financial standing, carried by such passenger while traveling thereon, and for his or her convenience, comfort, or personal adornment, to the extent, at least, of making good to such person any loss resulting from a theft of such property by its own employés while such person was under their protection. It guarantees, at least, that, while enjoying the comforts afforded by the car of the defendant, a person traveling thereon shall not be robbed by its employés. To what extent and under what circumstances it might be liable for the wrongdoing of other persons we do not think is involved in this case, and do not at present undertake to decide. By her declaration the plaintiff alleged that on or about March 2, 1892, she was a passenger for hire on defendant's sleeping car "America" from Chattanooga to Macon; that by the contract of hiring it undertook to use reasonable and proper diligence in guarding and protecting her from loss by theft while she slept, during the usual hours of sleep, in the berth assigned to her on the car by defendant; that she had with her reasonable money and jewelry, to wit, money to the amount of $35 and jewelry of the value of $700; that, upon retiring for the night upon the sleeper, she put the money and jewelry in a satchel, and placed the satchel between her person as she lay in her berth and the wall of the car, and then went to sleep; that defendant so negligently guarded and protected her while she was thus sleeping that, through its negligence, some person unknown to her, while she was asleep, and during the night, took the money and jewelry from the satchel, without her knowledge, and stole it, etc.

According to the evidence reported in the record, the plaintiff was a passenger upon defendant's car, and on the evening before she lost her property, in conversation with another passenger with whom she was traveling, she casually so exposed her pocketbook containing the money and jewelry sued for as that the porter of the car saw it in her possession, and saw her place it in a satchel. Upon retiring, this satchel was placed in the berth beside her, between herself and the wall of the car. She testified that she had not removed the pocketbook from the satchel, but, upon retiring, went to sleep, and so remained until the next morning, about daylight or before. That about this time she was awakened by a sensation as of some person intruding in her berth. That she awoke and recognized the head of the porter, a servant of the company, inside the curtain of her berth. That she asked what he meant, and, when ordered to close the curtain, he said he had come in to call her for breakfast at Macon, Ga. She, however, went to sleep again,—does not know how long she slept,—and then got up and dressed before she reached Macon. That when she finally awoke the satchel was at her feet, and open. That she closed the satchel, and several hours thereafter reopened it, to get some money with which to purchase fruit, and found that the money and jewelry were gone. That she called the attention of the conductor to it, and search was made, but it was impossible to recover the money and jewelry. The conductor testified that both the porter and himself were on watch until all the berths were made down, which was about 10:30 P. M.; that the porter then retired, and he remained on watch until 3:00 A. M., at which time he awoke the porter, who went on watch, and he then retired; that he arose between 6:30 and 7:00 A. M.; that from the time the berths were made down until he retired he was constantly watching the aisle between the berths, to see that the occupants thereof were not disturbed in their persons or property while they slept; that the plaintiff arose about 7:00 o'clock, but did not report her loss until about 11:30 A. M.; that she did not say where her satchel had been during this interval, whether she had left it unguarded for all or any portion of the time or not. The porter testified that he did not know anything of the earrings or money; that the conductor and himself were both on watch until the berths were made down, and then he went to bed, and the conductor remained on watch until 8:00 A. M.; that at that hour the conductor awoke him, and he stood watch alone until the passengers arose the next morning; that he kept a strict watch, did not go to sleep at any time, and was not out at any of the stations; that neither the plaintiff nor her property was interfered with by any one while he was on watch; that the other door was not locked, because it was not necessary, as he was on watch all the time, and could see it; that the car was an old one, and there was nothing to prevent him from seeing from one door to the other; that he did not go inside the curtain, nor put his head, his arms, or his shoulders inside the curtain, before the plaintiff got up; that he did not see her take her pocketbook out of her satchel at any time during the trip, or show her earrings or money to any one; that he remained

on watch until the conductor and passengers got up in the morning, and then the conductor shared his watch; that he was in the car the entire time, but was in bed and asleep between 1 and 3 A. M.; that while on watch he was constantly awake and on duty, guarding the car, the property in it, and the passengers, and no one could have disturbed the passengers or their property without his seeing it; that he blacked shoes that night at the end of the aisle, in the body of the car, where he had a full view through the aisle; that this was an old-style car, and had no smoking room in it; that in making down the berths he closed both sashes of the windows; that the windows all had fasteninga, to prevent their being raised from the outside; that there was no conversation between the plaintiff and himself; that in waking the passengers, if she was not already up, he woke her in the same manner as he awoke other passengers, by calling, and, if no answer was made, by putting his hand on the berth curtains and pushing them in until they touched her, so as to arouse her; that this was always the way passengers were waked up.

That this passenger lost her jewelry and money, and that she lost them while a passenger in this car, are both facts which may be taken as established beyond controversy by the evidence. The plaintiff's testimony places the porter, the servant of this defendant, in such a situation as that he might easily have purloined her property. According to his own statement, it was not necessary for him to have put his head inside her berth. According to her statement, he did put his head inside of her berth, and thereafter she found her satchel open and her purse gone. These circumstances, even in the face of a denial by the porter, would have furnished strong inferential evidence that he was the man who appropriated these goods. His guilt, we think, is practically demonstrated by his own testimony and that of the conductor. According to the conductor, he was constantly on guard from the time the passengers retired the evening before until 3 o'clock in the morning; and if his testimony be true—and it is not disputed by any one—it would have been impossible for any person without his knowledge to have intruded upon the privacy of this passenger during this interval, and stolen her property. According to the testimony of the porter, from 3 o'clock A. M. until the time when the passengers arose he was constantly on guard for the purpose of protecting the persons and property of the passengers against the depredations of other people; that he was in a position where he could have seen and would have seen any person who intruded upon the passengers in that car, and that no such thing was done. So that, according to his own statement and the statement of the conductor, it would have been impossible for any person other than one of these two to have robbed this plaintiff between the hour when she retired and the hour when she arose. But since she was robbed, and since, as we have seen, it would have been impossible for any person other than one of these two to have robbed her, then the inference is that she was robbed by the one or the other of these employés; and for the larceny of either the company would be responsible. We think the evidence of this plaintiff established beyond controversy that the porter intruded his head into her berth and stole her property. He was the person identified by the passenger as having intruded upon her privacy. According to his testimony, at the time she says it was done, it would have been impossible for any person other than he to have entered unobserved. This was the view the jury might have taken of this case in the court below. The only reasonable conclusion to be drawn from this evidence is that the servant of the defendant, whose duty it was to guard the person and property of this passenger while she slept, purloined the chattels sued for; and we therefore think that, without reference to the liability imposed upon the company for injuries resulting from the negligence of its employés, the jury were justified in finding against it because of the larceny committed by its servants.

2. It is unnecessary to discuss, further than is therein stated, the question of practice referred to in the third headnote to this opinion.

Let the judgment of the court below be affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WHITTENTON MFG. CO.
v.
Herbert M. STAPLES.

(.....Mass.....)

1. An obligation in the nature of a servitude upon an estate conveyed with a water privilege may be enforced, without any personal obligation of subsequent purchasers, under a stipulation that the grantee, his heirs and assigns, shall pay a certain part of the sums paid for flowage or damages to the proprietors of lands above a reservoir.

2. An obligation to pay a portion of the expense of the repairs to a dam is not created by a stipulation in a deed that the grantee shall pay a part of the sums which have to be paid for flowage or damages to proprietors of lands above the dam.

3. A servitude by prescription, charging property with the payment of a

NOTE.—The doctrine that a liability to make periodical payments of money may be established by prescription as a servitude on real property, seems to be a new development of the law of easements, for which there is no direct precedent. Believing the authorities most nearly pertinent are presented in the case itself, no attempt will be made to annotate the case.

39 L. R. A.

See also 45 L. R. A. 218.

portion of the expense of repairs to a dam from which a water power is furnished to the premises, is created, where for more than fifty years an annual contribution by the owner of the servient estate has been paid as a duty and collected by the other party as a right.

(October 4, 1895.)

RESERVATION by the Superior Court for Bristol County for the opinion of the Supreme Judicial Court of an action brought to compel defendant to pay a portion of the damages caused by, and of the costs of maintaining, a dam used to raise a head of water for the operation of water powers, one of which was owned by defendant. *Judgment for plaintiff.*

The facts are stated in the opinions.

Mr. **A. M. Alger** for plaintiff.

Mr. **G. E. Williams** for defendant.

Allen, J., delivered the opinion of the court:

The parties have agreed upon all the facts deemed to be material. The Taunton Manufacturing Company built the reservoir dam on land owned by it in 1832, at a time when it was the owner of five mill privileges on the stream below, all of which were then in operation. This dam was for the sole use of the mills upon said mill privileges, and was essential to the reasonable enjoyment of all of the water powers, as the natural flow of the stream during much of the year would be inadequate for furnishing power. Under this state of things, the corporation, in the first place, on August 12, 1833, conveyed to the Bristol Print-Works Company the two lowest mills, the land being described by metes and bounds, "together with all the buildings thereon, and all the rights, privileges, easements, and appurtenances to the said land in any wise appertaining or belonging, and all the streams and water rights and power thereof, also the dam and force of water." On September 6, 1833, the corporation conveyed the next lowest mill to Charles Richmond, under whom, through mesne conveyances, the defendant claims. This deed conveyed the land and buildings "and the water power, dam, and all the appurtenances and privileges thereto belonging," and contained further provisions as follows: "First. This conveyance is made subject to the right and privilege granted by said Taunton Manufacturing Company to the Bristol Print-Works Company, their successors and assigns, to draw water from a reservoir of said Taunton Manufacturing Company through the premises herein described and conveyed, and to enter on said premises for the purpose of relaying and repairing the aqueduct and pipes leading through the same. Secondly. The said Richmond, his heirs and assigns, grantees of these premises, shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agreed to pay for flowage or damages to the proprietors of any lands by reason of any dam made, or which may be made, by said Taunton Manufacturing Company, or their successors or assigns of any part of the estate of the said Taunton Manufacturing Company, upon any stream or waters flowing to their mills. . . . Fourthly. This conveyance is made subject to the reservations and privileges granted to the Bristol Print-Works by the Taunton Manufacturing Company. Fifthly. . . . The said Taunton Manufacturing Company intending hereby to alien and assign unto the said Charles Richmond, his heirs and assigns, all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, waterpower, and privileges, and head and fall of water (excepting as above excepted), for the considerations above mentioned and set forth. To have and to hold the lands, buildings, waters, and works aforesaid, with all and singular the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith, unto him, the said Charles Richmond, his heirs and assigns, forever, except as above excepted." The defendant contends that the above deed conveyed no right in the reservoir, and that the clause requiring Richmond and his heirs and assigns to pay one fifth of the damages for flowing is not binding on subsequent owners; and these are the principal questions which have been argued in the case. It is not disputed that the title and rights of the Taunton Manufacturing Company to the upper mill and privilege have come through mesne conveyances to the plaintiff.

If the construction of a deed is doubtful, the practical construction put upon it by the parties and their successors may be looked at in connection with the deed itself and the circumstances existing at the time of its execution. *Reynolds* v. *Boston Rubber Co.* 160 Mass. 240, and cases there cited. Until recently the parties in interest have assumed and have acted on the theory that Richmond and his heirs and assigns had an interest in the additional water power created by the reservoir, and were bound to pay one fifth of the damages for flowing. This is shown by the following facts: On July 15, 1835, the Taunton Manufacturing Company conveyed to James K. Mills and others the upper mill and privilege on the stream, "with the dams and water privileges thereon, together with all the right which said Taunton Manufacturing Company have to flow the land between the premises hereby conveyed and the bridge where the old road to Boston crosses Canoe river; the dams, water privileges, and rights of flowage hereby intended to be granted and reserved being fully set forth in and subject to an agreement by and between the grantor and grantees, bearing even date with, and to be referred to always as a part of these presents." The said agreement provided, among other things, as follows: "First. The reservoir dam at White's bridge above Whittenton shall not be altered in any mode without the consent of the parties therein interested, or a majority of them: provided, however, that the proprietors of the Whittenton mill shall always cause to be let down from said reservoir a quantity of water sufficient to propel the

present machinery of the Hopewell mills [the Hopewell mills were next below the Whittenton mill] until the water in said reservoir shall be drawn down to the level of the present Whittenton dam; and the proprietors of the Whittenton mill shall be entitled to a fair compensation from all the parties interested in the said reservoir for the time and labor of drawing the water as aforesaid. Second. The water between said reservoir dam and Whittenton mills shall be used hereafter as has been heretofore customary; that is to say, the Whittenton proprietors shall do no act to prevent the natural flow of water over their premises by raising their dam above its present height. . . . Fourth. The damages accruing from time to time for flowage shall be apportioned between the proprietors of the Whittenton mills and the mills now and formerly belonging to the Taunton Manufacturing Company by the award of judicious persons," etc.

The defendant derived his title as follows: The title of Richmond passed to Galen Hicks, under the foreclosure of a mortgage dated October 4, 1833, in which reference was made to the deed of the Taunton Manufacturing Company to Richmond. On March 1, 1848, Hicks conveyed to Dean & Morse with a similar reference; and they, in like manner, on April 1, 1849, conveyed to the Dean Cotton & Machine Company, which in its turn, on November 28, 1874, conveyed to the Taunton Cotton & Machine Company the land and water privileges, "together with all the rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the reservoir and flowage company [this company will be hereinafter described], and subject to all the liability on account of such rights; and, in relation thereto, reference may be made to an agreement between the Taunton Manufacturing Company and James K. Mills and others, dated July 15, 1835, and to the award," etc. On June 1, 1880, the Taunton Cotton & Machine Company conveyed the property to Park Mills, a corporation, with this provision: "This conveyance shall also include whatsoever rights, title, and interest, with the liabilities thereon, said corporation has in the Taunton Reservoir & Flowage Co." On July 19, 1889, the Park Mills conveyed to Staples, the defendant, with a similar provision. On the same day, the Taunton Cotton & Machine Company also executed a deed of the same premises to the defendant, "together with all rights of flowage appurtenant to said estate, and all the right, title, and interest of the grantor in the Reservoir & Flowage Co., and subject to all the liabilities on account of such rights. And, in relation thereto, reference may be made to three papers; namely, first, an agreement between the Taunton Manufacturing Company and James K. Mills and others, dated July 15, 1835, together with the award," etc.

The reservoir and flowage company referred to in some of the above deeds was established as follows: In 1852, the owners of the several mills, all being corporations associated together as a voluntary association, under the name of the Taunton Reservoir & Flowage Company, "for the purpose of aiding in the supplying themselves with water by the reservoir dam," and appointed Willard Lovering, one of the owners of the Whittenton mills, their agent, from time to time, as the damages for flowing should become due, to collect their proportions thereof, and to pay the same to the owners of lands flowed. The annual damages for flowing were in the same year fixed by agreements at $1,842.89, and have not since been changed. These damages are fair and reasonable. From that time to the present, Lovering (who died in 1875) and the successive owners of the Whittenton mills have continued without objection, in behalf of the owners, from time to time, of the several mills, under the name of the Taunton Reservoir & Flowage Company, to collect from said mill owners and to pay out said damages for flowing, and to repair the reservoir dam, and to draw water from the reservoir, and to collect from the several mill owners their respective shares of the expense thereof. The defendant, however, without assenting thereto or dissenting therefrom, otherwise than is herein stated, refused from time to time, as said charges accrued, to pay any part thereof, on the ground that he had not used the water. Bills for the annual expense of maintaining the reservoir dam as rendered to the several mill owners were usually made out under the general statement "To Flowage," without setting forth items for repairs or for drawing the water; but sometimes the bills were itemized. In 1885, the reservoir dam having been injured by a freshet, it was repaired at an expense of $813.12, and the owners of all of said mills paid their proportional shares of such expense. From the time of the execution of the above agreement to the present, the use of the reservoir dam, except as herein stated, has been in accordance with the terms of the agreement, and no person has objected thereto or made any claim inconsistent therewith; and all the mills, when operated, have had the enjoyment of the head of water created by said reservoir dam, and of the reserve waters thereby stored, and no person other than the owners, from time to time, has used the same, or had any interest therein. The water rights belonging to the two lower-mill privileges have been legally extinguished by abandonment. The defendant's mill buildings are standing; the water wheels are in position; but the dam at his mill was carried away by a flood a few months before the conveyance to him; and he has not operated the mill or used the water power, but he has not abandoned the same.

The defendant contends that the above agreement, whereby the Taunton Reservoir & Flowage Company was formed, was for a partnership, and was one which the corporations were not authorized to make, under the decision in *Whittenton Mills* v. *Upton*, 10 Gray, 582. We have no occasion to consider that question. This agreement is referred to for the purpose of showing the practical construction put upon the grant to Richmond, and for this purpose it may be looked at, whether valid or invalid. The right of the plaintiff to maintain the bill in equity does

not depend upon that agreement. The owners of the defendant's mill, from the time of the conveyance to Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the damages for flowing caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same; and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that, since steam came into general use, steam power has also been employed. But since 1890 the defendant has refused to make such contribution. The owners of the two lowest privileges contributed in like manner their proportion as fixed by the award referred to, down to the time of the extinguishment of their water privileges; and the owners of the two upper privileges have also paid their respective proportions according to the award.

Such being the facts, we come now to consider the question of the defendant's right and liability. The reservoir would naturally be of some benefit to the lower-mill privileges, without any express grant. But upon the construction of the deed to Richmond, taken by itself alone, and without reference to what followed, there would be strong reason for holding that some right, the extent of which is not defined, in the water power created by the reservoir dam, was intended to be included in the grant. This water power was in actual use at the time of the grant, and was essential to the reasonable enjoyment of what was in terms granted. Moreover, the reference in the deed to the rights of the Bristol Print-Works Company under the deed (then recent) of the grantor to that company shows clearly that it was understood that some right in the water power created by the reservoir was included in that deed. The provision binding Richmond and his heirs and assigns to pay one fifth part of the damages caused by the flowing to some extent implies that a similar right was intended to be granted to Richmond and his heirs and assigns. The conveyance includes, in broad terms, "all and singular the rights, privileges, easements, and appurtenances to the said land in any wise belonging or appertaining, and all the streams, dam, water power, and privileges, and head and fall of water, 'with all' the rights, privileges, easements, and appurtenances thereto belonging, and which have been or of right can be used or enjoyed therewith." It would seem, therefore, even upon the deed alone, when construed in view of the facts then existing, that some right in the power created by the reservoir dam was by implication included. The plaintiff has cited several cases to show that there is an implied grant of whatever within the grantor's power is necessary to the beneficial enjoyment of the thing granted; and others may be found collected in *Case* v. *Minot*, 158 Mass. 577, 585. In this respect the deed to Richmond is not like the deeds which were under consideration in *Bryce* v. *Yale*, 4 Allen, 398, and *Whitney* v. *Wheeler Cotton Mills*, 151 Mass. 396, 7 L. R. A. 618, cited by the defendant. But this construction of the deed, if otherwise doubtful, is made very clear by the subsequent acts of the parties. The whole plan was to treat the reservoir as existing for the common benefit of all the mill privileges which have been mentioned. This is shown especially by the agreement in 1835, and by the voluntary association formed by the owners of the several mills in 1852, under the name of the Taunton Reservoir & Flowage Company. The deed of 1874, in the defendant's chain of title, refers to both of these. The two deeds to the defendant himself, in 1889, both contain a like reference. The action of all the defendant's predecessors in title, and of the owners of the other privileges, has from the beginning been in accordance with this view as to the title. We find nothing tending in any degree to show that any other view was ever taken till after the defendant's purchase, in 1889. Looking, therefore, at the deed itself under which the defendant's title is derived, and at the subsequent acts of the parties in interest, we are of opinion that a right to have the use and benefit of the reservoir was included in the grant to Richmond and his heirs and assigns, and that such right has descended to the defendant. The extent of this right, and the manner of defining and enforcing it, we need not now consider.

The question then arises, whether a court of equity should enforce against the present owner of the premises the stipulation in the deed that Richmond and his heirs and assigns should pay one fifth part of the sums paid for flowing or damages to the proprietors of lands above the reservoir dam. In England it seems to be the tendency of recent decisions to hold that the burden of a covenant, unless possibly one which amounts to a grant, never at law runs with the land, except as between landlord and tenant; and that in equity the court will not, as against assigns, enforce covenants calling for the payment of money, but only covenants which are merely restrictive as to the use of the land. *Haywood* v. *Brunswick Permanent Ben. Bldg. Soc.* L. R. 8 Q. B. Div. 403; *Austerberry* v. *Oldham*, L. R. 29 Ch. Div. 750; *Clegg* v. *Hands*, L. R. 44 Ch. Div. 504; Gale, Easements, 6th ed. 61, 62; Goddard, Easements, 4th ed. 24. This doctrine has not usually been accepted in the United States. It has been held in many decisions in this commonwealth and elsewhere that at law the burden of a covenant may run with the land. *Savage* v. *Mason*, 8 Cush. 500; *Bronson* v. *Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Richardson* v. *Tobey*, 121 Mass. 457, 23 Am. Rep. 283; *King* v. *Wight*, 155 Mass. 444; *Joy* v. *St. Louis*, 138 U. S. 1, 34, 34 L. ed. 843, 853; *Fitch* v. *Johnson*, 104 Ill. 111; *Haslett* v. *Sinclair*, 76 Ind. 489; *Norfleet* v. *Cromwell*, 64 N. C. 1; 3 Pom. Eq. Jur. § 1295. It has also often been held elsewhere that a provision like that contained in the deed to Richmond is itself a covenant binding upon the grantee and his heirs and assigns; that it will run with the land; that it is valid in law; and that the relief granted by a court of equity is not to be limited to those covenants which are merely restrictive, but will be extended to covenants to do posi-

tive acts involving the expenditure of money. *Burbank* v. *Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Kellogg* v. *Robinson*, 6 Vt. 276, 27 Am. Dec. 550; *Atlantic Dock Co.* v. *Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Bowen* v. *Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Finley* v. *Simpson*, 22 N. J. L. 311, 53 Am. Dec. 252; *Sparkman* v. *Gove*, 44 N. J. L. 252; *Maynard* v. *Moore*, 76 N. C. 158; *Georgia Southern R. Co.* v. *Reeves*, 64 Ga. 492; *Conduitt* v. *Ross*, 102 Ind. 168; *Maxon* v. *Lane*, Id. 364. See, also, Rawle, Covenants, § 272, *note*. In this commonwealth, however, it has been held that such a provision in a deed poll does not constitute a technical covenant. *Parish* v. *Whitney*, 3 Gray, 516 *Maine* v. *Cumston*, 98 Mass. 317; *Martin* v. *Drinan*, 128 Mass. 516. In *Kennedy* v. *Owen*, 136 Mass. 199, the court followed the earlier decisions in saying that such a provision is not technically a covenant running with the land, because the grantee sealed nothing, but that it is rather "a mere personal obligation, imposed upon and assumed by the grantee, and binding upon him and his legal representatives as an implied contract entered into with the grantor,"—"an obligation which, if enforceable at all against the purchasers, is to be enforced against them by a court of equity alone." That case did not call for the determination of the question whether such equitable remedy existed or not. The present case, however, raises that question. An ordinary easement binding the granted premises may be created in favor of the grantor, his heirs and assigns, by words contained in a deed poll. *Atkins* v. *Bordman*, 2 Met. 457, 462, 37 Am. Dec. 100; *Bowen* v. *Conner*, 6 Cush. 132, 135. The grantee's acceptance of the deed subjects the granted estate, both in his own hands and in the hands of all others who may come in under him, to the easement reserved. And we see no good reason why, under circumstances like those existing in the present case, an easement or servitude calling for the performance of positive acts may not also be created in like manner. This seems to be implied by the language of the court in *Dyer* v. *Sanford*, 9 Met. 395, 403, 43 Am. Dec. 399. See also *Maine* v. *Cumston*, 98 Mass. 317; *Schwoerer* v. *Boylston Market Asso.* 99 Mass. 285, 297, 298; *Woburn* v. *Henshaw*, 101 Mass. 193, 3 Am. Rep. 333. It is binding upon the original grantee, and his assigns with notice are bound in like manner, at least to the extent that the performance of the duty may be charged upon the land to which they succeed. The general doctrine of the equitable enforcement of agreements concerning the occupation and mode of use of real estate is explained in the familiar cases of *Whitney* v. *Union R. Co.*, 11 Gray, 359, 71 Am. Dec. 715; and *Parker* v. *Nightingale*, 6 Allen, 341, 83 Am. Dec. 632. We are brought, therefore, to the conclusion that the obligation imposed by the deed to Richmond may be enforced as an obligation in the nature of a servitude upon the estate of the defendant, though not as a personal obligation of the defendant.

The final question which we have to determine is, whether the plaintiff is entitled to recover one fifth part of the cost of repairs upon the reservoir dam and of the plaintiff's compensation for drawing the water, as well as one fifth part of the sum paid for flowing. The deed to Richmond does not in terms include such cost of repairs. The language is that Richmond and his heirs and assigns "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one-fifth part of all sums which they may be held or agree to pay for flowage or damages to the proprietors of any lands by reason of any dam made or which may be made by said Taunton Manufacturing Company, or their successors or assigns of any part of the estate of the said Taunton Manufacturing Company, upon any stream or waters flowing to their mills." This language does not admit of a construction which will bind Richmond and his heirs and assigns to pay for repairs of the dam. It is limited to sums paid for flowing to the proprietors of other lands. Independently of this provision, the relation of the parties growing out of the conveyance of the mill privilege and water power would not bind the grantees to pay any part of the cost of such repairs. The right which was granted in respect to the reservoir was not any interest in the dam, but merely some right in respect to the flow of water in addition to that which the grantee would take as riparian owner. The ownership and immediate control of the dam remained with the grantor. The duty of exercising due care to make it safe rested with the grantor alone. The grantor and grantees did not become joint owners of the dam, and would not be jointly liable for damages in case of its giving way, by reason of negligent construction. A right to have a quantity of water, in addition to the natural flow of the stream, sent down from the reservoir, does not carry with it an ownership in the reservoir dam. The agreement between the Taunton Manufacturing Company and James K. Mills and others, which was made a part of the deed from the former to the latter in 1835, is significant as showing the mode in which it was then understood that the water was to be used; but Richmond was not a party to it, nor does the agreement contain anything to show that it was understood that he was to bear a part of the cost of making repairs. The agreement entered into by the various mill corporations in 1852, under the name of the Taunton Reservoir & Flowage Company, contained nothing in respect to the cost of repairs, so far as is shown by the agreed statement of facts.

No distinct agreement or stipulation being shown calling for the payment of one fifth of the cost of maintaining the dam, we have to consider whether a servitude has been imposed on the defendant's land by prescription, requiring such contribution. It is agreed that the owners of the defendant's property, "from the time of its conveyance to Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the flowage damages caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the

water from the same; and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir." After describing the agreement of 1852 between the various mill corporations, the statement of facts recites that, from that time down to the present, Lovering and the successive owners of Whittenton mills have continued without objection to collect from the owners of the several mills "the flowage damages, and repair the reservoir dam, and draw water from the reservoir, and collect from the several mill owners the respective shares of the expense thereof." The one party collected the money as a right; the other paid it as a duty. It would seem that the evidence is sufficient to establish such a servitude by prescription, if in law such a servitude can be so created.

The duty is of the same character as that which is created by the provision in the deed to Richmond, binding him and his assigns to pay one fifth of the sum paid for flowing. Its connection with the estate and rights granted is equally close. A covenant to make the payments would run with the land. A duty imposed on the grantee and his assigns by stipulation in the deed would be enforced in equity against the land. We see no reason why the same duty may not be established by prescription. In *Doane* v. *Badger*, 12 Mass. 65, it was recognized, though not expressly decided, that, where the owner of a close had an ancient right to take water from a well and pump situated on another close, he might be bound by prescription to keep the well and pump in repair. It is well established that there may be a prescriptive duty to maintain fences (*Bronson* v. *Coffin*, 108 Mass. 175, 185, 11 Am. Rep. 335, and cases cited); also, ways (*Middlefield* v. *Church Mills Knitting Co.* 160 Mass. 267). See also *Lynn* v. *Turner*, Cowp. 86; *Anonymous*, Lofft, 556, where it was held that there may be a prescriptive duty of keeping the bed or banks of a stream in order. So, where a reservoir dam is maintained for the benefit of several estates, the duty of repairs in whole or in a specified proportion may be established by prescription as a charge against one of the estates in interest. The duty of paying one fifth of the reasonable compensation for drawing water rests on the same grounds. For these reasons, in the opinion of a majority of the court, the payment of the whole sum claimed may be enforced against the land of the defendant.

Decree for the plaintiff.

Field, *Ch. J.*, dissenting:

I am unable to agree to the opinion of a majority of the court. That opinion, in effect, is that there has been acquired by prescription an easement or servitude in the land of the defendant being the "Brick Mill," so called, and its appurtenances, whereby that land is bound to contribute one fifth part of the annual flowage damages caused by the reservoir dam as erected by the Taunton Manufacturing Company in 1832, and one-fifth part of the reasonable expenses incurred in repairing that dam, and one fifth part of a reasonable compensation for the time and labor expended in drawing water from the reservoir, in accordance with the requirements of the agreement of 1835. The case was submitted upon an agreed statement of facts. The defendant acquired his title to the brick mill and its appurtenances by two deeds, each dated July 12, 1889. At that time the dam on the estate conveyed to the defendant had been carried away, and had not been rebuilt, but the mill buildings were standing and the water wheels were in position, and this condition of things has remained to the present time. The defendant has never operated the mills or used the water power, although he has not abandoned any rights he may have in the water power or in the reservoir.

It is agreed, among other things, as follows: "The defendant, at the time he accepted his deeds, did not have actual knowledge of the contents of the award alleged therein to have been delivered to him, or of any of the agreements herein mentioned; but the said award and agreements, and the books of the Taunton Reservoir & Flowage Company, running back for more than forty years, were then, and ever since have been, in the possession of the plaintiff, and, upon inquiry, the defendant could at any time have ascertained all facts which are herein stated, although he had no actual knowledge of the existence of the said books or agreements This statement shall not, however, be so construed as to exclude a finding on the facts stated of constructive knowledge." Neither the defendant nor any of his predecessors in title, while owners or occupiers of the estate, were parties to any of these agreements or to the award.

There is much discussion in the opinion of the majority of the court upon the effect of the deed of the defendant's premises from the Taunton Manufacturing Company to Charles Richmond, dated September 6, 1833, and of the mesne conveyances under which the defendant claims title, as well as of the two deeds to the defendant, although this discussion seems not absolutely necessary to the decision. In the deed to Richmond it is stipulated that the grantee, his heirs and assigns, "shall be held and obliged at all times to pay to the Taunton Manufacturing Company, their successors and assigns, one fifth part of all sums which they may be held or agreed to pay for flowage or damages to the proprietors of any lands by reason of any dam made, or which may be made, by said Taunton Manufacturing Company, or their successors or assigns of any part of the estate of the said Taunton Manufacturing Company, upon any streams or waters flowing to their mills." This provision is referred to in subsequent deeds. It covers, however, only one fifth part of the damages for flowage, and does not include any part of the expenses of repairs of the reservoir dam or of drawing off the water of the reservoir.

It is conceded by the majority of the court that, under our decisions, these stipulations on the part of the grantees in the several deeds do not constitute technical covenants on their part, because they are deeds poll.

The decision of a majority of the court does not proceed on the ground of any promise, express or to be implied, on the part of the defendant to perform the stipulations on the part of the grantee in the deed to Richmond, or the stipulations on the part of the grantees in any of the subsequent deeds which constitute the defendant's chain of title. The decree is not against the defendant personally, but it is a decree against his land; and it establishes a charge against this land, not only for one fifth of the damages caused by flowage, but also for one fifth of the expenses of the repairs of the reservoir dam and of drawing off the water. The decree proceeds on the ground of a right acquired by prescription more comprehensive than anything contained in any of the deeds under which the defendant claims title, which is in the nature of an easement or servitude inherent in the land, but which does not involve any personal obligation upon the owner of the land.

To establish this easement or servitude, the majority of the court rely upon the following statement of the agreed statement of facts: "The owners of the Brick mill, from the time of its conveyance to Charles Richmond, in 1833, down to the time of its conveyance to the defendant, have annually contributed one fifth of the flowage damages caused by the reservoir dam, and one fifth of the expense of repairing the same, and one fifth of the compensation for drawing the water from the same; and during said period, and from the time said reservoir dam was built, the motive power of said mill has been furnished by the water drawn from said reservoir, except that, since steam came into general use, steam power has also been employed." The effect of the decision seems to be that when any one buys a mill privilege on a stream which at the time of the purchase is unused, because the dam on the privilege has been carried away, if the stream has on it a reservoir dam belonging to other persons some distance above, and if, as a fact, his predecessors in title have maintained the dam on the mill privilege, and used the mill, and have also contributed to the maintenance of the reservoir for more than twenty years continuously, an easement or servitude is acquired by prescription in the land which constitutes the mill privilege, for the benefit of the owners of the reservoir, or as appurtenant to the reservoir, to have this contribution continued payable out of the land, even although the purchaser, at the time of the conveyance of the mill privilege to him, knew nothing of any such contribution, and the registry of deeds contained no information on the subject.

With, perhaps, one or two exceptions, easements in land are passive in their character, and, when acquired by prescription, consist in the right to use the servient tenement in a certain manner defined by an adverse user continued for the requisite period of time, and they are acquired by notorious acts done on the land under a claim of right. Payments of varying sums of money from year to year by an owner of a mill privilege to the owners of a reservoir situated on the stream some distance above the privilege are not in their nature notorious acts done on the mill privilege. It is said that there may be a prescriptive duty to maintain fences and ways; and *Bronson* v. *Coffin*, 108 Mass. 175, 11 Am. Rep. 335, and *Middlefield* v. *Church Mills Knitting Co.*, 160 Mass. 267, are cited. The actual decision in *Bronson* v. *Coffin* was upon the effect of a covenant of the grantor in a deed. *Middlefield* v. *Church Mills Knitting Co.* was decided upon a demurrer to the declaration, and it was said that the duty of the defendant to maintain the highway was "sufficiently alleged for the purposes of the case at bar." The manner in which that duty originated did not appear in the declaration. But if it be conceded, without expressing any opinion on the subject, that a duty to maintain fences and repair ways can be established by prescription or by covenant, these are confessedly exceptions to the general rule that an active duty can be attached to land. To deduce from these exceptions the rule that an active duty can be attached to land by prescription to pay money from time to time for the maintenance of an artificial reservoir of water belonging to other persons, miles away from the premises, which is a permanent easement in the land, whether the water is used or not, is, so far as I know, attaching unusual incidents to land, for which there is no precedent. Secret liens or interests in land, a knowledge of which cannot be obtained by a view of the land itself, or by a search in the proper registry of deeds, certainly ought not to be extended. As the decision of the majority of the court rests upon the doctrine of prescription, I do not consider whether such incidents as are attached to the land of the defendant by the decision can be attached to land by covenants in a deed, or whether, in the present case, from the stipulations in the deed poll which concern the duty of the grantees, a promise can be implied against the present defendant to perform these stipulations, as a continuing promise, to whosoever maintains the reservoir, or whether the deeds can be construed as deeds upon the condition that these stipulations shall be performed. Neither do I consider whether a court of equity in this commonwealth will enforce stipulations for the payment of money contained in a deed poll against the assigns of the grantee. I dissent from the doctrine that, on the facts agreed in the present case, an easement in the defendant's land, of the kind described in the opinion of the majority of the court, has been established by prescription.

Holmes and Lathrop, JJ., concur in this dissent.

FLORIDA SUPREME COURT

W. D. BLOXHAM, Comptroller, *Appt.*,
v.
CONSUMERS' ELECTRIC LIGHT & STREET R. CO.

(.....Fla.....)

*1. **The word "railroad," in its broadest signification, includes a street railroad.** When the word is used in a statute there is no definite rule of construction as to whether it includes street railroads. It may, or it may not, include them. The meaning of the word must depend upon the context and the general intent of the statute in which it is used.

2. **Besides judicial construction of statutes there is known to the law another kind** of construction. This kind of construction has especial application to statutes for the regulation of the different departments of the government, and is the interpretation put upon them by the actual administration of them by such departments. As distinguished from judicial construction, it is called the practical construction of statutes.

3. **A practical construction of a statute** by a governmental department, while not of such high authority as a judicial interpretation of the act, is, when not in conflict with the constitution or the plain intent of the act, of great persuasive force and efficacy.

4. **The contention is made that a street railroad extending along the streets of a single city,** and wholly located within a single county, is not a railroad in the contemplation of our statute requiring railroads to be assessed for taxation by the comptroller of the state, and that the same can be assessed for taxes only by the county tax assessor. For more than twelve years past the comptroller of the state has, under the act in question, or acts of similar import, assessed all railroads for taxation, including street railroads located in a single city and county. The taxes have always been paid to the state upon such street railroads, upon such assessments, without objection; the legislature with knowledge of such practice has several times repealed the statute containing such provision, and passed other acts containing similar provisions; thousands of dollars having been collected under such assessments, and no objection made, and no attack upon the validity of the same. *Held*, that such practical construction of the act by an executive department of the government is a matter of which the court can take judicial notice, and that under the circumstances stated the greatest deference and respect should be paid to the same, and that the same should not be interfered with.

5. **The courts cannot enjoin an officer of the state** from the collection of the state's taxes merely because they think he might adopt a mode which would be fairer and more equitable, if the mode he is pursuing is authorized by the statute. It is only when the tax is illegal, or is being illegally collected, that an injunction should be granted.

6. **The state's lien for taxes, having attached by the assessment of the property,** cannot be devested by a subsequent judicial sale in a proceeding in which the state is not a party, even though the decree under which the sale was made directs that the property be sold free from all liens and incumbrances. In such a case the lien continues until the taxes are paid, and a bill of complaint not alleging a payment or a tender of the taxes is demurrable.

7. **Private parties have no right,** in proceedings in which the state is not a party by consent, to have a decree entered which will devest it of its statutory tax lien upon the property involved in the suit, and force it to collect its taxes in some other manner than that prescribed by the statute. No court has jurisdiction or authority to enter a decree to such effect. The state, by its legislature, has ample power to choose its own method of collecting its taxes, and when the method chosen violates no constitutional provision no court can require it to adopt any other method.

(October 18, 1895.)

APPEAL by defendant from a decree of the Circuit Court for Hillsborough County in favor of plaintiff in an action brought to enjoin the sale of defendant's railway for taxes. *Reversed.*

The facts are stated in the opinion.

Messrs. **William B. Lamar,** *Atty-Gen.*, and **W. A. Carter,** *State's Atty.*, for appellant.

Mr. **P. O. Knight,** for appellee:

Where property is in the hands of a receiver it is entitled to the absolute protection of the court, and the receiver cannot be disturbed in that possession, even by the state, by virtue of its sovereign power, for nonpayment of taxes, and the only way in which the state can collect its taxes is by petition to the court asking that the receiver be instructed to pay its taxes.

Ex parte Tyler, Petitioner, 149 U. S. 164, 37 L. ed. 689.

When controversy arises as to the legality of the tax claimed, there ought to be no serious difficulty in adjusting such controversy upon proper suggestion. The usual course pursued in such cases is by intervention *pro interesse suo*, as in the instance of sequestration.

2 Dan. Ch. Pl. & Pr. 4th ed. 1057, 1744; *Savannah* v. *Jesup*, 106 U. S. 563, 27 L. ed. 276.

If the taxes are found valid, they must be paid; if invalid the court will so declare, subject to the review of the appellate tribunals.

Prince George County Comrs. v. *Clarke*, 86 Md. 206; *Greeley* v. *Providence Sav. Bank*, 98 Mo. 458; *Central Trust Co.* v. *New York City & N. R. Co.* 1 L. R. A. 260, 110 N. Y. 250; *Yuba County* v. *Adams*, 7 Cal. 37; *Georgia* v. *Atlantic & G. R. Co.* 3 Woods, C. C. 434; *Western U. Teleg. Co.* v. *Atlantic & P. Teleg. Co.* 7 Biss. 367; *Covell* v. *Heyman*, 111 U. S. 176, 28 L. ed. 390; *King* v. *Wooten*, 2 U. S. App. 651, 54 Fed. Rep. 612; High, Receivers,

*Headnotes by LIDDON, J.

NOTE.—For injunction against taxes, see *note* to Odlin v. Woodruff (Fla.) 23 L. R. A. 699.

For illustrations of the fact that street railways are not railroads within some other statutory provisions, see Montgomery v. Philadelphia City Pass. R. Co. (Pa.) 9 L. R. A. 369; Byrne v. Kansas City, Ft. S. & M. R. Co. (C. C. App. 8th C.) 24 L. R. A. 698.

See also 30 L. R. A. 626.

3d ed. § 189; *Ellis* v. *Vernon Ice, Light & Water Co.* 86 Tex. 109.

A purchaser at a judicial sale is entitled to look to the judgment or decree for the measure of his rights, and need look no further. It is his contract with the court and should not be changed.

Central Trust Co. of New York v. *Wabash, St. L. & P. R. Co.* 30 Fed. Rep. 882; Booth, Street Railways, § 271.

The difference between street railroads and railroads for general traffic is well understood. The difference consists in their use, and not in their motive power. A railroad the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public is not excluded from the use of any part of the streets as a public way; which runs at a moderate rate of speed, compared to the speed of traffic railroads; which carries no freight, but only passengers from one part of a thickly populated district to another, in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at the street crossings to receive and discharge its passengers,—is a street railroad whether the cars are propelled by animal or mechanical power.

Williams v. *City Electric Street R. Co.* 41 Fed. Rep. 556; *Newell* v. *Minneapolis, L. & M. R. Co.* 35 Minn. 112, 59 Am. Rep. 303.

Liddon, J., delivered the opinion of the court:

The appellee, who was complainant in the court below, brought its bill of complaint to enjoin the appellant (defendant below) from selling a certain line of street railroad for the payment of certain state and county taxes. The property in question is an electric street railroad located upon certain streets of the city of Tampa, and wholly situated within the county of Hillsborough. The taxes sought to be collected are for the year 1893, and have not been paid. The property was levied upon and a sale thereof advertised. A demurrer to the bill of complaint, for general want of equity, and upon other grounds, was overruled, and a temporary injunction granted, restraining the sale of the property. The appeal is taken from these orders.

Without attempting to give, even in a digested form, the allegations of the bill of complaint, it is sufficient to say that two principal grounds are set forth why the proceedings to sell the property should be enjoined. Inverting the order in which they are stated in the bill of complaint, these reasons, briefly stated, are as follows: 1. That the assessment of the property by the comptroller, under the statute regulating the assessment of railroads, was null and void, and that the same should have been assessed by the county tax assessor under the general statutes for the assessment of real and personal property. 2. That the property, after assessment, passed out of the hands of the parties owning it at the time of such assessment, and was sold at a judicial sale, in proceedings to which the state was not a party; that the order under which such sale was made directed "that the same be sold free from any mortgages, judgments, mechanics', laborers', materialmen's, and other liens or incumbrances of any kind whatsoever, and that all parties consented thereto." That the property sold for a large sum of money, which was paid into the registry of the court, where it still remained. That such sale was confirmed and a deed made to the purchaser, conveying the property to him in fee simple, free from all liens and incumbrances. That the complainant is now the owner of the property. That the property was sold *pendente lite*, and that it was the intention of said sale that the money for which said property should be sold should be brought into court and should represent the property, and that any liens and incumbrances whatever existing against the same should be paid out of said fund, and that said property should be sold free from any and all liens and incumbrances whatever. Wherefore it is claimed that the property should not be held liable for the taxes, but that the same should be paid out of the funds in the registry of the court.

Under the first objection, that the assessment of the property by the comptroller, under the statute regulating the assessment of railroads, was illegal and void, it is urged that a street railway extending over the streets of a single city, and wholly located within the limits of a single county, is not a railroad within the meaning of the word as used in the statute. If a street railroad is not a railroad in contemplation of the statute, the assessment is illegal, but if it is such a railroad, the assessment is legal and proper. The question presented requires an examination of the statute. Sections 48, 49, chapter 4115, Laws of Florida, Acts 1893. The 48th section of the Act provides, among other things, in substance, that certain officers of a railroad company, or the "receiver of any railroad, whose track or road-bed, or any part thereof, is in this state," shall annually make a return to the comptroller of the state under oath, showing the total length and value of such road, including branches, sidetracks, lots, parts of lots, terminal facilities, etc., in this state; the total length and value thereof in each county, city, or incorporated town, and the number and value of all locomotives, engines, cars, etc. If such return is not made, or the same when made is not satisfactory to the comptroller, then he, with the assistance and advice of the attorney-general and treasurer of the state, have the power to assess the property from the best information obtainable, specifying the values in each county. The value of the rolling stock is apportioned to each county *pro rata*, the length of the track, branches and sidetracks in the same, and the respective county assessors and the authorities of cities and towns notified accordingly; and upon the valuation thus apportioned the taxes shall be assessed as upon the property of individuals. The 49th section, among other things, provides that the comptroller, upon certificates showing default of payment in any county, shall have the power to issue a warrant directed to the sheriff of any county where such defaulting railroad, or any part thereof, is located, by which such sheriff is

authorized to sell the entire road, or such part thereof as may be necessary, to pay such taxes and the costs and expenses of sale. The proceeds of such sale are to be divided among the counties where such taxes are due. The legislature, especially in the 48th section, seems to assume that every railroad in this state extends into and is situated in more than one county thereof. The 49th section, however, implies that a railroad may be wholly located in one county. It is plain that the purpose and intention of the act, are that railroads, and the rolling stock and appurtenances used in the operation of the same, should be taxed as an entirety; that where it extends into different counties, there should be uniformity in the valuation and assessment thereof in such counties, and that the value of the rolling stock, which is almost constantly in motion, going from one county to another, should be properly taxed without double taxation or any dispute as to the situs of such property for taxation. The word "railroad," in its broadest signification, would undoubtedly include a street railroad; all railroads being more or less alike in their physical construction. It is said that when the word "railroad" is used in a statute, there is no definite rule of construction as to whether it includes street railways. It may or may not include them. The meaning of the word must depend upon the context, and the general intent of the statute in which it is used. 19 Am. & Eng. Encyclop. Law, p. 788; *Chicago* v. *Evans*, 24 Ill. 52. The word "railroad," as generally used, applies to commercial railways engaged in the transportation of freight and passengers for long distances, and, as a general rule, having steam engines for motive power, and making stops at regular stations for the receipt and discharge of freight and passengers. The term "street railroad" applies only to such roads, the rails of which are laid to conform to the grade and surface of the street, and which is otherwise constructed so that the public are not excluded from the street as a public highway, which runs at a moderate rate of speed compared with a commercial railroad, which carries no freight, but only passengers from one part of a thickly populated district to another in a town or city and its suburbs, and for that purpose runs its cars at short intervals, stopping at street crossings or other places irregularly, as the convenience of its patrons may require, for the receipt and discharge of its passengers. The cars upon such roads may be propelled by animal or mechanical power. *Williams* v. *City Electric Street R. Co.* 41 Fed. Rep. 556. No case has been pointed out to us by counsel, and after much investigation we have been unable to find a judicial definition of the word "railroad," occurring in any taxing statute similar to ours, as to whether or not it would include a street railroad.

Besides the judicial construction of statutes, there is known to the law another kind of construction. This kind of construction has especial application to statutes made for the regulation of the different departments of the government, and is the interpretation put upon them by the actual administration of them by such departments. As distinguished from judicial construction, it is called the practical construction of statutes. While not of such high authority as a judicial interpretation of the act, such practical construction of the class of statutes referred to, when not in conflict with the constitution or the plain intent of the act, is of great persuasive force and efficacy. The system of taxation of railroads by the state comptroller, in the manner prescribed by the sections of the act hereinbefore referred to, has existed in this state ever since the enactment of chapter 1713, Laws of Florida, Acts of 1869. Slight modifications have at various times been made by different legislatures, but the general system has remained unchanged. It is well known to all who are familiar with the history of the state, and with the method of taxation prevailing therein, that for at least twelve years past the comptroller of the state, under and by authority of the statute under which the action sought to be enjoined is taken, or statutes of similar import, has assessed all railroads, including street railroads, as being included within the general term "railroads," as the same is used in the law. Street railroads located in a single city have been no exception to the general rule. The taxes for many years have been paid to the state under such assessments without objection; thousands of dollars have been so collected, and no attack whatever has been made upon the validity of such assessment. This long prevailing construction is a matter of which the court can take judicial notice. *Westbrook* v. *Miller*, 56 Mich. 148. It is notorious that acts for the general collection of revenue are generally formulated by, or under the advice of, the comptroller of the state. Since this method of assessing taxes upon street railroads has been in force, the legislature has several times, repealing former acts, re-enacted the same provisions, thus giving legislative sanction to the practical construction of the act by the department of the state government which has charge of the assessment and collection of taxes from railroads. "Where there are different statutes *in pari materia* made at different times, or even expired and not referring to each other, they shall be taken and construed as one system and as explanatory of each other." *Lord* Mansfield, in *Rex* v. *Loxdale*, 1 Burr. 445, cited in *Doggett* v. *Walter*, 15 Fla. text 867. The question of the force and authority of a practical construction of a statute has often been passed upon by the courts. In *Westbrook* v. *Miller*, *supra*, an opinion delivered by *Judge* Cooley, it is said: "The construction placed by an executive department upon a statute affecting the performance of its duties is not lightly to be questioned, especially when it has become established by long usage and relates to matters of form only. But practical construction must not be allowed to defeat the manifest purpose of the statute." Further it is said in the same case: "When, in the performance of executive duties, it becomes necessary for the executive department to construe a statute, great deference is always due to its judgment; and the obligation is increased by the lapse of

considerable time before its acts are called in question." Many authorities from the Supreme Court of the United States and from subordinate courts of the federal system are cited to sustain the propositions announced.

The question involved is the method of taxation of the property in dispute. No question is raised of the liability of the property to taxation. No showing is made of any double assessment, or unequal, unjust, or oppressive taxation. The taxes on the property for the year for which the assessment was made have not been paid. The property has not discharged the burden of taxation which rests upon it as upon all other property in the state not specially exempted by law. In such a case we think the greatest deference and respect should be paid by this court to the long-prevailing construction of the statute made by the executive department of the state government, and we will not interfere with the same. We do not rest our conclusion upon the case of *Westbrook* v. *Miller*, *supra*, but have examined many other authorities upon the subject which practically unanimously agree with that case. Among other cases of similar import are, *Johnson* v. *Ballou*, 28 Mich. 379; *Malonny* v. *Mahar*, 1 Mich. 26; *Solomon* v. *Cartersville Comrs.* 41 Ga. 157; *Scanlan* v. *Childs*, 33 Wis. 663; *Union Ins. Co.* v. *Hoge*, 62 U. S. 21 How. 35, 16 L. ed. 61; *Chesnut* v. *Shane*, 16 Ohio, 599, 47 Am. Dec. 387; *Wetmore* v. *State*, 55 Ala. 198; *Edwards* v. *Darby*, 25 U. S. 12 Wheat. 206, 6 L. ed. 603; *United States* v. *Gilmore*, 75 U. S. 8 Wall. 330, 19 L. ed. 396; *Kiersted* v. *State*, 1 Gill & J. 231; *Brown* v. *United States*, 113 U. S. 568, 28 L. ed. 1079, and various authorities cited therein; *United States* v. *Lytle*, 5 McLean, 9; *People* v. *Dayton*, 55 N. Y. 367; *Wright* v. *Forrestal*, 65 Wis. 341; Sutherland, Stat. Constr. §§ 309 *et seq.* In the case cited from 41 Georgia the court said, adopting the practical construction of a statute made by the executive department of the government, that if the matter were before them as an original, independent proposition, they would be inclined to hold differently, but yielded their own views to such practical construction.

This brings us to the consideration of the second ground upon which it was claimed that the injunction should issue. The allegation of the bill of complaint as to the manner of complainant's acquiring a title to the property is very vague and indefinite, there being no direct statement whatever that it acquired title through the judicial sale mentioned. We will consider the case, however, as if the bill contained such an averment. The property had been assessed for its taxes, and a lien for the same thereby acquired by the state before the judicial sale. The contention, however, is that although the state was not a party to the proceedings in which the sale was made, yet by virtue of the direction of the court that the property be sold free from any mortgages, judgments, mechanics', laborers', materialmen's, or other liens and incumbrances whatever, such sale devested the state's lien, so that it cannot subject the property itself to the payment of the taxes assessed against it, but must intervene by petition in the suit, and obtain payment of the taxes from the funds in the registry of the court. It is contended that it would be inequitable for the state to now subject the property in the hands of complainant to the payment of taxes, when there is a fund in court from which such payment can be secured. Disposing of this minor contention first, we will quote the language of the supreme court of Rhode Island in the case of *People's Sav. Bank* v. *Tripp*, 13 R. I. 621, text 622: "The complainant contends that the collector ought to be enjoined because the levy and sale are inequitable and unfair. But in our opinion we cannot enjoin him merely because we think he might adopt a mode which would be fairer and more equitable, if the mode he is pursuing is authorized by the statute. The collector is an official of the government, and has as much right as the court to use his own judgment in the execution of his office. It is only when the tax is illegal, or is being illegally collected, that the courts, which go furthest, grant an injunction." Other remarks applicable to this point will be used in disposing of other questions in the further course of this opinion.

The state's lien for taxes having attached by the assessment of the property, could not be devested by a subsequent judicial sale, even though the decree under which the sale was made should have directed that the property should be sold free from all incumbrances. The case of *Mesker* v. *Koch*, 76 Ind. 68, is very much like the present one. The complainants, in the case cited, alleged that they had purchased the property at a judicial sale. The firm against whom the property was assessed had gone into bankruptcy; that the taxes claimed were set forth in the bankruptcy schedule of indebtedness; that the same was a preferred claim, and that funds to pay the same had been in the hands of the assignee in bankruptcy, which fact was known to the treasurer. A demurrer to the bill was sustained. The court, affirming the decision, quoting *Stokes* v. *State*, 46 Ga. 412, 12 Am. Rep. 588, held "that the state can enforce the payment of its taxes by a sale of the property upon which they are a lien, though the owner has been adjudged a bankrupt, and the assignee has sold the property to a third party. . . . The state has the right to follow the property into whosesoever hands found. . . . The bankrupt law does not attempt to deprive a state of this power. True, it makes provision for the payment of the state taxes, if the state chooses to come into the bankrupt court and claim them, but she cannot be compelled to come in. Hence, the assignee, by sale of a bankrupt's property, cannot devest the right of the state to enforce the payment of her taxes on the property, wherever it may be found." In the case of *Stokes* v. *State*, *supra*, the property had been sold under an order directing that the same be sold free from incumbrances. The trial court instructed the jury as follows: "That if it appears that the tax was assessed upon this land for the year 1868, as the property of Hunt and Bryan.

then the bankrupt court had no power to devest the lien of the taxes on the land in favor of the state, and that no sale or order of said court could interfere with the right of the state to collect said tax, and that said land, in whosever's hands it might be, was still liable for the tax." This charge was affirmed as a correct statement of the law by the appellate court. The principle stated in the cases quoted from are upheld by various authorities, among which are Black on Tax Titles, § 187; *Freeman* v. *Atlanta*, 66 Ga. 617; *Atlanta & R. Air-Line R. Co.* v. *State*, 63 Ga. 483; *Osterberg* v. *Union Trust Co. of New York*, 93 U. S. 424, 23 L. ed. 964; *Isaacs* v. *Decker*, 41 Ind. 410; *Bodertha* v. *Spencer*, 40 Ind. 353.

The sale under the decree of the court in the present case did not devest the state's lien for taxes. A proper interpretation of the decree of the court does not show that it intended to devest the state of its tax lien, even if it had the power so to do. Several classes of liens and incumbrances are expressly mentioned in the decree. The lien for taxes is not so mentioned. We need not invoke the doctrine of *expressio unius exclusio alterius est*, to show that a tax lien was not included in the decree, for it is well settled that such a lien does not stand upon the footing of an ordinary lien, and is not displaced by a sale under a pre-existing judgment or decree, unless so directed by statute. The lien continues until the taxes are paid, and the bill is demurrable unless it allege a payment or a tender of the taxes. Besides authorities above cited, see *Binard* v. *Nordyke*, 76 Ind. 180; *Iler* v. *Colson*, 8 Neb. 331.

In reference to the contention that the state ought to intervene by petition in the suit pending in the court below, and collect its taxes from the money the proceeds of the property in the registry of the court, the undoubted weight of authority is, that while the state might so intervene if it chose, it cannot be compelled to do so. Private parties have no right, in proceedings in which the state is not a party by consent, to have a decree entered which will devest it of its statutory tax lien upon the property involved in the suit and force it to collect its taxes in some other manner than that prescribed by the statute. No court has jurisdiction or authority to enter a decree having such effect. The state by its legislature has ample power to choose its own method of collecting its taxes. When the method chosen violates no constitutional provision, no court can require it to adopt any other method. To compel it to intervene in litigation to become a party to suits between private individuals or corporations, would impair the functions of the state government, would involve expense of court costs and counsel fees, delay and inconvenience in the collection of the public revenues. In this way taxes might be lost, the collection of them endangered, and the costs of collection would certainly be swelled by the fees and expenses of litigation. *Annely* v. *DeSaussure*, 12 S. C. 488, text 511; *Smith* v. *Gatewood*, 3 S. C. N. S. 333.

The counsel for appellee relies with much confidence upon the case of *Ex parte Tyler*, *Petitioner*, 149 U. S. 164, 37 L. ed. 689, and upon cases cited by the court in said opinion. What we have said disposes of the case before us, but in view of the earnestness with which the cases mentioned have been pressed upon our attention, we deem it not inappropriate to refer briefly to them. We cannot enter into any critical analysis of each case because such a course would extend this opinion to undue length. The case of *Ex parte Tyler*, *Petitioner*, was a habeas corpus proceeding to relieve from punishment for contempt a South Carolina sheriff who had levied a tax execution or warrant upon property in the hands of a receiver appointed by a United States court. An injunction had been previously issued against the levy, and the taxes sought to be enforced had been held illegal by the court. The supreme court denied the writ of habeas corpus upon the ground that the property in question was *in custodia legis*, and that the duty of the court to protect it from all interference extended to the levy of a tax warrant. Without expressing any assent to or dissent from the doctrine announced, it is sufficient to say that the facts of this case are entirely different from the *Tyler Case*. The property here levied upon is not in the custody of the court. It has been sold under order of court to private parties, and is in their exclusive ownership and possession. There is no ground for the contention in the present proceeding of an interference with the property in the possession of a receiver, an officer of the court. The money (the proceeds of the sale of the property) may be considered as *in custodia legis*, but the property itself is free and discharged from the care and custody of the court.

In the case of *Central Trust Co.* v. *New York City & N. R. Co.*, 110 N. Y. 250, 1 L. R. A. 260, the converse of the proposition contended for by appellee was asserted. There the state intervened and sought to enforce the payment of taxes of a railroad that had gone into the hands of a receiver from funds in his hands arising from the operation of the road. The statute pointed out a different remedy, and it was claimed that the statutory remedy should have been pursued. The court held that the state was not confined to the statutory remedy, but that the court might order the taxes paid upon the petition of intervention.

Several cases cited by appellee show that where the proceeds of property subject to payment of taxes has come into the custody of a court, such court might, upon the intervention of the state, direct the taxes paid by the receiver or officer holding such funds. But none of them hold that the state, in a case where the property has been sold and discharged from the custody of the court, is compelled to seek payment of its taxes from the proceeds of the property in the custody of the court. On the contrary, one of the cases cited by appellee (*Savannah* v. *Jesup*, 106 U. S. 563, 27 L. ed. 276) shows that the course pursued by the state in the present instance is a correct one. In that case the court said: "If the city had a valid claim for taxes, . . . two courses were open to it,—to postpone action under its executions

until the proceedings in the circuit court of the United States were concluded, and its possession of the property, by receivers, had ended; or, with leave of court, to file a petition *pro interesse suo*, submitting its claim for judicial determination. It adopted the latter course." It is useless to further cite or analyze the cases in appellee's brief. The most that can be claimed for any of them is that they forbid an interference by virtue of a tax warrant with property actually in the custody of the court. None of them are authority for the proposition that a tax warrant cannot be levied upon property which has been discharged from such custody. The doctrine is laid down in High on Receivers, section 602, that real estate which has been held by a receiver, where the title did not vest in him, after the termination of the possession of the receiver is subject to the lien of a judgment and execution against it the same as if there had never been any receivership. If this is true of the lien of an ordinary judgment, the reason is much stronger for applying it to the lien of the state for taxes, which is the highest of all liens.

The decrees appealed from are reversed, with directions to the court below to enter an order dissolving the temporary injunction granted in the cause, sustaining the demurrer, and dismissing the bill of complaint. The order dismissing the bill of complaint not to be entered if complainant desires to make a further case by amendment. In such event the usual course will be taken.

CALIFORNIA SUPREME COURT.

W. G. SKINNER, *Appt.*,
v.
City of SANTA ROSA *et al.*, *Respts.*

(.....Cal.....)

1. A provision for the payment semi-annually of interest on municipal bonds at a certain per cent is unlawful, where the notice of election, which the law requires to state the rate of interest, names such per cent payable annually.

2. The terms and conditions of municipal bonds, which the statute requires to be stated in a notice of election, including those as to rate of interest and the tax levy required for

NOTE.—*Special contracts and obligations to make payment in gold or silver.*

I. *Before legal tender act.*
II. *Application of legal tender act to specific contracts for coin.*
 a. *Decisions before Bronson v. Rodes.*
 1. *Denying effect to such contracts.*
 2. *Supporting such contracts.*
 3. *In equity cases.*
 4. *Effect of state statutes.*
 b. *Doctrine of Bronson v. Rodes and later cases.*
 1. *Federal cases.*
 2. *State decisions generally.*
 3. *Alternative provisions; coin or equivalent.*
 4. *Municipal and state contracts.*
III. *Implied contracts or obligations imposed by law.*
 a. *In general.*
 b. *Bailment and conversion of coin.*
 c. *Bank deposits.*
 d. *Accounting for trust.*
 e. *Other actions for damages.*

I. *Before legal tender act.*

An agreement to pay a certain sum in specie at a future date in consideration of a loan of paper money was sustained in Brachan v. Griffin, 3 Call (Va.) 375 (1803), in a suit in equity for relief against the contract in which an injunction that had been granted was dissolved and the bill dismissed.

An early Kentucky statute, providing that when a note was made payable "in gold or silver" the judgment should specify that fact, was enforced in Webb v. Moore, 4 T. B. Mon. 433 (1827), and it was held that a note calling for dollars "in specie" came within the statute.

But without referring to such statute as controlling or existing, the effect of the words "in gold and silver" in a note calling for a specified amount in dollars and cents is also considered in Hart v Blynn, 8 Dana, 191 (1839), in which it is said that such a note is for the direct payment of money, and cannot be discharged, or imply an undertaking to pay, in bullion, bars of gold and silver, or old silver teapots, spoons, and rings, and that if such had been the intention the amount would not have been measured by dollars and cents, but by ounces and pounds.

In case of a due bill for $895 in dimes on demand, it was said that the fact that it was payable in dimes was perfectly immaterial, as it might be discharged by the payment of eagles, dollars, or dimes. Atchafalaya R. & Bkg. Co. Comrs. v. Bean, 8 Rob. (La.) 414 (1843). But this seems to involve merely the denomination of the money, and not the kind of it.

II. *Application of legal tender act to specific contracts for coin.*

a. *Decisions before Bronson v. Rodes.*

1. *Denying effect to such contracts.*

The leading case on the subject of specific agreements to pay an obligation in gold or silver is that of Bronson v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 (1869), reversing 34 N. Y. 649 (1866), in which it was decided that a bond to pay a certain sum in gold and silver coin lawful money of the United States, with interest also in coin, was payable only in coined money.

Some of the state courts, before this decision, construed the legal tender act to cover agreements which specifically called for payment in gold and silver, as well as other contracts which did not specify the medium of payment further than to name the number of dollars and cents that should be paid. These, although they may be regarded as now only of historical value, are here compiled to show the whole course of decisions on the subject. It will be seen, from subsequent portions of this note, that some of these decisions have been expressly overruled by later decisions of the same court.

Thus, in Illinois, it was decided in Whetstone v. Colley, 36 Ill. 396 (1865), in an action on a promissory note, that a contract for the payment of money specifically in gold could be discharged by the payment of the same sum in legal tender notes, and

See also 32 L. R. A. 479; 33 L. R. A. 673; 34 L. R. A. 541; 39 L. R. A. 444; 40 L. R. A. 302, 666.

payment thereof, must substantially follow those stated in such notice.

3. Municipal bonds cannot be made payable "in gold coin of the United States of America of the present standard of weight and fineness," where a statute provides that such bonds shall be payable "in gold coin or lawful money of the United States."

(June 22, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for Sonoma County affirming the validity of certain bonds proposed to be issued by the city of Santa Rosa. *Reversed.*

The facts are stated in the opinion.

Mr. **W. F. Russell** for appellant.

Messrs. **Rodgers & Paterson**, with *Messrs.* **A. B. Ware** and **C. S. Farquar**, *amici curiæ*, in support of the appeal, in connection with an affidavit and petition filed by H. W. Byington:

Ordinance 153 is invalid.

Placerville v. *Wilcox*, 35 Cal. 21; 2 Dill. Mun. Corp. 3d ed. § 818; *Merriam* v. *Moody*, 25 Iowa, 163.

The gold bonds should not issue.

The decision of the proper officials that the consent of the taxpayer was duly obtained, expressed in the recitals of the bonds, is conclusive, and an innocent purchaser may rely upon the recitals without looking further.

Venice v. *Murdock*, 92 U.S. 494, 23 L. ed. 583.

The law, as construed by the highest court of the state, at the time of the issue of the bonds, enters into and forms a part of the contract between the corporation and the bond holder.

Gelpcke v. *Dubuque*, 68 U. S. 1 Wall. 175, 17 L. ed. 520; *Kenosha* v. *Lamson*, 76 U. S. 9 Wall. 477, 19 L. ed. 725; *Elmwood* v. *Marcy*, 92 U. S. 289, 23 L. ed. 710.

Messrs. **J. W. Goodwin** and **W. F. Cowan**, for respondents:

All power that a city has to issue bonds is derived from the legislature, and as the legislature has prescribed only certain things of which the council was to apprise the electors, it is to be presumed that the expression of these things was the exclusion of all others.

Sutherland, Stat. Constr. § 325; Dill. Mun. Corp. § 97; *Yesler* v. *Seattle*, 1 Wash. 308; *Derby* v. *Modesto*, 104 Cal. 515; *Enfield* v. *Jordan*, 119 U. S. 680, 30 L. ed. 528.

Where bonds are made payable elsewhere than at the city treasury, they are not thereby invalidated.

Johnson v. *Stark County*, 24 Ill. 75; *Sherlock* v. *Winnetka*, 68 Ill. 530.

Where a city is authorized to issue bonds bearing a certain rate of interest, and issues bonds at a greater rate, the bonds will be void only as to the excess.

Quincy v. *Warfield*, 25 Ill. 317, 79 Am. Dec.

that in a suit upon such a contract a judgment could only be rendered for the amount due upon its face, which judgment would of course be payable in such notes.

In Indiana, in Reynolds v. Bank of State, 13 Ind. 467 (published in 1862), the supreme court of Indiana held that, although the charter of the bank provided that it should "not at any time suspend or refuse payment in gold or silver of any of its notes, bills, or obligations," a tender, by the bank, of United States treasury notes in redemption of its own notes or bills, was valid under the legal tender act of congress. But the court rendered this decision in deference to the action of the federal government and contrary to its own opinion, saying that as its decision was that of a *nisi prius* court, which must be reviewed by the federal court, it had better err in acquiescing in than by declaring null the acts of congress. It does not appear from this case that the notes or bills of the bank expressly provided for payment in coin, but the charter of the bank, if construed as a part of the contract, would make the case substantially the same as if a provision for payment in gold or silver was included in the notes and bills themselves.

A promissory note to pay $500 "in gold" is held in Thayer v. Hedges, 23 Ind. 141 (1864), to require a judgment merely for $500 and interest, and not for the value of $500 of gold coin.

The decision in Thayer v. Hedges is followed in Brown v. Welch, 26 Ind. 116 (1866), denying recovery for more than the nominal amount of payment on a contract calling for gold, or, if paid in paper, the amount necessary to purchase gold.

In Iowa a note payable in "United States gold," made before the passage of the legal tender act, was held in Warnibold v. Schlicting, 16 Iowa, 244 (1864), to be merely a promise to pay money, and to be payable in any medium or currency declared by law to be a legal tender.

This case was followed by the same court in Troutman v. Gowing, 16 Iowa, 415 (1864), in a suit for the specific performance of a bond for the conveyance of land.

In Kentucky a note for a specified number of dollars, made in 1866, which includes the clause "this money is to be paid in gold or silver," is construed in Johnson v. Vickers, 1 Duv. 266 (1864), to have the same effect as if this clause was omitted, and to be enforceable only for the specified number of dollars, without any provision for payment in gold and silver. This decision was rendered without considering the effect upon the case of the legal tender act, and was based on the construction of the contract alone, and it made no reference to the case of Webb v. Moore, 4 T. B. Mon. 483 (1827), or to the early Kentucky statute therein referred to, recognizing the validity of a provision that a note should be payable "in gold or silver."

A note to pay a specified sum in gold is regarded as simply an undertaking to pay that sum in money, and nothing more, in the Kentucky case of Riley v. Sharp, 1 Bush, 348 (1866), and therefore no damages were allowed for failure to pay the debt in gold on account of the difference that had arisen between the values of gold and the legal tender notes.

Thus, it was held in Galliano v. Pierre, 18 La. Ann. 10, 89 Am. Dec. 643 (1866), that a charter-party calling for payment in gold could not be enforced in that particular, but that only the amount specified in lawful money could be recovered. This decision was followed in Olanyer v. Blanchard, 18 La. Ann. 616 (1866), in case of a contract to pay francs or "their equivalent in gold currency of the United States."

In Massachusetts, in Wood v. Bullens, 6 Allen, 516 (1863), a promissory note payable in specie is held to be payable in any money which is legal tender, although specie was at a premium when the note was made.

In Tufts v. Plymouth Gold Min. Co., 14 Allen, 407 (1867), it was held that the salary of an agent, expressly made payable in specie, entitled him only to a judgment for the amount due expressed in dollars, and the fact that it was declared to be payable in specie did not alter the amount due.

So in the Michigan case of Buchegger v. Shults, 13 Mich. 420 (1865), it was held, Judge Cooley writing

330; *Quincy* v. *Chapman*, 25 Ill. 322; *Byrne* v. *Luning Co.* 8 Cal. Dec. 189.

An innocent purchaser could not place himself behind this recital in the bond, because if there is a want of power in the municipality this is fatal, and no recital can make up for want of legislative sanction.

Dill. Mun. Corp. §§ 549–553.

The words "gold coin" are particular, whereas the words "lawful money of the United States" are general; and the rule is well established that particular expressions govern those which are general.

Sedgw. Stat. & Const. L. p. 360; Sutherland, Stat. Constr. § 268.

A city, given power to issue bonds payable in gold coin, can add to the bond a provision that it should be payable in money of the same weight and fineness as that for which the bond was sold.

Judson v. *Bessemer*, 4 L. R. A. 742, 87 Ala. 240; *University of Alabama Trustees* v. *Moody*, 62 Ala. 389; *Moore* v. *Walla Walla*, 60 Fed. Rep. 963.

Per Curiam:

The controversy herein was submitted to the superior court upon an agreed case, under the provisions of section 1138 of the Code of Civil Procedure. The city of Santa Rosa, desiring to construct a system of waterworks, the estimated cost of which is stated at $165,000, proposed to raise that sum by the sale of the bonds of the city, to be issued under the provisions of the Act of 1889 authorizing the incurring of indebtedness for the construction of waterworks and other improvements. Stat. 1889, p. 399, as amended by Stat. 1891, p. 94, and Stat. 1893, p. 61. The several ordinances required by the statute were duly passed and published, the notice of election given, and the election held, at which more than two thirds of the electors voting thereat voted in favor of the issuance of the bonds. Ordinance 148, calling said special election, described the bonds proposed to be issued as serials payable in gold coin or lawful money of the United States in the manner following: "One-fortieth part of the whole amount of said indebtedness so incurred, together with annual interest at the rate of 4 per cent per annum on all unpaid sums thereof, shall be payable each and every year on a day in each year, and at a place to be fixed by the common council of said city, until the whole amount of said indebtedness shall have been paid." The notice of election contained the foregoing description of the bonds proposed to be issued, and in addition declared as follows: "Each bond shall have attached thereto a separate coupon

the opinion, that a contract for "dollars" payable in gold may be discharged by payment of the specified amount in notes which congress has made legal tender.

So in Missouri a note for a certain amount "in gold" was held enforceable only for its face value payable in any lawful money, and a judgment including premium on gold was held invalid. Henderson v. McPike, 35 Mo. 255 (1864).

So a contract to be paid in the "current gold coin of the United States in full tale or count, without regard to any legal tender that may be established or declared by any law of congress," is held not to be enforceable, as the contract plainly regards gold as money, and as such no distinction can be made between gold and legal tender notes. Appel v. Woltmann, 38 Mo. 194 (1860).

So in Nevada the courts at first denied the force of a provision for gold coin in a contract made before the Nevada specific contract act, and denied the right to a judgment for gold coin. Burling v. Goodman, 1 Nev. 314 (1865).

As to the effect of state statutes authorizing judgment for coin when a contract specifically provides for such money, see *infra*, II., a, 4.

In New Hampshire, in a case of assumpsit for money had and received where gold coin had been pledged as security and afterwards went above par, it was held that the damages must be limited, in that form of action, to the amount of money received, excluding any premium on the gold; and that, even if the action was in the form of trover, only the value at the time of conversion could be allowed as damages. Frothingham v. Morse, 45 N. H. 545 (1864).

In New York, in an action on a foreign judgment which would be payable only in gold or currency equal to gold at the place where it was rendered, it was held in Swanson v. Cooke, 30 How. Pr. 385 (1866), that premium on gold could not be included; and, as the parties agreed that a pound sterling was equal to $4.84, the judgment was rendered on that basis without allowing any premium on gold.

A provision in a charter-party for payment of freight "in silver or gold dollars," if discharged in the United States, is held in Wilson v. Morgan, 30 How. Pr. 386, 4 Robt. 58, 1 Abb. N. S. 174 (1866), to be satisfied by tender of the freight in United States notes, where the contract was made after the passage of the legal tender act.

In Murray v. Gale, 5 Abb. Pr. N. S. 236, 52 Barb. 427 (1868), affirming Murray v. Harrison, 47 Barb. 484, 33 How. Pr. 90 (1867), it was held that the words "in specie, gold, and silver coin," in an obligation for the payment of a certain number of dollars, did not affect the right to discharge the contract by paying the stipulated amount in legal tender notes.

In Jones v. Smith, 48 Barb. 552 (1867), it was held to follow inevitably, from the legal tender act as interpreted by Rodes v. Bronson, 34 N. Y. 649 (1866), that a bill of exchange payable "in specie or its equivalent" could be paid in legal tender notes called greenbacks.

In Pennsylvania an express contract to pay "specie, current gold and silver money of the United States," was held to be within the operation of the legal tender act, in Shoenberger v. Watts, 5 Phila. 51 (1862).

So ground rent payable in "dollars, lawful silver money of the United States, each dollar weighing 16 penny weights, 6 grains, at least," is held redeemable in legal tender notes. Mervine v. Sailor, 52 Pa. 9 (1866).

The same is held in case of ground rent payable in "dollars, lawful money of the United States of America," in Shollenberger v. Brinton, 52 Pa. 9 (1866).

Likewise as to ground rent payable in "lawful money." Davis v. Burton, 52 Pa. 9 (1866).

So where the provision was for ground rent payable in "lawful money of the United States." Kroener v. Colhoun, 52 Pa. 9 (1866).

The same doctrine is held in case of a certificate of deposit of "gold payable . . . in like funds, with interest." Sandford v. Hays, 52 Pa. 9 (1866).

A note for a sum of money with the amount marked "specie" on the margin, which by bank-

for the interest for every year that such bond has to run, and each of said coupons shall be made therein payable, and shall be payable, at the office of the city treasurer of said city of Santa Rosa, on the first Monday of December of the year for the interest whereof it is given. Each of said bonds shall therein be made payable, and shall be payable, at the office of the city treasurer in the city of Santa Rosa on the first Monday in December of each year." The notice of election also stated the precise amount of the annual tax to be levied to pay the annual interest, and the series of bonds falling due each year, thus: "First year, $10,725; second year, $10,560;" and so on down to the "fortieth year, $4,290,—the aggregate tax levy for the forty years being $300,300." On June 6, 1893, after the result of the election was ascertained, the city council adopted ordinance No. 149, which recited all the previous proceedings and prescribed the form of the bonds, in exact conformity to all the particulars stated in the notice of election. The agreed statement then recites the steps taken to sell said bonds, and adds: "That neither said legislative body, nor said city, nor any of the officers, received any bids for said bonds in answer to the notice so published; that said legislative body used strenuous efforts to sell such bonds, but was unable to find any purchaser therefor." The statement then recites that, in view of the great needs of the city for a system of waterworks, the city council, on November 17, 1894, passed ordinance No. 156 rescinding ordinance 149, and changing the form of the bonds so as to make them payable at the Chemical National Bank in the city of New York "in gold coin of the United States of America of the present standard of weight and fineness," with interest at the rate of 4 per cent per annum, "payable semi-annually in like gold coin." The bonds in this new form were executed, and on December 1, 1894, Robert Effey (a party to this agreed case) bid for said bonds their face value in United States gold coin, and the city council, having accepted his bid, were about to deliver the bonds to him, when W. G. Skinner, describing himself as a taxpayer of said city, served upon the city council and each of the officers of said city a protest against the sale of said bonds to Effey, in which he notified them that he would use every lawful means to resist the collection of any tax levied for their payment, and that he would apply to the court for an injunction to restrain the collection of a tax levied on October 5, 1894, of 25 cents on each $100 to pay the principal and interest due on said bonds for the year 1894 and the interest due June 1, 1895. The city council thereupon passed a resolution

ers' rules meant silver or gold coin, was held in Graham v. Marshall, 52 Pa. 9 (1866), to be payable in legal tender notes, and the same decision was made in respect to a note for dollars "in gold," in Laughlin v. Harvey, 52 Pa. 9 (1866).

In Texas a note for "$600 in gold" was held, in Shaw v. Trunsler, 30 Tex. 390 (1867), to be dischargeable by the payment of legal tender notes, on the grounds that congress had made them legal currency, and that judgment on such a note could not be rendered for specie.

In the case of Flournoy v. Healy, 31 Tex. 590 (1869), where the contract provided for payment of $500 in specie, or $894 in United States currency, it was held that the word "specie," in a judgment for a certain number of dollars in specie, was surplusage, but nevertheless an error which might be struck out on appeal.

b. *Supporting such contracts.*

But some decisions of the state courts sustained these specific agreements to pay in coin before the Supreme Court of the United States decided to that effect.

Thus in Georgia a promise to pay a certain number of dollars "in American gold coin" is held, in Myers v. Kaufman, 37 Ga. 600, 95 Am. Dec. 367 (1868), to be enforceable, and not to be discharged by tender of the nominal value in depreciated legal tender notes. In the case of Taylor v. Green, passed upon at the same time and by the same opinion, a contract to pay "in gold" is likewise sustained.

In several states distinctions were made which have since become unimportant.

In the decision of the supreme court of Massachusetts in Essex Co. v. Pacific Mills, 14 Allen, 389 (1867), it was also held that a contract to deliver a certain number of ounces of silver of a certain fineness in payment of rent, or its equivalent in gold, was a contract for the delivery of a commodity the breach of which required a judgment for the market value thereof payable in United States notes.

A loan of $10,000 in gold, on an agreement to repay in gold, was held in Bank of Commonwealth v. Van Vleck, 49 Barb. 506 (1867), to be valid and subject to discharge only by payment in gold, and the legal tender act of congress is held to be inapplicable to such a contract. This case is distinguished from the decision by the court of appeals in Rodes v. Bronson, 34 N. Y. 649 (1866), on the ground that in the latter the obligation was to pay "in lawful money," and that the words "in gold and silver coin" were surplusage, while in the present case the agreement was not to pay an ordinary debt, but to return articles of the same kind that were received.

Upon a bill of exchange drawn in Prince Edward's Island, "payable in United States gold coin," the holder is held, in Bank of Prince Edward's Island v. Trumbull, 53 Barb. 459, 35 How. Pr. 8, 4 Abb. Pr. N. S. 82 (1868), to be entitled, in case of nonpayment, to an amount equal to the value of the gold in legal tender notes at the time of the trial.

A bond for payment "in gold coin of the United States" of a particular "fineness, notwithstanding any law which now may or hereafter shall make anything else a tender in payment of debts," was held in Dutton v. Pailaret, 52 Pa. 109, 91 Am. Dec. 135 (1866), to be enforceable according to its terms, and judgment rendered thereon for the value of the gold in currency. The court said: "When parties stipulate for specific chattels, and expressly exclude the legal tenders which government has prescribed, the bargain must be presumed to rest upon an adequate consideration, and neither legislative nor judicial power can pluck the fruits that belong to one of the parties for the mere purpose of giving them to the other." The court distinguished this case from Graham v. Marshall, 52 Pa. 9 (1866), on the ground that there the ordinary legal tenders of the country were stipulated for.

Ground rent payable in "21 Spanish coined fine silver pieces of 8¼ part of a piece of 8, each piece weighing 17 pennyweights and 6 grains, or so much lawful money of the said province of Pennsylvania as shall be sufficient to purchase or procure" the specified coin, is held, in Mather v. Kinike, 51 Pa.

directing the city attorney to take immediate steps to unite with such officers and persons as were interested in submitting an agreed case, "so as to obtain as soon as possible the judicial determination of said question, case, and controversy in and by the supreme court of this state."

The foregoing outline of the statement, as originally prepared, contains all of it that is material. It closed with the statement that "the foregoing is a full, true, and correct statement and case, containing all the facts upon which the controversy depends," and signed by counsel for the respective parties, and followed by the affidavit of Skinner to the effect that the controversy is real, and the proceedings in good faith.

The contention on Skinner's part, as appears in the agreed case, is: (1) That the city council have no power to issue the bonds in the form prescribed by ordinance 156. (2) That the city council had no power to levy the tax of 25 cents per $100 on October 5, 1894, the bonds then authorized under ordinance 149 not having been sold. (3) That ordinance 153, authorizing the city marshal to collect delinquent taxes by sale of the property, is invalid because in conflict with the city charter which makes it the duty of the city attorney to collect them by suit, the marshal having advertised his property for sale on December 17. Certain amendments were afterwards made to the statement, viz.: That the said tax levy of 25 cents, together with other city taxes levied for the current year, do not exceed 1 per cent of the assessed valuation, and are less than the limit fixed by law; that Skinner had tendered all other taxes; that there had been a sufficient amount of said 25-cent tax voluntarily paid into the city treasury to meet the semiannual interest accruing prior to the next annual tax levy; and "that at the time of the levy of said 25-cent tax an offer to purchase for the face value thereof, in United States gold coin, said bonds to be issued under ordinance No. 149, had been presented to said common council, which offer was thereafter withdrawn." Judgment was rendered that bonds issued under ordinance 156 would be valid, and also affirming the validity of said 25-cent tax, and from this judgment said Skinner appeals.

The question, "Are the bonds which the city council intended to issue valid in the form proposed?"—must be answered in the negative.

No question is made as to the regularity of the proceedings up to and including ordinance No. 149, nor that bonds issued under that ordinance and in the form therein prescribed would have been valid, but the bonds proposed to be issued under ordinance 156 do

425 (1866), to be a specific article called for by the covenant, and not to be payable in currency.

Ground rent, payable in "Spanish milled silver dollars which weigh 17 pennyweights and 6 grains at least," was held not legally represented by United States legal tender notes, but to be payable only in coin according to the contract. Christ Church Hospital v. Fuechsel, 54 Pa. 71 (1867). The court distinguished this case from that of Mervine v. Sailor and others, decided by the same court, in which the rent agreed upon, although specified as gold or silver, was further described as "lawful money," but this distinction was subsequently abandoned by the court, which was constrained by the decisions of the Supreme Court of the United States to sustain the stipulation in either form when coin was agreed upon. See also, as to effect of state statutes, *infra*, II.a, 4.

The supreme court of Nova Scotia also sustained such contracts, and held that on a lease of property in the British dominions, payable in "dollars and cents of United States currency," made before the passage of the legal tender act, payment could be made only in coin. Nova Scotia Teleg. Co. v. American Teleg. Co. 4 Am. L. Reg. N. S. 365 (1865).

3. In equity cases.

The power of equity to give effect to a specific provision for payment in coin, when this was not enforceable at law, was a question on which the courts were not agreed.

The power of equity to give effect to a specific provision in a contract for payment in gold is denied in Humphrey v. Clement, 44 Ill. 299 (1867), following Whetstone v. Colley, 26 Ill. 328 (1865) on the general doctrine that specific agreements for payment in gold are not valid.

In Howe v. Nickerson, 14 Allen, 400 (1867), it was held that a bill in equity would not lie to enforce specific performance of an award to pay a certain number of dollars in gold.

But, on the other hand, it was held in Kentucky that in an equity suit for specific enforcement of a contract, made in 1862, to pay the price of land in gold, where the difference between gold and legal tender notes was taken into account in fixing the price, the provision would be sustained. Hord v. Miller, 2 Duv. 103 (1865). The court allowed the debtor time to make the payment in gold with a warning that on default thereof the value of the gold would be estimated in paper currency and the amount adjudged against him enforced by sale of the land.

4. Effect of state statutes.

A specific contract law, providing that judgments may be made payable in coin in actions on contracts which specifically call for such money, is sustained by the supreme court of Nevada, and declared not to be repugnant to the legal tender act of congress, in Linn v. Minor, 4 Nev. 462 (1868). This case overrules several prior cases to the contrary, which were Milliken v. Sloat, 1 Nev. 573 (1865); Mitchell v. Bromberger, Id. 604; Fox v. Barstow, Id. 612.

Such a statute in California has been the subject of numerous decisions. That it does not conflict with the legal tender act of congress was decided in Carpentier v. Atherton, 25 Cal. 564 (1864), and its validity is assumed by the later cases.

That such a contract relates to actions or proceedings on the contract itself, and not to an order in supplementary proceedings for repayment by a borrower of gold from funds in court, is decided in Hathaway v. Brady, 26 Cal. 581 (1864), because this proceeding is not "an action" within the meaning of the statute.

That a specific contract act applies to contracts made before its passage, is decided in Otis v. Haseltine, 27 Cal. 80 (1864); Galland v. Lewis, 26 Cal. 68 (1864).

A tender of legal tender notes at par was held insufficient to discharge a note payable in coin, in the case of Vilhac v. Biven, 28 Cal. 410 (1865).

A purchaser of goods under an oral contract to pay for them in gold is enforceable under the California statute, where after the liability accrued and suit was commenced, a written contract was

not conform to the ordinance calling the election, nor to important particulars specified in the notice of election, and in one of these particulars they do not conform to the statute under which it is proposed to issue them.

The ordinance calling an election and the notice of election each provided that the bonds to be issued, if the qualified voters should authorize their issue, should bear interest at the rate of 4 per cent per annum, and the principal and interest should be payable "in gold coin or lawful money of the United States," and the notice of election specified, in addition, that the bonds, as well as the interest, should be payable at the city treasury. The statute under which said bonds were proposed to be issued is the Act approved March 19, 1889 (Stat. 1889, p. 399), and the amendments thereof hereafter noticed. By secion 2 of said Act, as amended in 1891 (Stat. 1891, p. 94), it is provided, among other things, as follows: "The ordinance calling such special election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvement, and that the bonds of the municipality shall issue for the payment of the cost of such improvement, as in such ordinance set forth, if the proposition be accepted by the qualified voters as hereinafter provided." Section 3 of said Act (Stat. 1889, p. 400) provides for the publication of said ordinance calling such election, and that after such publication there shall be published, not less than two weeks, "a notice of such special election, the purpose for which the indebtedness is to be incurred, the number and character of the bonds to be issued, the rate of interest to be paid, and the amount of the tax levy to be made for the payment thereof." By section 6 of said Act, as amended March 1, 1893 (Stat. 1893, p. 61), it is provided, among other things, that such bonds "shall be payable in gold coin or lawful money of the United States." Section 7 (Stat. 1889, p. 401) provides: "The legislative branch of any city, town, or municipal corporation issuing bonds under the authority of this act shall have the right to determine the rate of interest such bonds shall bear; provided, that in no case shall it exceed 7 per cent per annum, and to name the date and place where such bonds and interest shall be paid; provided, that the place of payment shall be either at the office of the treasurer of the municipality, or at some designated bank in San Francisco, Chicago, New York, or Boston. . . ."

From this review of the statute it will be seen that the rate of interest the bonds shall bear, and the amount of the tax levy to be

made to pay the gold. Meyer v. Kohn, 29 Cal. 278 (1865).

In an action on a judgment rendered prior to the specific contract act, judgment cannot be entered for gold coin. Reed v. Eldredge, 27 Cal. 346 (1865).

But where the complaint in an action on a judgment alleges that such judgment was rendered payable in coin, the new judgment thereon may be for coin. Wallace v. Eldredge, 27 Cal. 498 (1865).

As to action on judgment, see also *supra*, Swanson v. Cooke, 20 How. Pr. 385 (1860).

As to pleading under such statute, see *note* to Belford v. Woodward (Ill.) *post*, —.

b. *Doctrine of Bronson v. Rodes and later cases*

1. *Federal cases.*

The case of Bronson v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 (1869), has already been referred to as the leading case on the subject. It established the doctrine that express provisions for payment in gold or silver were valid, and enforceable as if they were for payment in wheat or any other valuable thing.

The case of Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 (1869), applied the doctrine of Bronson v. Rodes to a contract made in 1791 for rent payable in English golden guineas weighing 5 pennyweights and 6 grains at 35 shillings each, and other gold and silver at the present weights, and rates established by act of assembly. The court regarded the contract as obviously intended to require payment of the rent in gold and silver for the purpose of avoiding fluctuations to which currency was subject.

Chief Justice Chase said, in Butler v. Horwitz, *supra*: "A contract to pay a certain sum in gold and silver coin is, in substance and legal effect, a contract to deliver a certain weight of gold and silver of a certain fineness, to be ascertained by count." The chief justice also said: "It was not necessary in the case of Bronson v. Rodes, nor is it necessary now, to decide the question, whether the acts making United States notes legal tender are warranted by the constitution. We express no opinion on that point."

The case of Bronson v. Kimpton, 75 U. S. 8 Wall. 444, 19 L. ed. 438 (1869), followed Bronson v. Rodes and Butler v. Horwitz, and held that a mortgage to secure a bond for the payment of a certain sum in gold and silver coin was not satisfied by a tender of United States notes equal in nominal amount to the sum due on the bond and mortgage.

On a contract to pay yearly rent of 4 ounces, 3 pennyweights, and 12 grains of pure gold in coined money, judgment should be entered for coined dollars and parts of dollars, instead of treasury notes equivalent in market value to the value in coined money of the stipulated weight of pure gold. Dewing v. Sears, 78 U. S. 11 Wall. 379, 20 L. ed. 189 (1871), reversing the decision of the Massachusetts supreme court in Sears v. Dewing, 14 Allen, 413 (1867), which held that the gold should be delivered by the lessee as a commodity, and that in default thereof judgment should be rendered for the market value thereof, estimated in United States treasury notes.

Freight money for transportation from Whampoa to New York, fixed at 163 pounds, 4 shillings, 4 pence sterling, was held to be payable in United States gold and silver dollars of equal value. Forbes v. Murray, 3 Ben. 498 (1869).

The validity of a note payable in coin was also sustained in *Re* Elder, 1 Sawy. 81, 3 Nat. Bankr. Reg. 678 (1870), in a case of bankruptcy, where it was held that it was properly proved against the bankrupt's estate according to its terms, although a new note for its equivalent in currency would not be invalid.

A note and mortgage calling for pounds sterling of Great Britain was held, in *Re* Surplus and Remnants of The Edith, 5 Ben. 446 (1871), to be payable only in coin.

An award by the attorney-general under act of congress, "payable in gold," was held in Tyers v. United States, 5 Ct. Cl. 509 (1869), to be payable in coin instead of currency. And where the claimant accepted depreciated currency under protest, declaring that he would take it only at its value in

made for the payment thereof, are expressly required to be stated in the "notice of election," while the place of payment and the kind of money in which they are to be paid are not. The ordinance calling the election and the notice of election fixed the rate of interest at 4 per cent, payable annually, while ordinance 156, under which the bonds in controversy are proposed to be issued, fixes the rate at 4 per cent, payable semiannually. It is contended by respondents, if we correctly understand them, that as section 7 of the Act above cited leaves the determination of the rate of interest to the common council, and as by section 6 it is provided that interest may be payable annually or semiannually, making the interest payable semiannually instead of annually is a "mere matter of detail, to be arranged between the buyer and the city, and, being confided to the discretion of the council, it was not within their domain to limit or circumscribe that discretion in any way, but that it was their duty to use their best judgment when they were called upon to act." That the payment of interest semiannually increases the rate is obvious. If it did not, purchasers would not be likely to insist upon it. It therefore becomes part of the rate, and, while the council are authorized to fix the rate, the rate of interest, as well as the main question of incurring the indebtedness for the purposes specified, is required to be submitted to the voters. The maximum rate authorized by the statute is the legal rate of interest allowed in this state, which is now 7 per cent. Putting an extreme case, it will not be contended that if the proposition submitted to the voters at such election specified the rate to be paid at 2 per cent, the common council might, in their discretion, issue bonds bearing 7 per cent. But if the common council can depart at all from the rate of interest submitted to the voters, no limit, save the rate fixed by the statute, can define their power. Counsel for respondent cite the case of *Yesler* v. *Seattle*, 1 Wash. 308, and quote four or five pages therefrom. In that case the ordinance of submission fixed the rate of interest at 5 per cent. So far as the rate of interest is concerned, that case is not in point, inasmuch as the statute there did not require the rate to be stated in the ordinance of submission or notice of election. In that case, however, other particulars not required to be stated in the ordinance of submission were specified, and some of them were conditions not named in the statute. As to these particulars, which were not required to be submitted to the voters, the case supports respondent's contention, and is in point so far as the place of payment is concerned. The

gold, and was permitted to take it without his agreement to accept in full, it was held not to preclude his claim for the balance.

But accepting other legal tender notes in lieu of gold on redemption of such notes, though under protest, where there was no deception, mistake, or undue advantage, was held in Savage v. United States, 92 U. S. 382, 23 L. ed. 660 (1876), to be a waiver of any right to payment in gold on the redemption.

By peculiar mistake the authors of some textbooks of the law have asserted that the decisions of the Supreme Court of the United States, sustaining and enforcing contracts for payment in specie or in coin, were overruled by the Legal Tender Cases, so called. This statement has been accepted and repeated by other persons. But it is utterly unjustifiable. The Legal Tender Case—Knox v. Lee, 79 U. S. 12 Wall. 457, 20 L.ed. 287 (1871)—which overruled Hepburn v. Griswold, 75 U. S. 8 Wall. 603, 19 L. ed. 513 (1870), deciding that the legal tender notes constituted lawful tender or payment in case of contract made before the passage of that statute as well as later contracts, did not so much as imply a doubt of the correctness of the previous decisions sustaining the validity of express contracts to pay in coin or specie. On the contrary, in a dissenting opinion *Mr. Justice* Clifford cites Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed 149 (1869), as deciding that, when the intent of the parties as to the medium of payment is clearly expressed in a contract, damages for the breach of it, whether made before or since the enactment of this law, may be properly assessed so as to give effect to that intent; and he adds: "No doubt is entertained that that rule is correct."

Not only was there an entire absence, in the opinions of the justices in the so-called Legal Tender Cases, of any intent to overrule Bronson v. Rodes, but that case was expressly followed and its doctrine reiterated after the legal tender act in Knox v. Lee, *supra*, was held constitutional as to ordinary contracts made before its passage.

Thus, in the year following, the case of Trebilcock v. Wilson, 79 U. S. 12 Wall. 687, 20 L. ed. 460 (1872), was decided, again sustaining the validity of a contract to pay "in specie," requiring it to be paid in gold or silver coin, and expressly declaring that the act of congress "was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie."

In the latest of the legal tender cases, Juillard v. Greenman, 110 U. S. 421, 28 L. ed. 204 (1884), in which it was decided that congress has constitutional power to make the treasury notes of the United States a legal tender in payment of private debts in time of peace as well as in time of war, the opinion of the court clearly implies that the statute does not apply where there is an express stipulation for payment in a particular kind of money. The summing up of the doctrine in the opinion is as follows: "A contract to pay a certain sum in money, without any stipulation as to the kind of money in which it shall be paid, may always be satisfied by payment of that sum in any currency which is lawful money at the place and time at which payment is to be made."

The truth is, every case decided by the Supreme Court of the United States, or in fact by any federal court, has recognised the validity of such contracts.

That a person, who has expressly undertaken to discharge his obligation by payment in gold or silver, will be held to his contract as specifically made, is also recognized to be the law in Maryland v. Baltimore & O. R. Co., 89 U. S. 22 Wall. 105, 22 L. ed. 713 (1874), but that case turned on the fact that there was no express undertaking to pay in coin, and that none could be implied, since the implication was not apparent upon the face of the contract.

2. *State decisions generally.*

Even after the decisions in Bronson v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 (1869); Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 (1869); and Trebilcock v. Wilson, 79 U. S. 12 Wall. 687, 20 L. ed. 460, (1872), but without mention of them, a promissory

argument upon which that decision rests is that the legislature delegated to the common council, the municipal legislature, with the assent of its constituents, the power to contract the indebtedness, "it being the sole judge of the proper method, whether by bonds or warrants or open account, confidence being reposed in the wisdom and honor of its members that they will act for the best interest of the community. Nor does the law permit the council of a city to delegate to the popular vote the determination of any matter before it, unless the right to so delegate it has been expressly conferred or enjoined by statute. . . . Therefore we conclude that the council could lawfully submit to vote only those matters directed to be submitted by its superior authority,—the legislature." We cannot assent to the conclusion reached by the learned justice who wrote the opinion, nor to the argument by which it is reached. The opinion concedes that under the constitution and laws of the state no indebtedness can be incurred beyond a certain limit, without authority expressed at an election duly held for that purpose; so that the real question to be determined is, Has that assent been given? It is quite true that in that case, as in this, particulars were inserted in the submission which the statute did not require to be submitted; but these particulars having been submitted, the vote authorizing the indebtedness to be incurred imports the particulars named as the conditions upon which that assent has been given, and hence no one can say that, without these favorable conditions, the result of the election would have authorized the indebtedness to be incurred. The rate of interest, the place of payment, the kind of money in which payment must be made, would influence any business man in determining whether he should incur a personal debt, and must do so when he is called upon as a voter to determine whether he will favor his municipality's incurring a debt, for the payment of which, in common with others, his property is liable to taxation. He might readily consent, upon very favorable terms being offered or proposed, and strenuously oppose it if the terms were unfavorable or were uncertain. If the terms and conditions submitted to the electors may be departed from, and such election held to authorize the issuance of bonds under other terms and conditions, a door will be opened authorizing the common council to submit a proposition so favorable as to secure beyond question a favorable vote, and then change the conditions as to rate of interest and otherwise, even without any fraudulent purpose or intent, so that, if again submitted, an overwhelming defeat would result.

note made in 1866 payable "in gold" was given effect in the case of Munter v. Rogers, 50 Ala. 288 (1873), only as an obligation for the specified number of dollars in lawful money. This case follows the legal tender cases, Knox v. Lee, 79 U. S. 12 Wall. 457, 20 L. ed. 287 (1871), and Norwich & W. R. Co. v. Johnson, 82 U. S. 15 Wall. 195, 21 L. ed. 178 (1873), which decide only the question of the constitutionality of the legal tender act as to prior contracts in general, and do not touch the question of specific agreements to pay coin. It is quite plainly based on an inadvertent error of the court.

In Reinback v. Crabtree, 77 Ill. 182 (1875), it is said: "Neither the Supreme Court of the United States, nor this court, recognizes two legal standards of value. A dollar is a dollar, whether payable in gold or in national currency; and 10 per cent interest payable in gold may be lawfully paid, dollar for dollar, in any currency which the general government has declared to be a legal tender in the payment of debts." But this statement is made by way of recital, and the question was not before the court for decision.

All other decisions by state courts since the cases of Bronson v. Rodes, Butler v. Horwitz, and Trebilcock v. Wilson, *supra*, have recognized the doctrine of those cases, and sustained contracts for payment in coin when such cases were presented to them.

A contract to pay a certain number of dollars in gold is sustained as lawful and enforceable, in Hittson v. Davenport, 4 Colo. 169 (1878).

A note for a certain number of dollars, with a provision that at maturity it shall be paid in currency equivalent in value to the specified amount of currency at the date of the note, is sustained in Whitaker v. Dye, 56 Ga. 380 (1876). The court says, in dealing with it, the value of gold was involved to find out how much currency was due, but for that purpose only.

The case of McGoon v. Shirk, 54 Ill. 408, 5 Am. Rep. 122 (1870), decides that a promissory note payable in terms in American gold cannot be discharged by a tender of United States treasury notes, although the contract was made after the passage of the legal tender act. This decision is based on those in Bronson v. Rodes and Butler v. Horwitz, and declares that these overrule Hull v. Kohlsaat, 36 Ill. 130 (1864), Whetstone v. Colley, 36 Ill. 328 (1865), and Humphrey v. Clement, 44 Ill. 299 (1867), in which cases the supreme court of Illinois had decided that express provisions for payment in gold would not avail to prevent the discharge of the contract by a tender in legal tender notes.

That debts payable specifically in coin are not affected by the legal tender act was also expressly decided in Churchman v. Martin, 54 Ind. 380 (1876).

In Proctor v. Heaton, 114 Ind. 250 (1887), a deduction from the amount of a note was claimed, because, on a judgment of 1865 that a renewal note be made payable in gold coin, a new note in settlement of the dispute was made for "two and a half times the debt," but the decision of the court was chiefly based on the fact of long acquiescence in this settlement.

On foreclosure of a mortgage for $4,000 "in gold coin, or its equivalent value in current money," where the mortgagee sought to have money that had been paid into the custody of the clerk of the court applied on his mortgage debt as an allowance for improvements, and it did not appear in what kind of money it was paid to the clerk, it was held that this money would satisfy an equal number of dollars of the mortgage debt, but that the balance must be paid in gold coin. Stark v. Coffin, 105 Mass. 328 (1870).

That an express agreement to allow gold payments to be applied with 20 per cent premium is valid, was held in Wright v. Jacobs, 61 Mo. 19 (1875).

A draft for a certain number of gold dollars, drawn in Canada on a bank in New York, was held in Chrysler v. Renois, 43 N. Y. 209 (1870), to be negotiable, and the payment thereof enforceable according to its terms.

A contract to deliver "$10,000 current funds of the United States at 15 cents on the dollar, to be delivered in ten months from this date," is construed in Cooke v. Davis, 53 N. Y. 320 (1873), to be a con-

The logical inference from the case above cited is, however, that, as to all matters required to be submitted, such submission measures the authority of the common council. The case of *Moore* v. *Walla Walla*, 60 Fed. Rep. 961, so far as the above questions are concerned, follows the decisions of the state court, which are of binding force in the federal court, and is therefore not an independent authority, and lends no weight to *Yesler* v. *Seattle*, *supra*, which it cites. What has been said applies as well to the place of payment and the exact statement of the amount to be levied each year of the forty years, as to the interest, so far as its influence upon the vote is concerned.

Upon the question as to the change made in the kind of money in which the bonds and the interest thereon are to be paid, it should be observed that, prior to the amendment of March 1, 1893 (Stat. 1893, p. 61), the statute was silent as to the kind of money in which payment should be made, but that amendment requires that the bonds and interest "shall be payable in gold coin or lawful money of the United States." Several cases are cited by counsel for respondents to the effect that a grant of power to a municipal corporation to issue bonds, without limitation as to the kind of money in which they shall be payable, confers authority to make them payable "in gold coin of the United States, of the present standard weight and fineness." *Judson* v. *Bessemer*, 87 Ala. 240, 4 L. R. A. 742; *University of Alabama Trustees* v. *Moody*, 62 Ala. 389; *Moore* v. *Walla Walla*, 60 Fed. Rep. 961. Prior to the amendment of 1893, above stated, the power to make the bonds payable "in gold coin of the present standard of weight and fineness," or in any other kind of coin or currency, could not be controverted. There was no restriction. The power to determine that question was as ample as that of a natural person to stipulate in what his personal obligation should be paid. The amendment must therefore have been intended to restrict that power, and this was done by expressly stating the kind of money in which alone they "shall be" made payable. Whether the increased value of the bonds caused by the stipulation that they shall be paid in gold coin of the present standard of weight and fineness would equal or exceed any probable appreciation of gold, cannot control the express provision of the statute in that regard.

But it is contended that if the act gave the council no power to make the bonds payable in gold coin of the present weight and fine-

tract to pay $1,500 in coin for $10,000 in legal tender notes, and was held to be a valid and enforceable contract. The court said: "That the percentage agreed to be paid therefor by plaintiff was to be payable in coin, is as clear as if stated in those words." Therefore an action for damages was held to be sustained for breach of the agreement to deliver such currency when its value had increased.

A covenant, in a lease, to pay a yearly rent of 6 pence sterling for every acre of land "in current money of the state of New York equal in value to money of Great Britain," is held in Stranaghan v. Youmans, 65 Barb. 392 (1872), to be a contract for payment in coined money of the United States, and if payment is made in legal tender notes enough of them must be paid to equal in value the stipulated amount of coin.

A promissory note "to be paid in gold or silver" is held, in Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 69 (1871), to be enforceable according to its terms.

On a claim for payment of wages in gold coin, it was held that there was no valid contract therefor in the absence of a writing. Davis v. Mason, 3 Or. 154 (1869).

The validity of such contracts is sustained in Walkup v. Houston, 65 N. C. 501 (1871), in case of a note payable in specie.

Ground rent payable in "gold or silver money of the United States" is held in Rankin v. Demott, 61 Pa. 263 (1869), following Bronson v. Rodes and Butler v. Horwitz, to be payable only in coin or its equivalent. The court remarks that the distinction taken in prior cases between contracts for a specific article and for lawful money is now unimportant.

But when a bond for a certain amount in "lawful silver money of the United States" was secured by a recorded mortgage reciting that it was payable "in lawful money," it was held insufficient to make the mortgage a lien for anything but payment in lawful money. Eagle Beneficial Soc's App. 75 Pa. 226 (1874).

On notes payable in specie without any specification of the kind of specie, a judgment including the premium on silver coin in addition to the nominal amount of the debt was held invalid on the ground that a part of the debt was not payable in specie, and it was said that the exact amount of the part that was due in specie could not be ascertained from the record. Townsend v. Jennison, 44 Vt. 315 (1872).

Payments in currency on a contract specifically calling for payment in gold, if this provision is not waived, are to be computed at the value of such currency estimated in gold at the date of payment. Hittson v. Davenport, 4 Colo. 169 (1878); Walkup v. Houston, 65 N. C. 501 (1871).

Also among the cases which have followed the doctrine of Bronson v. Rodes, and recognize the validity of express contracts to pay obligations in coin, although in some of them the questions have been chiefly as to the form of judgment or procedure, are the following: Sheehy v. Chalmers (Cal.) 36 Pac. Rep. 514 (1894); Watson v. San Francisco & H. B. R. Co. 50 Cal. 523 (1875); Warren v. Franklin Ins. Co. 104 Mass. 521 (1870); Foster v. Atlantic & P. R. Co. 1 Mo. App. 390 (1876); Smith v. Peabody (N. Y. Super. Ct.) (1870), cited in Ransford v. Marvin, 8 Abb. Pr. N. S. 432 (1870),—on the same question; Lillie v. Sherman, 39 How. Pr. 287 (1870); McCalla v. Ely, 64 Pa. 254 (1870); Calhoun v. Pace, 37 Tex. 454 (1872); Smith v. Wood, 37 Tex. 616 (1872). These cases are not more particularly set out in this *note*, but are further considered in a *note* to Belford v. Woodward (Ill.) *post*, —, on the subject of judgments and procedure in cases of this sort.

The validity of such contracts is also assumed in a decision that an agreement by one employing another to procure a loan, to give notes and mortgage "in your usual form," does not make a provision of the latter's customary form for payment in gold a part of the contract, so as to exclude evidence that the employer had previously by like application procured loans upon notes and mortgages without such provision, as the expression as to form does not bind him to make payment upon unusual terms and conditions printed in such forms. Peabody v. Dewey, 37 L. R. A. 322, 153 Ill. 657 (1894).

ness, that clause would be void, and that in such case it would be the duty of the treasurer in paying the bonds to pay them in the kind of money required by the statute, and cites the case of *Enfield* v. *Jordan*, 119 U. S. 680, 30 L. ed. 528. That case, however, related to the place of payment. The court said: "The objection that the bonds are illegally made payable at a bank in Chicago does not invalidate them. The agreement to pay at that place is void, but the balance of the coupons and bonds are not rendered invalid for that reason. In paying the interest, the treasurer should not obey that agreement in the bond, but pay it at the village treasury." But this does not, nor do any of the cases cited by counsel, meet the question here presented as it is presented. The question in that case, as in the cases cited from the supreme court of Illinois, arose between holders of municipal bonds and the municipality that had issued them and received the value of them. Two of these cases related to the place of payment, and two involved bonds purporting to bear a rate of interest greater than that authorized by the statute, and in these cases it was held that the holder could recover the authorized rate, and no more. The question whether the bonds, if issued, would be void in the hands of a holder for value, is not the test or measure of the right of a taxpayer of the city to enjoin the issue of them. It may well be that the purchaser is bound to know whether the rate of interest specified in the bond is within the limit fixed by the statute; but the rate being within the statutory limit, it does not follow that he may not rely upon the recitals in the bond as to the regularity of the proceedings by the municipality in fixing the rate specified, or that such recitals will not, in favor of the bondholder for value, bind the corporation. The distinction between the question now under consideration and that which would arise in an action by a bona fide holder of one of these bonds is noticed by the Supreme Court of the United States in the leading case of *Knox County Comrs.* v. *Aspinwall*, 62 U. S. 21 How. 539, 16 L. ed. 208, where, after quoting the recitals of the bond showing that it was issued by authority, it was said: "The purchaser was not bound to look further for evidence of a compliance with the conditions to the grant of the power;" and afterwards further said: "We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previously to the execution of the power, and before the rights and interests of third parties had attached; but, after the au-

A South Dakota statute to the effect that it shall be unlawful to require payment in any certain kind of money (S. Dak. Laws 1891, chap. 85) is recited in Jones on Mortgages, § 901; but this does not seem to have been passed upon in any adjudicated case.

3. *Alternative provisions: coin or equivalent.*

Some lack of agreement appears as to the effect of a provision for payment in coin, when there is added a provision for "its equivalent," or some provision as to the damages in case of default in the payment agreed. But the logic of the decisions sustaining agreements for payment in gold or silver requires that the effect intended by the parties should be given also to these alternative provisions, and such is the decision in nearly all the cases. Yet there are two decisions to the contrary.

On a contract made before the California specific contract act to pay gold "or the equivalent of such gold coin if paid in legal currency," it was held in Reese v. Stearns, 29 Cal. 273 (1865), that it was not enforceable in gold, but was a contract to pay a given number of dollars in any kind of lawful money.

So, on a note payable in gold coin or the equivalent thereof in legal tender notes, it was held in Killough v. Alford, 32 Tex. 457, 5 Am. Rep. 249 (1870), to require payment only in lawful money, as the legal tender notes are by law the equivalent of the gold. The court cited Bronson v. Rodes, but considered that it was not in conflict with that decision.

But, on the contrary, a note for "gold coin or its equivalent in United States legal tender notes" was held to be valid according to its terms, in Wells, F. & Co. v. Van Sickle, 6 Nev. 45 (1870), disapproving Reese v. Stearns, 29 Cal. 273 (1865). The court in this case declared that no specific contract act was necessary to give effect to such a contract.

So a note payable "in gold, or its equivalent in the currency of the country" is held to be valid and enforceable, in Mitchell v. Henderson, 63 N. C. 643 (1869).

And the same court which decided Reese v. Stearns, *supra*, held that a note promising to pay a certain sum in gold coin of the standard value of 1860, and in default thereof to pay as damages such further amount as may be equal to the difference in value in the San Francisco market between such gold coin and paper money, is within the California Specific Contract Act of 1863, and enforceable according to its terms. Lane v. Gluckauf, 28 Cal. 288, 87 Am. Dec. 124 (1865).

Also an agreement in notes secured by mortgage to pay a certain number of dollars in "United States gold and silver coin," and, in case of failure, to pay a further sum or percentage as damages equal to the actual difference in value in the San Francisco market between such coin and United States treasury notes or other legal tender, is sustained in Burnett v. Stearns, 33 Cal. 468 (1867) following Lane v. Gluckauf, holding that such a contract was within the provisions of the California specific contract act. The alternative provision for damages in case of default is held not to defeat the specific agreement to pay in gold.

The right to judgment payable in gold coin on a note specifically providing for payment in such coin is not defeated by an unperformed condition in the note, that, if paid at maturity or before suit thereon, it shall be payable in any lawful money of the United States. Churchman v. Martin, 54 Ind. 380 (1876).

The validity of a contract to pay in gold or its equivalent is also sustained in Atkinson v. Lanier 69 Ga. 460 (1882), and Bond v. Greenwald, 4 Heisk. 453 (1871), in which cases the question of difficulty was as to the amount of recovery when the relative value of gold and legal tender notes changed between the time when the obligation matured and the time of judgment. On this question, see the *note* to Belford v. Woodward (Ill.) *post*, —, as to judgments and procedure in case of liability to pay in coin.

The alteration of a note payable in gold or its equivalent without the knowledge or consent of a surety on the note is held to release the surety, in Church v. Howard, 17 Hun, 5 (1879).

So it was a material alteration to add the words "in gold coin." Wells v. Wilson, 3 Or. 308 (1869).

thority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question." *Knox County Comrs.* v. *Aspinwall, supra,* has been cited and followed in a very large number of cases in that and other courts, and, as applied to the facts of that case, has not been doubted. In a later case, *Coloma* v. *Eaves,* 92 U. S. 484, 23 L. ed. 579, the rule was more cautiously stated, thus: "Where legislative authority has been given

4. Municipal and state contracts.

Power to make city bonds payable in gold coin is held, in Judson v. Bessemer, 4 L. R. A. 742, 87 Ala. 240 (1889), to be included in the express and general power to a city to issue negotiable bonds, as this implies power to make them payable in any constitutional legal tender.

Following this case it is held in Parson v. Louisville Sinking Fund Comrs., 16 Ky. L. Rep. 856 (1895), that municipal bonds are not invalid because made payable, both principal and interest, in gold coin of the United States, without any especial provision for it in the act authorizing their issue.

Likewise it is held that under municipal authority to sell negotiable bonds for public improvements, they could be made payable "in gold coin of the present standard weight and fineness." Moore v. Walla Walla, 60 Fed. Rep. 961 (1894). Although a possible advance in the value of gold coin would make the city debt exceed the legal limit, while the city received its income in money of less value.

That city bonds may lawfully provide for interest payable in gold was also decided in Pollard v. Pleasant Hill, 3 Dill. 195 (1874).

But, on the other hand, bonds payable "in gold coin" issued by a levee district in Mississippi under a statute authorizing the issuance of bonds for $1,000,000, were held in Woodruff v. State, 66 Miss. 298 (1889), to be void for want of authority to issue them. It is said that the legislative use of the term "money" must have meant that legal tender which constituted the basis of the general business of the country.

Even if a provision in a contract for a street improvement requiring the work to be paid for in gold coin is not authorized by statute, it will be ineffectual, and therefore will not invalidate the contract in other respects. N. P. Perine Contracting & Paving Co. v. Quackenbush, 104 Cal. 684 (1894). See also the main case of SKINNER v. SANTA ROSA.

State railroad bonds payable on their face in gold and silver were sustained according to their terms, in State v. Hays, 50 Mo. 34, 11 Am. Rep. 402 (1872). It was decided that, although the legislature had directed payment in legal tender notes, they were not sufficient to discharge the obligation. Yet as the state officers had been ordered by the statute to pay in these notes, the court would not issue a mandamus to pay in coin.

Where the governor was authorized to indorse railroad bonds on behalf of the state, which should bear 8 per cent interest, it was held he might lawfully indorse such bonds bearing 8 per cent interest in gold. Young v. Montgomery & E. R. Co. 2 Woods, C. C. 606 (1875).

In a suit to enjoin the issue of municipal bonds "payable in gold or lawful money of the United States at the option of the holder," it was said in Heilbron v. Cuthbert (Ga.) 23 S. E. Rep. 206 (1895). "No reason now occurs to us, nor was any stated, why it would be unlawful" to make the proposed bonds thus payable.

III. *Implied contracts or obligations imposed by law.*

a. In general.

The fact that payment in coin was the only mode of payment recognized by law at the time a contract was made, and therefore the parties doubtless expected payment in coin to be made, is not sufficient to raise an implication that payment in coin is intended, whereby such payment may be enforced after the passage of the legal tender act, if nothing in the language of the contract indicates an intent that payment shall be made in coin. Maryland v. Baltimore & O. R. Co. 89 U. S. 23 Wall. 105, 22 L. ed. 713 (1874).

The fact that the consideration of a promissory note was a loan of gold and silver does not make it payable in coin unless expressly stipulated to that effect. Curiac v. Abadie, 25 Cal. 502 (1864).

The words "American gold," following the words "value received" in a promissory note, were held in Hull v. Kohlsaat, 36 Ill. 130 (1864), to be insufficient to show an intent to pay in gold.

In an action for services rendered without any agreement as to the price, the court refused to instruct the jury that they must not take into account the difference in value of currency. Spencer v. Prindle, 28 Cal. 276 (1865).

A policy of a mutual insurance company, providing for payment of losses as well as premiums in gold, does not imply a provision for payment of dividends declared upon such premiums in gold. Luling v. Atlantic Mut. Ins. Co. 51 N. Y. 207 (1872), affirming 50 Barb. 520, 30 How. Pr. 60.

Judgment for duties on imports should be for gold. Sun Cheong-Kee v. United States, 70 U. S. 3 Wall. 320, 18 L. ed. 72 (1866).

So a state statute requiring taxes to be paid in gold or silver coin is not affected by the legal tender act, as such taxes are not debts within the meaning of that act. Lane County v. Oregon, 74 U. S. 7 Wall. 71, 19 L. ed. 101 (1868).

b. Bailment and conversion of coin.

The right to allowance for the depreciation of gold which was wrongfully withheld by a person holding it as security, was allowed in Gibson v. Groner, 63 N. C. 10 (1868).

That a judgment for gold may properly be rendered in an action for conversion of gold, was held in Phillips v. Speyers, 49 N. Y. 658 (1872).

In an action against an agent for the value of gold, where defendant admitted that the gold had been changed into currency, it was held that judgment might be rendered for the amount in currency which would be equivalent to the value of the gold. Greentree v. Rosenstock, 61 N. Y. 583 (1875). The court says, in respect to the validity of a stipulation for payment in gold coin, that the rule is perfectly well established in the case of express contracts, and that the principle extends to such cases as the present, where the right to recover is based on an implied contract.

In an action against an agent who had collected in gold certain premiums due to an insurance company, it was held in Independent Ins. Co. v. Thomas, 104 Mass. 192 (1870), that a specific judgment should be rendered for gold coin and execution should be issued accordingly, on the authority of Bronson v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 (1869), and Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 (1869).

In an action by a guest against a hotel keeper, for the theft of gold coin from a satchel which was delivered to the clerk of the hotel for safe keeping, it was held that the guest was entitled to a judgment for the same amount in gold coin, and not for the currency value of the gold. Kellogg v. Sweeney, 46 N. Y. 291 (1871), 17 Am. Rep. 333.

to a municipality or to its officers to subscribe for the stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent has been complied with, their recital that it has been,

In an action against a common carrier for failing to deliver a canvass bag containing 90 double eagles of the coinage of the United States, which it received for transportation, it was held in Cushing v. Wells, F. & Co., 98 Mass. 550 (1868), that the recovery should be for $1,800 with 30 per cent additional as the amount of the premium, since, under the legal tender act, treasury notes could be tendered in payment of the judgment.

c. *Bank deposits.*

Since a deposit of gold in a bank without express agreement creates merely the relation of debtor and creditor, the depositor may be repaid in legal tender notes, unless there was an express agreement to the contrary. Gumbel v. Abrams, 20 La. Ann. 568, 96 Am. Dec. 426 (1868); Chesapeake Bank v. Swain, 29 Md. 483 (1868); Thompson v. Riggs, 72 U. S. 5 Wall. 663, 18 L. ed. 704 (1867).

And marking the character of the deposit as coin on the margin of bank books against the entry of deposit is insufficient to establish an express contract to repay the deposit in specie, where there is no proof that this was the purpose of the marking. Thompson v. Riggs, *supra*.

But evidence of usage may show a contract to repay a gold deposit in gold, though a usage of only two or three banks in a city is not enough. Chesapeake Bank v. Swain, *supra*.

In the absence of a binding contract for the payment of gold coin by a bank in which such coin was deposited, it was held that the depositor was entitled only to lawful money. Davis v. Mason, 3 Or. 154 (1869).

Also that the custom of a single bank to repay gold deposits in gold was not sufficient to make it a part of the contract of deposit.

In Kupfer v. Bank of Galena, 34 Ill. 328, 85 Am. Dec. 309 (1864), it was held that a deposit in American gold in a bank which had a rule that a depositor could only draw for currency if he deposited currency, constituted a special contract for the return of coin or its equivalent in value, and therefore the deposit could not be applied to checks for currency without allowing for the premium.

Where coin has been deposited as a specific article, and not merely as money, its value is open to inquiry, and may be ascertained by evidence, and allowance therefor in full be made in a judgment for converting it. Bank of State v. Burton, 27 Ind. 426 (1867).

d. *Accounting for trust.*

An administrator is chargeable with the premium on gold or gold notes which he actually received, in addition to the nominal or face value of the paper. Cunningham v. Cauthen, 37 S. C. 123 (1893).

But an administrator, who charges himself with cotton at a specified price in gold when gold is at a premium, will not be required to add any per cent on account of premiums received upon the notes taken for such cotton, in an accounting when gold is at par. Cunningham v. Cauthen (S. C.) 21 S. E. Rep. 800 (1895).

An executor is chargeable only with the amount of gold purchased at a premium to satisfy a debt which was due in gold, when at the time of his settlement gold was not at a premium. *Re* Sanderson, 74 Cal. 199 (1887).

So it is held in *Re* Shipman, 82 Hun, 108 (1894), that an executor cannot be charged, upon final settlement, with a premium upon gold at the time it came into his possession. This decision was rendered when gold was not at a premium.

In Halliburton v. Carson, 100 N. C. 110 (1888), it is held that an executor is justified in paying a judgment on a bond payable "in United States coin," where it included the amount of premium on the gold, without further resisting the recovery, since this method of conversion of the debt in gold into another form was in accordance with the decision of that court in Robeson v. Brown, 68 N. C. 554 (1869), although it is said to be at variance with that of the Supreme Court of the United States, as shown by Bronson v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 (1869), and Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 (1869).

A judgment for gold cannot be rendered on the bond of a surety which does not expressly provide for payment in that kind of money. Fox v. Minor, 32 Cal. 120, 91 Am. Dec. 566 (1867).

e. *Other actions for damages.*

Where a person was required to discharge his debt in gold before he could rightfully take possession of certain property, but, without making such payment, wrongfully took possession, it was held that the damages must be the amount of his obligation in gold or its equivalent in currency. Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740 (1878).

In a collision case the value of goods shipped from Canada, when estimated in Canadian currency, was held recoverable according to the value of such currency in legal tender notes. The Telegraph v. Gordon, 81 U. S. 14 Wall. 258, 20 L. ed. 807 (1872).

Judgments for trespass cannot be made payable in coin. Livingston v. Morgan, 53 Cal. 23 (1878).

Neither can a judgment for slander. Chamberlin v. Vance, 51 Cal. 75 (1875).

So, a judgment for costs cannot be made payable in gold coin in an action of forcible entry and detainer. More v. Del Valle, 28 Cal. 170 (1865).

In estimating damages on dissolving an injunction, the difference between gold and legal tender notes cannot be considered. Riddlesbarger v. McDaniel, 38 Mo. 138 (1866).

Questions as to the form of judgment to be followed when a valid obligation to pay in coin exists, and also as to the procedure to be followed in such cases, are considered in a *note* to Belford v. Woodward (Ill.) *post*, ——.

The consideration of all the authorities on the subject shows that since the case of Bronson v. Rodes, the validity of specific agreements to pay obligations in coin has been established, although one decision in Alabama in 1873, assuming to follow the so-called Legal Tender Cases, and ignoring the decision in Bronson v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 (1869), and others following it adopted the contrary doctrine. All other decisions of both federal and state courts rendered since those of Bronson v. Rodes, *supra*, Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 (1869), and Tebilcock v. Wilson, 79 U. S. 12 Wall. 687, 20 L. ed. 460 (1872), sustain the validity of such contracts.

That the decisions of the Supreme Court of the United States effectually overrule as well as disapprove the decisions of the state courts to the contrary, is shown by Tebilcock v. Wilson, *supra*, in which it was expressly decided that a decision by a state court sustaining a tender of legal tender notes on a contract providing for payment in specie was reviewable by the Supreme Court of the United States. Such decision by a state court was in fact reviewed and reversed in that case. The result is to establish the doctrine of the United States Supreme Court as the law in every state, whatever contrary state decisions may have been rendered. R. A. R.

made in the bonds issued by them and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality; for the recital is itself a decision of the fact by the appointed tribunal."

Respondents' argument that the bonds would be valid, at least to the extent of 4 per cent annual interest, payable "in gold coin or lawful money of the United States," at the office of the city treasurer, is a virtual concession that the bonds in the form prescribed in ordinance 156 are not authorized by the proceedings, and if that be true, they should not be issued; while, if they would be valid in the hands of a bona fide holder so that he could compel payment in gold coin of the present standard of weight and fineness, with interest in like coin payable semiannually, in the city of New York, a burden would be imposed upon the taxpayers to which they have not assented, and they should not be allowed to issue. Counsel refer to the case of the controversy between *Derby* and *Modesto*, 104 Cal. 515. In that case the bonds had been sold, the purchase money paid into the treasury, and the controversy arose more than a year afterwards. One point then urged by the taxpayer was that the bonds provided for the payment of semiannual interest. In reply to this contention it was said: "The statute provides that the trustees shall have the right to determine the rate of interest such bonds shall bear, provided that in no case shall it exceed 7 per centum per annum. The time at which the interest is to be paid, whether annually or semiannually, affects the rate of interest, and is within the power conferred upon the board by the statute, and the rate being within the statutory limit, the bonds are valid as against this objection." The facts should have been more fully stated upon that point. The ordinance of submission and the notice of election both provided for semiannual interest, precisely as stated in the bonds, but the statute at that time was silent as to the payment of interest semiannually, and the contention was that in providing for semiannual interest the statute had not been followed. In the case at bar, where the question arises before the bonds have been delivered, we hold that the city has no power to issue them in a form which does not substantially comply with the terms stated in the ordinance of submission and notice of election, and with the statute under which the proceedings were had.

It becomes unnecessary to discuss the remaining questions, brought up by the record. For the reasons given in the foregoing opinion, it is ordered that *so much of the judgment appealed from as affirms the validity of the bonds proposed to be issued under said ordinance 156 be reversed*, and cause remanded, with directions to enter a judgment enjoining the sale and delivery thereof.

RHODE ISLAND SUPREME COURT.

Edward E. CADY
v.
Charles P. SCHULTZ.

(.....R. I.....)

1. **There can be no property right** in the shape, size, color, or arrangement of signs without regard to the letters which they bear.

2. **No exclusive right can be acquired** to the use of the words "scientific dentistry at moderate prices."

3. **Names which are not trade-marks strictly speaking may be protected** as property if they are taken by others with fraudulent intention, and are so used as to be likely to effect such intention.

4. **The use of the words "U. S. Dental Rooms" and of the letters "U. S."** upon the windows of a dental office may be enjoined at the suit of one who has adopted them as a trade-name, against another who by their use is plainly attempting to convey the idea that he is carrying on a branch of the former's business, and so profit from his advertising and business reputation.

(September 19, 1895.)

BILL for an injunction to restrain defendant from the alleged wrongful use of plaintiff's trade-name. *Injunction granted.*

The facts are stated in the opinion.

Mr. **Charles A. Aldrich,** for complainant:

The complainant by extensive advertising has built up a large and lucrative business under the name of the U. S. Dental Association, which is merely a fancy designation for his business. Where a geographical or other name is used simply as a fancy designation, its use will be protected.

Barrows v. *Knight*, 6 R. I. 434, 78 Am. Dec. 452; *Sanders* v. *Utt*, 16 Mo. App. 322; *American Solid Leather Button Co.* v. *Anthony*, 15 R. I. 338; *Colton* v. *Deane*, 7 N. Y. S. R. 78; *Lauferty* v. *Wheeler*, 11 Abb. N. C. 220.

If the trade-name is designated or calculated to mislead, its use will be restrained.

In this case it is submitted that the respondent's signs and trade-name were so calculated and designed. The coloring and lettering on the signs is practically the same. The use of the letters "U. S." across the windows shows clearly an intent to deceive.

Barrows v. *Knight*, *American Solid Leather Button Co.* v. *Anthony*, and *Colton* v. *Deane*, *supra*; *Colton* v. *Thomas*, 2 Brewst. (Pa.) 308; *Sanders* v. *Utt*, *supra*; *Alexander* v. *Morse*, 14 R. I. 153, 51 Am. Rep. 369; *Sanders* v. *Jacob*, 20 Mo. App. 98; *Davis* v. *Kendall*, 2 R. I. 566.

Mr. **Isaac H. Southwick, Jr.,** for respondent.

Douglas, *J.*, delivered the opinion of the court:

The complainant is engaged in the practice

NOTE.—On the question, What may be appropriated as trade-marks? see *notes* to Alff v. Radam (Tex.) 9 L. R. A. 145; Rumford Chemical Works v. Muth (C. C. D. Md.) 1 L. R. A. 44; Prince Mfg. Co. v. Prince's Metallic Paint Co. (N. Y.) 17 L. R. A. 129.

of dentistry, having offices and rooms for that purpose in Providence, in this state, in Baltimore, Md., and in Washington, in the District of Columbia, and employing assistants to attend to patients at these places. In the prosecution of this business for four years or more he has used as a trade-name the words "United States Dental Association," and has displayed this name, or abbreviations of it, upon signs affixed to his place of business in Providence, and in advertisements and cards widely distributed through Providence, Pawtucket, and Attleboro, so that the business of which he is proprietor has become known in the city of Providence and in the adjacent city of Pawtucket by that name. The defendant, who is likewise a dentist, formerly had an office in Providence, near the complainant's rooms, and about December 1, 1894, removed to Pawtucket, and opened an office there, and displayed upon his windows and upon the walls of the building signs in close imitation in size, shape, and color of those used by the complainant. We have no doubt from the evidence that these imitations were intentional. Indeed, this is not denied, and we can conceive of no motive for the use of these similar signs except to take advantage of the advertisements of the complainant, and to induce customers to patronize the defendant. The complainant presents instances where customers were actually misled by them; and the defendant says that people have come into his office supposing it to be controlled by the United States Dental Association, though he asserts that in all cases he has undeceived them. The complainant particularly urges that the use of the words "U. S. Dental Rooms," as displayed upon the defendant's signs, and the letters "U. S.," painted upon the defendant's windows in the same color, size, and shape as the same letters are shown upon the complainant's windows, is an illegal use of these words and letters, and the defendant should be restrained from so employing them. He also claims that he is the inventor of the phrase "Scientific dentistry at moderate prices," and that defendant cannot lawfully display this legend on his signs, and generally he asks that defendant may be enjoined from using similar signs to those he uses.

We are of the opinion that the complainant can have no property in the shape, size, color, or arrangement of signs, without regard to the letters which they bear; nor can he claim any exclusive use of the words, "Scientific dentistry at moderate prices." The characteristics of the signs do not differ from those which ordinarily appear on business signs placed as these are. The statement that a dentist does his work scientifically, and charges moderate prices for it, is one which any dentist may make and disseminate if he can do so truthfully. It ought not to be inapplicable equally to all members of the profession. Neither of these things tends to injure unlawfully the complainant's business. But we think the use of the words "U. S. Dental Rooms," and the use of the letters "U. S." upon the windows of defendant's office, is a plain attempt to convey the idea that the business carried on there is a branch of the complainant's business, and should be restrained. The argument of the defendant has been directed to the point that the name adopted by the plaintiff lacks the elements of a lawful trade-mark. It consists of a geographical name, coupled with a descriptive term of wide application, and no doubt the defendant is right in contending that such a name is objectionable if intended to be used as a trade-mark. It would be almost impossible to use the name of the United States within the limits of the country itself so as to devest it of territorial significance and make it a mere fancy mark. But the argument ignores certain discriminations which should be made in discussing cases of this character. A trade-mark is a symbol arbitrarily selected by a manufacturer or dealer and attached to his wares to indicate that they are his wares. In selecting such a device he must avoid words merely descriptive of the article or its qualities, or such as have become so by use in connection with known articles of commerce. He must also avoid words—*e. g.* geographical names—which are descriptive of the local origin of the goods, if other persons have the right to deal in goods of a similar origin. When it has become generally known in the trade that this symbol or word has been taken by one dealer or manufacturer to indicate his goods, he acquires a title to it for that purpose, and no one else can use it, even innocently. A trade-name is of a different character. It is descriptive of the manufacturer or dealer himself as much as his own name is, and frequently, like the names of business corporations, includes the name of the place where the business is located. If attached to goods, it is designed to say plainly what a trade-mark only indicates by association and use. The employment of such a name is subject to the same rules which apply to the use of one's own name of birth or baptism. Two persons may bear the same name, and each may use it in his business, but not so as to deceive the public and induce customers to mistake one for the other. The use of one's own name is unlawful if exercised fraudulently to attract custom from another bearer of it. Trade-marks, properly so called, may be violated by accident or ignorance. The law protects them, nevertheless, as property. Names which are not trade-marks, strictly speaking, may be protected likewise, if they are taken with fraudulent intention, and if they are so used as to be likely to effect such intention. A leading and instructive case upon this subject is *Croft* v. *Day*, 7 Beav. 84, in which *Lord* Langdale, *M. R.*, says (at page 88): "It has been very correctly said that the principle, in these cases, is this,—that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose either that he is that other person or that he is connected with and selling the manufacture of such

other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud. I stated, upon a former occasion, that in my opinion the right which any person may have to the protection of this court does not depend upon any exclusive right which he may be supposed to have to a particular name, or to a particular form of words. His right is to be protected against fraud, and fraud may be practiced against him by means of a name, though the person practicing it may have a perfect right to use that name, provided he does not accompany the use of it with such other circumstances as to effect a fraud upon others." The same principle is applied in *Sanders* v. *Utt*, 16 Mo. App. 322; *Sanders* v. *Jacob*, 20 Mo. App. 98,—where the name "N. Y. Dental Rooms" was protected. In all such cases it is obvious, as defendant urges, that the effect of imitation depends very much upon propinquity. In many cases the use of a similar trade-name, in localities not very remote from each other, would not justify an inference that the establishments were those of a common proprietor, and so would not result in damage, or justify an allegation of fraud. The character of the name adopted by the complainant suggests a distribution of offices. It would be natural for a person reading the advertisement of the complainant in a Pawtucket paper, and seeing the signs of the defendant displayed there, to suppose that they indicated a branch office of the same concern; and this we have no doubt the defendant intended should happen. It is the only result which he could anticipate from his contrivances.

We conclude, therefore, that *the complainant is entitled to an injunction* restraining the use by the defendant of the words "U. S. Dental Rooms," or the letters "U. S." upon his signs or windows, and all words, letters, and symbols tending to indicate that his business is conducted or managed by the plaintiff.

William H. McTWIGGAN *et al.*
v.
George F. HUNTER, Collector of Taxes, *et al.*

(.....R. I.....)

1. **The only notice to taxpayers of an assessment** required by Pub. Stat., chap. 43, is that required by section 6 in respect to the time and place of meeting at which each taxable person is directed to bring in an account, and no subsequent notice of a time to hear objections is required.

2. **Requiring every taxable person to bring in an account** of his ratable estate to the assessors at a time and place of which he has notice, upon which he may be examined and heard, is sufficient to constitute due process of law in a tax assessment.

3. **The exemption of property from taxation is beyond the power of a town in the absence of constitutional legislative authority.**

4. **The omission by assessors to include property in an assessment** solely by reason of their mistake as to the binding effect of an agreement for an exemption, and not by any intentional disregard of law or other wrongful or fraudulent purpose, will not make their assessment void.

(October 28, 1895.)

SUIT to enjoin defendants from enforcing the payment of taxes which were alleged to have been illegally levied. *Bill dismissed.*

The facts are stated in the opinion.

Messrs. **Bassett & Mitchell,** for complainants:

The provision in regard to notice being of vital importance to the taxpayer is mandatory, and a compliance with it is a condition precedent to the legality of the tax.

Cooley, Taxn. ed. 1879, pp. 216–218, 265–268; Black, Tax Titles, §§ 90, 130; 1 Desty, Taxn. p. 541.

The law is mandatory, and every portion of it must be complied with.

Young v. *Joslin*, 13 R. I. 675; *Evans* v. *Newell*, 18 R. I. —; *Nashville* v. *Weiser*, 54 Ill. 245; *Thames Mfg. Co.* v. *Lathrop*, 7 Conn. 550; *Slaughter* v. *Louisville*, 89 Ky. 113; *Ormsby* v. *Louisville*, 79 Ky. 197; *Davis* v *Farnes*, 26 Tex. 296; *Sharpe* v. *Speir*, 4 Hill, 77; *Torrey* v. *Millbury*, 21 Pick. 65; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *McLean* v. *Jephson*, 9 L. R. A. 493, 123 N. Y. 142; *Doughty* v. *Hope*, 1 N. Y. 79.

The contract for exemption, made by the town in town meeting, was entirely unauthorized by any act or authority from the general assembly, and therefore clearly *ultra vires* and void.

Cooley, Taxn. 2d ed. p. 200, and cases cited; *State* v. *Hannibal & St. J. R. Co.* 75 Mo. 208; Green's Brice's Ultra Vires, p. 746; 2 Beach, Pub. Corp. § 1443; *Austin* v. *Coggeshall*, 12 R. I. 329, 34 Am. Rep. 648.

The resolution of April 11, 1892, cannot be strengthened by the Act of May 21, for that act does not purport to be and therefore cannot be retroactive.

Bowen v. *Newell*, 16 R. I. 238.

The exemption of this corporation would be illegal even if authorized by an act of the general assembly, for the legislature is powerless when the constitution prescribed a rule of equality which forbids exemption.

Cooley, Taxn. pp. 132–144, and cases cited; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244, 27 L. ed. 922.

Therefore *a fortiori* would the general assembly be without authority to delegate a general power to a municipality to exempt corporations.

Brewer Brick Co. v. *Brewer*, 62 Me. 62, 16 Am. Rep. 395; *Allen* v. *Jay*, 60 Me. 124, 11 Am. Rep. 185; *Lowell* v. *Boston*, 111 Mass. 454, 15 Am. Rep. 39.

The omissions of the assessors in previous years cannot control the duty imposed by law upon their successors.

Vicksburg, S. & P. R. Co. v. *Dennis*, 116 U. S. 665, 29 L. ed. 770.

NOTE.—As to power of municipal corporations to exempt property from taxation, see Whiting v. West Point (Va.) 15 L. R. A. 860, and note.

It was not a case of accidental omission, but a case of intentional omission, and it matters not what was the belief of the assessors. This intentional omission or exemption renders the entire assessment illegal.

Cooley, Taxn. par. *Invidious Exemptions*, pp. 152–154; *Weeks* v. *Milwaukee*, 10 Wis. 243; *State* v. *Branin*, 23 N. J. L. 484; *State* v. *Platt*, 24 N. J. L. 108; *Henry* v. *Chester*, 15 Vt. 461; *Hasen* v. *Rochester*, 65 N. Y. 516; *Smith* v. *Smith*, 19 Wis. 615, 88 Am. Dec. 707; *Brauns* v. *Green Bay*, 55 Wis. 118; *Hersey* v. *Milwaukee County Supvrs.* 16 Wis. 185, 82 Am. Dec. 713.

Messrs. **Edwin P. Allen** and **Stephen A. Cooke**, for respondents:

It is not claimed that any taxpayer has sufferred any loss or injury by reason of this notice, or from want of notice.

Albany & B. Min. Co. v. *Auditor General*, 37 Mich. 391; 2 Desty, Taxn. 2.

The omission of the assessors to assess ratable property must be fraudulent or from a corrupt motive, otherwise such omission will not render the whole assessment invalid.

2 Dill. Mun. Corp. § 776, *note* 1, pp. 953, 954; *People* v. *McCreery*, 34 Cal. 434; *Dunham* v. *Chicago*, 55 Ill. 357; *Merritt* v. *Farris*, 22 Ill. 308; Cooley, Taxn. pp. 216, 217; *Le Roy* v. *New York*, 4 Johns. Ch. 358, 1 L. ed. 865; *Wilson* v. *Wheeler*, 55 Vt. 454; *Muscatine* v. *Mississippi & M. R. Co.* 1 Dill. 542; 2 Desty, Taxn. 674; *Burlington & M. R. R. Co.* v. *Saline County Comrs.* 12 Neb. 306; *Burlington & M. R. R. Co.* v. *Seward County Comrs.* 10 Neb. 211; *Sanford* v. *Dick*, 15 Conn. 456; *Dillingham* v. *Snow*, 5 Mass. 558; *Van Deventer* v. *Long Island City*, 139 N. Y. 133; *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 50.

If the omission is made in good faith from error of judgment or mistake of fact or of law, the assessment is legal and its collection will not be enjoined.

Plumer v. *Marathon County Supvrs.* 46 Wis. 176; *Fifield* v. *Marinette County*, 62 Wis. 541; *Dillingham* v. *Snow*, *Le Roy* v. *New York*, and *Muscatine* v. *Mississippi & M. R. Co. supra*; *State* v. *Platt*, 24 N. J. L. 108; *State* v. *Branin*, 23 N. J. L. 484; *Hersey* v. *Milwaukee County Supvrs.* 19 Wis. 615, 82 Am. Dec. 717.

Matteson, *Ch. J.*, delivered the opinion of the court:

This is a bill to enjoin the collection of a tax because, as alleged, its assessment was illegal. The first ground upon which it is claimed that the assessment was illegal is that the assessors gave no notice of the time and place of their meeting, as required by law. The provisions of the statutes relating to the assessment of taxes, so far as material to the present inquiry, are contained in R. I. Pub. Stat., chap. 43, §§ 6–8, 18, and are as follows:

"Sec. 6. Before assessing any tax, the assessors shall post up printed notices of the time and place of their meeting, in three public places in the town, for three weeks next preceding the time of such meeting, and advertise in some newspaper published in the town, if any there be, for the same space of time. Such notices shall require every person and body corporate liable to taxation to bring in to the assessors a true and exact account of all his ratable estate, describing and specifying the value of every parcel of his real and personal estate, at such time as they may prescribe.

"Sec. 7. Every person bringing in any such account shall make oath before some one of the assessors that the account by him exhibited contains to the best of his knowledge and belief a true and full account and valuation of all his ratable estate; and whoever neglects or refuses to bring in such account if overtaxed shall have no remedy therefor.

"Sec. 8. The assessors shall make a list containing the true, full, and fair cash value of all the ratable estate in the town, placing real and personal estate in separate columns, and distinguishing those who give in an account from those who do not, and shall apportion the tax accordingly."

"Sec. 18. The assessors, on completing the assessment as aforesaid, shall date and sign the same and deposit it in the office of the town clerk."

Before proceeding to the assessment, the assessors posted up printed notices in three or more public places in the town, for three weeks next preceding the time of their meeting, as specified in the notices, which were in the following form:

"Town of East Providence. 1894. Assessors' Notice. The undersigned, assessors of taxes of the town of East Providence, R. I., for the year 1894, hereby give notice that they will be in session at the town hall, East Providence Centre, Tuesday, August 21; at Riverside, in the engine house Wednesday, August 22; and at the town clerk's office, Thursday and Friday, August 24, from 2 to 4 o'clock, P. M., on each of said days, for the purpose of receiving from persons and bodies corporate liable to taxation in said town of East Providence true and exact accounts of their ratable estates." (Here follows in the notice R. I. Pub. Stat., chap. 43, § 7, quoted above.) "Transfers of real estate from the records will close on Tuesday, July 31, 1894, and all real estate will be taxed to the persons or bodies corporate in whose name it stands at the close of the day. Joseph L. Luther, William L. Sunderland, Timothy L. Risley, Assessors. East Providence, June 26, 1894."

There was no newspaper published in East Providence during the three weeks next preceding the time of their meeting, as specified in the notices, and therefore the assessors, though not required by the statute, gave further notice of the time and place of their meeting by advertisement during that period in the Evening Bulletin and Evening Telegram, newspapers published in Providence. The theory of the complainants is that section 6 requires the giving of two notices,—(1) a notice to every person and body corporate liable to taxation to carry in a true account of his or its ratable estate; and (2) a notice of the time and place of the meeting of the assessors for the purpose of assessing the tax. Their contention is that the statute contemplates that, after having given notice to those liable to taxation to bring in their accounts within the time to be prescribed by the notice, and after having made up the list

required by section 8, the assessors shall hold a final meeting, of which they shall give notice in the manner specified, so that the taxpayers shall have an opportunity to inspect the assessment roll, and, if they consider themselves unfairly taxed, may object, and be heard by the assessors upon their objections, before the assessment has been signed and deposited by them in the town clerk's office, as provided in section 18. We do not think that this is the view to be taken of the statute. Section 6 is the only section relating to notice. It does not provide in terms for two distinct notices. It simply directs the assessors, before proceeding in the assessment, to give notice, in the manner specified, of the time and place of their meeting, and then goes on to provide that the notices posted up, besides specifying the time and place of meeting, shall require every person and body corporate liable to taxation to bring in to the assessors an account, etc. It is the evident purpose of the statute to compel every one liable to be taxed to personally carry in an account to the assessors, since the requirement is that he shall make oath to the account before one of the assessors. Upon the account so rendered he may be examined by the assessors. He at the same time will have an opportunity to be heard upon it, and a basis will be afforded the assessors on which to make the assessment. If a person liable to taxation neglects or refuses to carry in his account, he waives his right to be heard, and, under section 8, if overtaxed is without a remedy. We do not see that such a procedure is in any way repugnant, as intimated by the complainants, to article 5 of the Amendments to the Constitution of the United States, that no person shall be deprived of life, liberty, or property without due process of law. We do not think that the assessment was invalid for want of notice.

The second ground upon which it is contended that the assessment was illegal is the alleged willful and intentional omission and exemption by the assessors of property of the Grosvenordale Company. The respondents, though conceding that property of the Grosvenordale Company was intentionally omitted from the assessment, deny that the omission was willful and intentional in the sense that it was fraudulent or corrupt, and seek to justify it by reference to certain records and deeds mentioned in (and copies of which are annexed to) the answer. From these it appears that the Grosvenordale Company made a proposition in writing, dated April 9, 1892, to the town, to convey or procure to be conveyed to it certain lands for highway purposes, and certain loam and gravel for making streets, and to erect a two-story brick building, 184 feet in length by 60 feet wide, for manufacturing purposes, on certain land in the town, being lots numbered 6, 7, 8, and 9 on the Grosvenor plat, in consideration that the town would exempt the improvements from taxation for ten years and cause the land conveyed to it to be laid out as public highways, and the highways to be constructed in the manner and within the time specified in the proposition; that at the annual town meeting, on April 11, 1892, the electors of the town, qualified to vote on a proposition to impose a tax, accepted the proposition, and passed a resolution authorizing the town council to exempt from taxation the brick building proposed to be erected, and the machinery, stock, furniture, and fixtures to be kept therein, in accordance with the provisions of any acts of the general assembly that might be passed authorizing such exemption; that, at the same meeting, a further resolution was passed authorizing the town council, until the next annual election, to exempt from taxation, for a period not exceeding ten years, manufacturing or other ratable property not already located in the town which might be located there in consequence of such exemption, in accordance with the provisions of any act of the general assembly which might be passed authorizing such exemption; that by deeds dated April 28, 1892, and recorded in the land records of the town May 14, 1892, the lands proposed to be conveyed to the town for highway purposes were conveyed to it by the owners of such lands, according to the terms of the proposition, which deeds were, by vote of the town council on May 17, 1892, accepted and ordered to be recorded.

On May 21, 1892, the general assembly passed the following act (R. I. Pub. Laws, chap. 1088):

"Section 1. The electors of any town or city qualified to vote on a proposition to impose a tax, when legally assembled, may vote to exempt, or may authorize the town or city council of such town or city, for a period not exceeding one year, to exempt from taxation, for a period not exceeding ten years, such manufacturing property as may hereafter be located in said town or city in consequence of such exemption, and the land on which such property is located.

"Sec. 2. Property so exempted shall not during such period of exemption be liable to taxation while such property is used for the purposes for which it was so located.

"Sec. 3. All acts and parts of acts inconsistent herewith are hereby repealed.

"Sec. 4. This act shall take effect on and after its passage."

The power to exempt property from taxation is the converse of the power to determine what property shall be the subject of taxation; the selection of certain property for the purpose of taxation being the exclusion or exemption of that which is not selected. It is, therefore, included necessarily in the power to tax, which resides in the state alone, and consequently can be exercised only by the general assembly, representing the sovereign power of the state, acting within the limitation of the constitution, or by the several cities, towns, or other municipal bodies, in pursuance of lawful authority granted to them by the general assembly. Cooley, Taxn. 2d ed. 200. This was evidently the idea of the framer of the resolutions passed by the town, which do not purport to exempt any property from taxation, but simply confer on the town council authority to grant exemptions in accordance with the provisions of any act or acts of the general assem-

bly which might be passed authorizing the exemption. R. I. Pub. Laws, chap. 1088, was doubtless passed for the purpose of enabling the making of the exemption. But it does not purport to be retroactive, and, conceding the competency of the general assembly to pass the act (which, in view of the limitation contained in article 1, section 2, of the Constitution, that the public burdens ought to be fairly distributed, we think is at least susceptible of doubt), it does not appear that either the electors of the town qualified to vote on a proposition to impose a tax or the town council took any action, prior to the assessment, in pursuance of that statute. We are of the opinion, therefore, that the attempt to justify the omission of the property from the assessment, on the ground that its exemption was authorized and therefore legal, fails.

The respondents seek further to justify the omission of the property from assessment on the ground that the town, by the acceptance of the proposition of the Grosvenordale Company and the benefits derived from it, became bound in good faith and equity to exempt the property from taxation, and contend that a court of equity will not disregard a subsisting contract and set it aside until one or the other of the parties to it has offered to rescind it and has restored or tendered back the consideration received from the other; that the complainants, and the other taxpayers of the town in whose behalf they file the bill, have derived the benefits arising from the conveyance of the streets to the town for highway purposes, and cannot ask a court sitting in equity to say that the assessors have so erred in recognizing the contract as to render the assessment null and void; that the complainants, representing the taxpayers generally, must, before asking the interposition of equity, do what is equitable,—or, in other words, before asking the court to pronounce the assessment invalid, must secure such action as will restore to the other party to the contract the consideration which the town has received. We do not think that the omission to include the property in the assessment can be justified on the ground of the contract. As we have already held, the exemption of the property from taxation, in the absence of constitutional legislative authority, was beyond the power of the town, and hence, in so far as such exemption entered into the contract, the contract was null and void. It did not bind the town, or the complainants as taxpayers, whose rights as such would be affected by carrying it into effect; and it made no difference that the Grosvenordale Company may have acted in the belief that the town could make the contract, since it was bound to know the extent of the town's authority. *Austin* v. *Coggeshall*, 12 R. I. 329, 331, 34 Am. Rep. 648; *Farnsworth* v. *Pawtucket*, 18 R. I. 82, 88; *Mathewson* v. *Hawkins*, Index QQ. 15. In the face of the fact, however, that the resolutions of the town do not purport to grant the exemption, but merely authorize the town council to make it, in accordance with the provisions of such act or acts of the general assembly as might be passed for the purpose, it seems scarcely probable that the Grosvenordale Company was not aware of the incapacity of the town to bind itself by so much of the contract as related to the exemption of the property from taxation.

Since the making of the agreement the assessors have recognized it as binding on the town, and have accordingly omitted to assess the property to which it relates. No question has been made as to the validity of such exemption, until the filing of the bill in this suit. The assessors who made the present assessment omitted to assess the property in good faith, without any intention or purpose to enable the company to escape or be free from legal taxation, with the knowledge that it had been exempted by the previous boards of assessors, and in full belief of the duty of the town to exempt the property from taxation and of the validity of the exemption. It is contended by the respondents that, as the omission to assess the property was because of the belief of the assessors that the agreement was binding upon the town, and that the exemption was valid on that account, and was, therefore, a mistake of law, it did not vitiate the assessment as a whole, and consequently that the bill should be dismissed. On the other hand, the complainants, though conceding that an accidental omission of property that should be taxed will not avoid an assessment, insist that such will be the effect when the omission, as in the present case, was intentional, and that it matters not what was the belief or motive of the assessors. We do not think that the fact that the omission of the property from assessment was intentional, in the sense merely that it was not accidental, is sufficient to avoid the assessment. To have that effect the omission must be a conscious disregard of law, in such manner as to impose illegal taxes on those who are assessed. It is the conscious intention to disregard the law to the injury of others, or, in other words, an intention to do a wrong or commit a fraud, which vitiates an assessment; and when this appears, it matters not that the motive for it would otherwise have been a worthy one. Accidental omissions, or omissions arising merely from mistakes of law or fact or errors of judgment, in an honest endeavor on the part of the assessors to perform their duty, though increasing somewhat the burdens of taxpayers, will not render the assessment void. In *Weeks* v. *Milwaukee*, 10 Wis. 264, it is said: "Omissions of this character, arising from mistakes of fact, erroneous computations or errors of judgment on the part of those to whom the execution of the taxing laws is intrusted, do not necessarily vitiate the whole tax. But intentional disregard of those laws, in such manner as to impose illegal taxes upon those who are assessed, does. The first part of the rule is necessary to enable taxes to be collected at all. The execution of these laws is necessarily intrusted to men; and men are fallible, liable to frequent mistakes of fact and errors of judgment. If such errors on the part of those who are attempting in good faith to perform their duties should vitiate

the whole tax, no tax could ever be collected. And, therefore, if they sometimes increase improperly the burdens of those paying taxes, that part of the rule which holds the tax not thereby avoided is absolutely essential to the continuance of the government. But it seems to me clear that the other part is equally essential to the just protection of the citizen. If those executing these laws may deliberately disregard them and assess the whole tax upon a part only of those who are liable to pay it, and have it still a legal tax, then the laws afford no protection, and the citizen is at the mercy of those officers who, by being appointed to execute the laws, would seem to be thereby placed beyond legal control." And see *Wilson* v. *Wheeler*, 55 Vt. 445, 453, 454; *Henry* v. *Chester*, 15 Vt. 460, 461; *Spear* v. *Braintree*, 24 Vt. 414, 418; *Dillingham* v. *Snow*, 5 Mass. 547, 558, 559; *Van Deventer* v. *Long Island City*, 139 N. Y. 133, 138; *State* v. *Platt*, 24 N. J. L. 108, 120, 121; *Exchange Bank of Columbus* v. *Hines*, 3 Ohio St. 1; *Fiefield* v. *Marinette County*, 62 Wis. 532, 541; *Burlington & M. R. R. Co.* v. *Seward County*, 10 Neb. 211, 216; *Burlington & M. R. R. Co.* v. *Saline County Comrs.* 13 Neb. 396, 397; *People* v. *McCreery*, 34 Cal. 434, 458; Cooley, Taxn. 2d ed. 214, 217.

The omission to include the property in the assessment having been occasioned solely by the mistake of the assessors as to the binding effect of the agreement on the town, and not by any intentional disregard of law or other wrongful or fraudulent purpose, we are of the opinion that the assessment was not thereby avoided, and hence that *the injunction should be denied and the bill dismissed.*

MAINE SUPREME JUDICIAL COURT.

Clarence L. ROBINSON
v.
ROCKLAND, THOMASTON & CAMDEN STREET RAILWAY.

(87 Me. 387.)

1. **The use of indecent or profane language in a street-car,** which by statute constitutes a breach of the peace for which a person may be punished by fine or imprisonment, justifies the conductor in putting the offender off the car.

2. **A passenger in a crowded street-car in which there are many ladies,** who on being requested by the conductor to stop swearing denies his guilt, and when told that he has been profane calls the conductor "a damned liar," says that he would swear as much as he "damned pleased," and that he "would be God damned if he would put him off the car,"—should be ejected from the car even if the conductor was at first in error in charging him with profanity.

(April 9, 1895.)

MOTION by defendant for new trial after verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by plaintiff's wrongful expulsion from one of defendant's cars. *Granted.*

The facts sufficiently appear in the opinion.

Mr. **W. H. Fogler** for defendant in support of the motion.

Mr. **J. E. Moore,** for plaintiff, *contra:*

When a prima facie case of assault and battery is sought to be justified, it is incumbent upon the one who justifies, to show that no more force was used than the exigency of the case called for.

Goddard v. *Grand Trunk R. Co. of Canada*, 57 Me. 202, 2 Am. Rep. 39; *Hanson* v. *European & N. A. R. Co* 62 Me. 84, 16 Am. Rep. 404: *Vinton* v. *Middlesex R. Co.* 11 Allen, 304, 87 Am. Dec. 714.

A corporation cannot escape liability because its servants acted in good faith, if they failed to exercise good judgment.

Booth, Street Railways, § 327, last clause; *Haman* v. *Omaha Horse R. Co.* 35 Neb. 74; *Putnam* v. *Broadway & S. A. R. Co.* 55 N. Y. 108, 14 Am. Rep. 190.

There is no pretense in this case that the plaintiff was intoxicated, or would disturb or annoy others. His offense was in denying the conductor's charge, and calling him a liar after continuous prodding and very great provocation by the conductor. If provocation excuses a conductor, it certainly should doubly so the passenger, when provoked by the conductor, whose duty is to exercise great care to treat him well.

Booth, Street Railways, § 372, and cases cited in *note.*

The weight of evidence, especially when conflicting, is for the jury.

Elliott v. *Grant*, 59 Me. 418; *Smith* v. *Brunswick*, 80 Me. 189; *Hunter* v. *Heath*, 67 Me. 507; *Shannon* v. *Boston & A. R. Co.* 78 Me. 52; *Lesan* v. *Maine Cent. R. Co.* 77 Me. 85.

The question of damages is one which the law submits to the jury.

Powers v. *Cary*, 64 Me. 9.

The right of the jury to give exemplary damages for injuries wantonly, recklessly, or maliciously inflicted, is as old as the right of trial by jury itself.

Goddard v. *Grand Trunk R. Co. of Canada*, 57 Me. 202, 2 Am. Rep. 39; *Pike* v. *Dilling*, 48 Me. 539; *Hanson* v. *European & N. A. R. Co.* 62 Me. 84, 16 Am. Rep. 404; *Wyman* v. *Leavitt*, 71 Me. 227, 36 Am. Rep. 308; *Prentiss* v. *Shaw*, 56 Me. 427, 96 Am. Dec. 475; *Webb* v. *Gilman*, 80 Me. 177; *Johnson* v. *Smith*, 64 Me. 558; *Field* v. *Plaisted*, 75 Me. 476.

Walton, J., delivered the opinion of the court:

We think the verdict in this case is clearly wrong. It is an action to recover damages for being removed from a street-railway car, and the plaintiff has obtained a verdict for $1,187.27. We think the removal was justifiable, and that the verdict is clearly erroneous, and must be set aside.

NOTE.—For profanity as a crime, see *note* to Com. v. Linn (Pa.) 22 L. R. A. 353.

In this state, the use of indecent or profane language in a street-railroad car is a breach of the peace. It is a crime for which a person may be punished by fine or imprisonment. And the conductor of the car may immediately arrest any person guilty of such a breach of the peace, and hold him till a warrant can be obtained or he can be placed in custody of the proper officers of the law. Rev. Stat. chap. 51, § 78, as amended by Act 1889, chap. 261. Or the conductor may remove a person guilty of such a breach of the peace from the car. The cases which sustain this right of removal are too numerous for citation. And in the exercise of this right the conductor acts as a police officer. He is not to act or refuse to act at the dictation of his own will and pleasure. When indecent or profane language is being used in his car, it is his duty to check it; and he will be guilty of a breach of duty if he fails to do so. And if, in a car filled with passengers, nearly one half of whom are ladies, a man in earnest conversation undertakes to emphasize his statements, as some men are apt to do, by saying, "By God," it is so, or "By God" it is not so, the law makes it the duty of the conductor to check him; and, if the latter denies his guilt, and, upon being assured by the conductor that he is guilty, flies into a passion, and calls the conductor a "damned liar," it is the opinion of the court that he may rightfully be removed from the car; not as a punishment for his insult to the conductor as an individual, but to vindicate the authority of the law, which forbids the use of such language in a street-car, or any other public place, where women and children have a right to be. The fact, if it be a fact, that the offender was innocent of the misconduct with which he was at first charged, can be no excuse for his subsequent offense. A thief cannot excuse his crime by showing that before committing the theft in question he had been falsely accused of a similar offense. No more can a man excuse the use of indecent or profane language in a street-railway car by proof that he was first falsely charged with the use of similar language. To be first falsely charged with an offense is not license to become immediately guilty of a similar offense.

And herein lies the weakness of the plaintiff's case. He admits that he called the conductor of the car "a damned liar," and he does not claim that he had any excuse for so doing, except that the conductor had first falsely accused him of swearing, and admonished him to desist. And he does not claim that the conductor spoke to him in a loud, harsh, or angry tone of voice. He admits that the car was filled with passengers, nearly half of whom were ladies. He says that the conductor approached him, and, in an ordinary tone of voice, requested him to stop swearing; that he denied that he had been swearing; and that, upon the conductor's again affirming that he had been swearing, and that he must desist or he should be obliged to put him out of the car, he called the conductor "a damned liar." And several witnesses testify that he went further, and defied the conductor, and said that he "would be God damned if he would put him off the car," and that he would swear as much as he "damned pleased," and that he used much other indecent and profane language.

But if it should be conceded that the plaintiff's account of the transaction is strictly true, and that all of the defendant's witnesses are mistaken, it would still be the opinion of the court that the plaintiff's conduct justified his removal from the car.

We are reminded by the plaintiff's counsel that in *Goddard* v. *Grand Trunk R. Co. of Canada*, 57 Me. 202, 2 Am. Rep. 39, a verdict for very large damages was sustained. Certainly. And our present decision is in harmony with that decision. In that case a servant of the railroad company used exceedingly foul and profane language to a respectable and unoffending passenger. Here a passenger used very offensive and indecent language to a respectable and unoffending servant of the railroad company. We protected the passenger in that case, and for the same reason we hope to be able to protect the railroad servant in this case. Both decisions are in favor of morality and decency. In that case the servants of railroads were taught to treat passengers with civility, and in this case we hope to teach passengers to treat the servants of railroads with civility. To call a street-railroad conductor who, in a crowded car half filled with ladies, is endeavoring to maintain order and suppress profanity, "a damned liar," is a poor foundation on which to rest a suit for punitive damages.

Motion sustained.

INDIANA SUPREME COURT

City of SOUTH BEND, *Appt.*,
v.
William G. MARTIN.

(.....Ind.....)

1. One engaged in going personally from house to house and selling chairs and delivering them at the time of the sale is a peddler within an ordinance requiring peddlers to obtain a license.

2. An ordinance imposing a license on hawkers and peddlers does not interfere with interstate commerce in the case of a peddler of chairs imported into the state before his employment begins, even though the sale by him is conditional and the title remains in the foreign owner.

3. A city has power to pass an ordinance requiring a license to hawk and peddle

NOTE.—For peddlers and drummers as related to interstate commerce, see *Re* Spain (C. C. E. D. N. C.) 14 L. R. A. 97, and *note*; also State v. Gorham (N. C.) 25 L. R. A. 818, and *note*; Com. v. Harmel (Pa.) 27 L. R. A. 388.

29 L. R. A.

See also 35 L. R. A. 497; 41 L. R. A. 501; 47 L. R. A. 583; 48 L. R. A. 99, 417.

therein, under Rev. Stat. 1894, § 8541, empowering cities to "restrain hawking and peddling."

(September 17, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for St. Joseph County in favor of defendant in an action brought to enforce a penalty for violating a municipal ordinance against peddling without a license. *Reversed.*

The facts are stated in the opinion.

Mr. **Wilbert Ward** for appellant.

Mr. **Joseph G. Orr,** for appellee:

If the state can tax for the privilege of selling to one class it can for selling to another or to all. In either case it is a restriction on the right to sell and a burden on the lawful commerce between citizens of two states.

A regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling house, whether by going personally with the goods from house to house and selling and delivering the same, is surely a regulation of commerce.

The goods which the defendant was engaged in selling are open to no condemnation and are unchallenged subjects of commerce.

Brennan v. *Titusville*, 153 U. S. 289, 38 L. ed. 719.

This license does not purport to be exacted in the exercise of the police, but rather of the taxing, power.

Even though the license had in terms been declared to be exacted as a police regulation, that would not conclude this question, for, whatever may be the reason given to justify or the power invoked to sustain the act of the state, if that act is one which trenches directly upon that which is within the exclusive jurisdiction of the national government, it cannot be sustained.

New Orleans Gas Light Co. v. *Louisiana Light & Heat Producing & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Henderson* v. *Wickham*, 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Crutcher* v. *Kentucky*, 141 U. S. 59, 35 L. ed. 658.

Nothing which is a direct burden upon interstate commerce can be imposed by the state without the assent of congress, and the silence of congress is equivalent to a declaration on its part that it should be absolutely free.

Welton v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143; *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 392.

One cannot be guilty of the offense of hawking and peddling, unless he actually makes a sale, either a present sale or by taking an order for future delivery. In this case there was an actual sale made.

Emert v. *Missouri*, 156 U. S. 296, 39 L. ed. 430.

McCabe, J., delivered the opinion of the court:

The appellant prosecuted the appellee before the mayor of said city to recover the penalty of not less than $1, nor more than $20, provided in an ordinance with a violation of which the appellee was charged in the verified complaint filed. Said complaint charged "that the defendant, on the 12th day of September, 1894, at the city . . . aforesaid, violated sections Nos. 24 and 25 of Ordinance No. 988 of said city, passed by the common council thereof on the 11th day of December, 1893, and amended August, 1894, by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend by carrying, exposing, offering, and crying for sale, articles of merchandise, to wit, rattan rocking-chairs, in the public streets and avenues of said city, without having a license for that purpose; that while so engaged the defendant sold and delivered to one Emma Wright one rattan rocking-chair, for the sum of six dollars; that said articles of merchandise so sold were not newspapers nor produce nor provisions, and that said sales were not for future delivery of said chairs; that defendant is not a wholesale traveling merchant." The city recovered judgment in the mayor's court for one dollar, and the defendant appealed to the circuit court, where a trial resulted in a judgment for the defendant. The plaintiff appeals therefrom to this court. One of the questions presented by the record and briefs is whether the ordinance referred to is valid. That alone rescues the appeal from the exclusive jurisdiction of the appellate court. Acts 1891, p. 89; Rev. Stat. 1894, § 1336. The only error assigned is that the circuit court overruled appellant's motion for a new trial. The ground for the motion for a new trial is that the decision of the court was contrary to law and the evidence.

The only evidence in the cause was the following agreed statement of facts:

"A. H. Ordway & Co. are manufacturers of rattan chairs, residing in South Framingham, Mass., of which state they are citizens, and in which city they have their manufactory and place of business. In the prosecution of the said business they sell directly to the people of the different states, and do not sell to retail dealers in the trade. They ship their chairs from the factory to A. H. Ordway & Co., in care of their agents at different points throughout the United States. In the prosecution of their said business they employ men, who go about from town to town in Indiana and other states of the Union with the chairs, going personally from house to house, and selling the chairs on the installment plan, retaining the title in the chairs until they are fully paid for, and deliver the goods at the time the sales are made. The defendant, William C. Martin, was an employé of the said A. H. Ordway & Co., employed by them to travel and sell their chairs in the manner stated, upon a commission on the amount of his sales, at the time of his arrest, September 13, 1894. The particular chairs which defendant was engaged in selling in South Bend, Indiana, at the time of his arrest, were shipped by the owners and manufacturers, A. H. Ordway & Co., from South Framingham, Mass., to A. H. Ordway

& Co., in care of their agent at Chicago, state of Illinois, where they have a branch and repository, and then reshipped from Chicago to South Bend, Indiana. The defendant, William C. Martin, at the time of his arrest, and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city, and selling the chairs, and delivering the same at the time of sale, and was acting solely for A. H. Ordway & Co.; and the said sales were made on the installment plan, and the title retained in A. H. Ordway & Co. until same are fully paid for. The common council of the city of South Bend had enacted an ordinance, in force at the time of the arrest of the said William C. Martin, entitled 'An ordinance concerning the licensing of certain extraordinary trades and establishments,' passed December 11, 1893, amended August 28, 1894. Section 24 of said ordinance provides as follows:

"'It shall be unlawful for any person to carry on the business of hawking and peddling within the corporate limits of South Bend, at wholesale or retail, by carrying, exposing or crying for sale within any street, avenue, alley or public square of said city, or otherwise, any article of commerce without a license from said city for that purpose; provided this section shall not apply to the sale of newspapers nor to produce and provisions nor fruit of peddlers' own raising, nor to taking orders for future delivery of any kind of goods, wares, or merchandise, nor to wholesale traveling merchants and farmers who sell only to retail dealers in like commodities. Any person violating any section of this ordinance shall be fined for each offense not less than one dollar nor more than twenty dollars.'

"'Sec. 25. License to hawkers and peddlers shall be signed by the mayor and countersigned by the clerk on payment of a license fee as follows: For carrying goods by hand, one dollar per day, five dollars per week, ten dollars per month and twenty dollars per year. For selling from any kind of vehicle two dollars per day, eight dollars per week, fifteen dollars per month, twenty-five dollars per year. The clerk for such services shall receive fifty cents for each license issued, to be paid by the applicant.

"'Sec. 26. No license issued under any section of this ordinance shall be transferable; nor shall any person other than the person named in the license be permitted to use the same, nor shall any license protect any person from incurring the penalties prescribed by this ordinance except the licensee named in the license.'

"The defendant, William C. Martin, at the time of his arrest, was not engaged in the sale of newspapers, produce, provisions, or fruit, and was not taking orders for future delivery, and was not a wholesale traveling merchant, but was selling at retail to consumers. The defendant, . . . at the time of his arrest, had not obtained a license as required by said ordinance. The defendant was arrested, tried, convicted, and sentenced to pay a fine of . . . $1 and costs, under said ordinance, before D. B. J. Schafer, mayor of said city of South Bend, September 13, 1894. If the court should be of the opinion, upon the facts stated, that the defendant . . . was liable to pay the license fee provided by said ordinance, then judgment to be rendered for the plaintiff for one dollar ($1) and costs of suit. If the court should be of opinion that the said Martin was not liable to pay, then judgment to be entered for the defendant for costs of suit."

Subdivision 23, § 3106, Rev. Stat. 1881 (Burns' Rev. Stat. 1894, § 3541), empowers cities "to regulate the ringing of bells and crying of goods and to restrain hawking and peddling." It has been held by this court that this statutory provision empowers a city to pass an ordinance requiring a license to hawk and peddle in a city. *Huntington* v. *Cheesbro*, 57 Ind. 74. The ordinance involved in *Graffty* v. *Rushville*, 107 Ind. 502, 57 Am. Rep. 128, imposing a penalty on "every person who peddles, hawks, sells, or exhibits for sale, any goods, wares, or merchandise not the growth or manufacture of Rush county, Indiana, or shall take orders for any such goods, wares, or merchandise for immediate or future delivery about the streets, alleys, hotels, business houses, or at any public or private place in said city," without a license,—was held void both because it violated section 23 of article 1 of the State Constitution, which provides that "the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities which upon the same terms shall not equally belong to all citizens," and because of its plain repugnance to the Federal Constitution, which commits to congress the exclusive power to regulate commerce among the several states. The provision in that ordinance that brought it in conflict with both constitutions, in the opinion of the court, was its discrimination against "any goods, wares, or merchandise not the growth or manufacture of Rush county, Indiana." Graffty had been taking orders from citizens of said city for shirts, socks, and men's furnishing goods, about the streets, etc., of said city, which were not of the growth or manufacture of said Rush county. That he resided in Indianapolis, and was in the employ of Paul H. Krauss, a manufacturer and dealer in such goods, residing and having his business house in the city of Indianapolis. That Graffty's manner of business was to carry samples of the different articles manufactured or sold by his employer, and exhibit them, from house to house, to individuals, not dealers, soliciting orders from each individual for such articles and in such quantities as the individual might require or purchase. The goods thus ordered were to be delivered at a future day, by express or otherwise. He delivered no goods, nor did he carry any goods with him, except the samples. It is easy to see that, as against Graffty, this ordinance, under the facts, was an infringement of the provision quoted from the State Constitution; but it is difficult to see how, under those facts, it violated any provision of the Federal Constitution. It is also easy to see that a case might arise, on a

different state of facts, that would make the ordinance void, as to that case, because of its infringement of the Federal Constitution. For instance, had the manufacturer and dealer in these goods been a resident of another state, and had his business house there, his goods then would have been the legitimate subjects of interstate commerce, and Graffty would have been engaged in interstate commerce, the exclusive power to regulate which is vested by the Federal Constitution in the congress of the United States. But the facts in that case show that Graffty was not engaged in interstate commerce, but that he was engaged in intrastate commerce; that his commerce and trade, and by which it was charged he violated the ordinance, were entirely confined within the boundaries of the state of Indiana, the power to regulate which has never been delegated by the Federal Constitution to congress, but has been retained by, and belongs to, the several states. The case, however, rightly decided that the ordinance was void because of its infringement of the state constitution, but not as an infringement of the Federal Constitution, under the facts of that case. It will be observed that the ordinance now before us makes no discrimination, but applies to all, without regard to residence or the place from whence the goods come.

Two questions arise under the assignment of errors and the contention of counsel: (1) Was the business of the appellee, conducted in the manner described in the complaint and agreed facts, within the prohibition of the ordinance against hawking and peddling? (2) Was the ordinance in question a valid exercise of the power vested in the city by the statute referred to? The answer to both questions depends, to some extent, upon the answer to the question, What are hawking and peddling? Because it is that that the city is authorized to restrain, and requiring a license was held to be a restraint on such business in *Huntington* v. *Cheesbro*, *supra*. In *Graffty* v. *Rushville*, *supra*, it was said: "The extent of the power conferred upon cities by the statute, in this connection, is to restrain hawking and peddling, and any mode of selling which does not legitimately fall within these terms cannot be made unlawful by being specially described and restrained in the ordinance. Such sales and exhibitions of wares, and such orders for the future delivery of goods, and such only, as are embraced by the terms 'hawking and peddling,' may be restrained by ordinances duly passed under the power conferred by the statute above set out." We must therefore inquire and ascertain what constitutes a hawker and a peddler. This court, in the case last referred to, adopted the definition of *Chief Justice* Shaw in *Com.* v. *Ober*, 12 Cush. 493, which definition has been adopted by many courts,—among them the Supreme Court of the United States, in *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 480. It was said by *Chief Justice* Shaw that "the leading, primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader, who has goods for sale, and sells them, in a fixed place of business. Superadded to this (though, perhaps, not essential), by a 'hawker' is generally understood one who not only carries goods for sale, but seeks for purchasers, either by outcry, which some lexicographers conceive as intimated by the derivation of the word, or by attracting notice and attention to them as goods for sale, by actual exhibition or exposure of them, by placards or labels, or by a conventional signal, like the sound of a horn for the sale of fish." Webster defines "peddling" as traveling about and selling small wares, and "hawking" as offering for sale in the streets by outcry. Another definition also adopted by this court in the case referred to, and by the Supreme Court of the United States in the case referred to, runs thus: "A peddler, petty chapman, or other trading person, going from town to town, or to other men's houses, and traveling, either on foot or with horse or horses, or otherwise carrying to sell, or exposing to sale, any goods, wares, or merchandise." Rapalje & Lawrence, Law Dict. title "*Hawker*." This court and the Supreme Court of the United States, in the cases mentioned, quote with approval another definition found in the various law dictionaries, showing the disfavor in which the common law held the vocation, as follows: "Hawkers. Those deceitful fellows who went from place to place buying and selling brass, pewter, and other goods and merchandise which ought to be uttered in open market, were of old so called; and the appellation seems to grow from their uncertain wandering, like persons that, with hawks, seize their game where they can find it. . . . Hawkers and peddlers, etc., going from town to town or house to house, are now to pay a fine and duty to the king." The purpose and policy of the statute in empowering cities to pass ordinances in restraint of hawking and peddling was probably twofold. One and the principal object to be attained was the protection and encouragement of local dealers and merchants, who are largely dependent for their patronage on their reputation for integrity and fair dealing, and their social and moral standing in the community, and who, by investing their means, providing fixed places of trade, and paying taxes on their merchandise, help to build up and maintain the city in which they reside, and contribute to the support of its schools, and other local interests and enterprises. The other was to prevent the indiscriminate invasion of the houses and places of business of citizens, and shield them from the practices of itinerant traders of unknown repute, who may be frequently patronized by persons in order to be rid of their importunities and presence. Under these definitions of "hawking and peddling," the city was amply empowered to enact the ordinances in question. The police power vested by the statute in the city may be properly exerted to restrain all such as, by their methods of doing business, are liable to invade social order, or injuriously affect the prosperity of the city, by seeking purchasers for their wares in the

homes of citizens, or in the streets or public places of a city, to the discouragement of the more legitimate methods of others on whom the municipality is dependent for its support. In *Graffty* v. *Rushville*, *supra*, it was said: "Any method of selling goods, wares, or merchandise by outcry on the streets or public places in a city, or by attracting persons to purchase goods exposed for sale at such places, by placards or signals, or by going from house to house, selling or offering goods for sale at retail to individuals not dealers in such commodities, . . . constitutes the person so selling a hawker or peddler, within the meaning of the statute. In this way we are brought to the conclusion that the appellant's method of conducting business was within the prohibition against hawking and peddling without being duly licensed." The same is true in the case now before us.

The next question is, Was the ordinance in question a valid exercise of the power vested in the city by the statute? The answer to that question depends upon whether the ordinance violates or infringes any of the limitations of the constitution, state or federal. It is not claimed that it violates any provision of the state constitution, or infringes any of its provisions. This is practically conceded by the appellee. But he contends earnestly that it infringes that provision of the Federal Constitution which vests in congress the power to regulate commerce with foreign nations and among the several states. It is contended that the business of the appellee, and the manner in which it was conducted, as shown by the agreed statement of the facts, made it interstate commerce, and therefore beyond the control of the state authorities. In support of this contention, appellee's counsel cite and rely on *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719. It was said in that case, quoting from *Chief Justice* Fuller in *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, that: "The power vested in congress 'to regulate commerce with foreign nations and among the several states and with the Indian tribes' is the power to prescribe the rule by which that commerce is to be governed, and is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of the state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered. *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 1, 6 L. ed. 23; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678. And while, by virtue of its jurisdiction over persons and property within its limits, a state may provide for the security of the lives, limbs, health, and comfort of persons and the protection of property so situated, yet a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the state, unless placed there by congressional action." But the facts in that case (*Brennan* v. *Titusville*) were entirely different from those in the case at bar, though, at first blush, they may seem to be very similar. In that case, J. A. Shephard was a manufacturer of picture frames and maker of portraits, residing in Chicago, Ill., of which state he was a citizen, and in which city he had his factory and place of business. He employed agents, who, under his direction, solicited orders for pictures and picture frames in the state of Pennsylvania and other states of the Union, by going personally to residents and citizens of said states, and exhibiting samples,—going, when necessary, from house to house. Brennan was an agent of Shephard, employed by him to travel and solicit orders for said articles, in the manner stated, upon a salary, and also upon commission upon amount of his sales. Upon receiving orders for pictures and picture frames, the agents of said Shephard forwarded the same to him, at Chicago, Ill., where the goods were made, and from there said Shephard shipped the goods to the purchasers in Titusville, Pa., by railroad, freight and express; and the price of said goods was collected and forwarded by the express companies, and sometimes by the agents, to Shephard, at Chicago, Ill. The agent, Brennan, employed by said Shephard, was engaged in conducting the business in the manner stated at the time of his arrest in said city of Titusville, Pa. There was at the time in force in said city an ordinance enacted by said city of Titusville, providing "that all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay to said treasurer therefor the following sums, according to the time said license shall be granted;" and then follows the price of the license for the different lengths of time for which they may be granted. The penalty provided for a violation of the ordinance was a fine not exceeding $100, nor less than the amount required for a license to such person, together with 20 per cent added, with costs of suit. The agent had not procured a license when he did the business with which he was charged. It was further said in that case, quoting from the opinion of *Mr. Justice* Bradley in *Leloup* v. *Port of Mobile*, 127 U. S. 640, 645, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, that, "of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation, and a tax on the occupation of doing a business is surely a tax on the business." And further quoting in that case from the opinion of *Mr. Justice* Field in *Welton* v. *Missouri*, 91 U. S. 275, 278, 23 L. ed. 347, 348, it was said: "Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is, in effect, a tax upon the goods themselves." It was further said in the case of *Brennan* v. *Titusville*, *supra*, that "it is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only

indirectly affecting the business, but is a direct charge and burden upon that business; and, if a state may lawfully exact it, it may increase the amount of the exaction, until all interstate commerce in this mode ceases to be possible. And, notwithstanding the fact that the regulation of interstate commerce is committed by the constitution to the United States, the state is enabled to say that it shall not be carried on in this way, and, to that extent, to regulate it." And, after reviewing a long line of decisions of the Supreme Court of the United States, it was said by *Mr. Justice* Brewer, who delivered the opinion of the court, that, "within the reasoning of these cases, it must be held that the license tax imposed upon the defendant was a direct burden on interstate commerce, and was therefore beyond the power of the state." For that reason the judgment of the supreme court of Pennsylvania, which had held the ordinance valid, was reversed. It follows, therefore, from these principles, well established by the decisions of the Supreme Court of the United States,—the court of last resort upon such questions, and whose decisions thereon are binding upon and authoritative with us,—that if the goods involved in the case now before us were the subjects of interstate commerce at the time the appellee was dealing with them, and if the appellee, in selling them as he did, engaged in interstate commerce, then the ordinance he was charged with violating was void, at least as to him and that transaction. But it will have been observed that the facts in *Brennan* v. *Titusville*, *supra*, as before remarked, are very different from those in the case now before us. The goods in *Brennan's Case*, when his employment was at an end in each sale, were still in the manufacturer's possession, in another state than that in which he made the sales. His employment as a "person canvassing or soliciting within said city orders for goods," etc., was at an end, so far as the restriction in the ordinance went, when he transmitted the order for which he had canvassed or which he had solicited, to his employer, in the other state. Therefore, in taxing his occupation the goods were taxed by the ordinance before they had come into the state of Pennsylvania and become incorporated into the mass of property in that state, and while they were in the state of Illinois. Not so under the facts in the case now before us. Before appellee's employment can begin in any sale of chairs, as shown by the agreed state of facts, such chairs must be first shipped by their owners and manufacturers, A. H. Ordway & Co., in Massachusetts, into the state of Indiana, for sale by the appellee as their agent. The chairs, in the regular course of business as shown to have been conducted by the appellee, must reach their final destination and resting place in Indiana before appellee can have anything to do with them. After they reach such final destination, and not before, appellee's employment, which is taxed by ordinance, begins.

Whether such chairs, after their final destination is reached, are the subject of interstate commerce, is the turning point in this case, and is a very different question than that presented in *Brennan* v. *Titusville*, *supra*. There the employment of the agent ceased before the goods were shipped, even, and much longer before they reached their final destination and resting place, as to each particular sale. But the Supreme Court of the United States, more than one year later,—on March 4, 1895,—decided a case that is exactly in point, namely, *Emert* v. *Missouri*, *supra*. At page 309, 156 U. S., and page 433, 39 L. ed., *Mr. Justice* Gray, speaking for the court, said: "The facts were agreed, that the Singer Manufacturing Company for more than five years last past, and on the day in question, was a corporation of New Jersey; that the defendant, on and prior to that day, was in the employment of that company, and on that day, in pursuance of that employment, and having no peddler's license, was engaged in going from place to place in Montgomery county, in the state of Missouri, with a horse and wagon, soliciting orders for the sale of the company's sewing machines, and having with him in the wagon one of those machines, the property of the company and manufactured by it at its works in New Jersey, and which it had forwarded and delivered to him for sale on its account; and that he offered this machine for sale to persons at different places, and found a purchaser, and sold and delivered it to him. The supreme court of the state, in its opinion, understood and assumed the effect of those facts to be as follows: The defendant was engaged in going from place to place, selling and trying to sell sewing machines, in Montgomery county, in this state, and had been so engaged for some years. He carried the machines with him, in a wagon, and, on making a sale, delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold. These acts bring him clearly within the statutory definition of a 'peddler,' and, having no license from the state, he became liable to the penalties imposed by the statute, unless for any reason he was exempt from the operations of the law. . . . Upon any construction, it is clear that the defendant was engaged in going from place to place within the state, without a license, soliciting orders for the sale of sewing machines, having with him, in the wagon, at least one of those machines, and offering that machine for sale to various persons at different places, and that he finally sold it, and delivered it to the purchaser. . . . The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the state of Missouri, in a wagon, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer from one state to another, and were neither interstate commerce, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic, and, so far as appears, the only goods in which he was dealing had become a part of the mass of

property within the state. Both the occupation and the goods, therefore, were subject to the taxing power and to the police power of the state. The statute in question is no part of the revenue law. It makes no discrimination between residents or products of Missouri and those of other states, and manifests no intention to interfere in any way with interstate commerce. Its object in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the state against the cheats and frauds, or even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door." A large number of the decisions of that court upon that question are reviewed in the case last quoted from above, and quotations made therefrom. Quoting from *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, it is there said: "Coal brought in flat boats from Pittsburg to New Orleans was still afloat in the Mississippi river after its arrival, in the same boats and in the same condition in which it had been brought, and was held in order to be sold, on account of the original owners, by the boat load; yet this court unanimously decided that a tax imposed by general statutes of the state of Louisiana upon this coal was valid, and, speaking by *Mr. Justice* Bradley, said: 'It was not a tax imposed upon the coal as a foreign product, or as the product of another state than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a state of transit through that state to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans.' The taxing of goods coming from other states, as such, or by reason of their so coming, would be a discriminating tax against them as imports, and would be a regulation of interstate commerce inconsistent with that perfect freedom of trade which congress has seen fit should remain undisturbed. But if, after their arrival within the state,—that being their place of destination for use or trade,—if, after this, they are subjected to a general tax, laid alike on all property within the city, we fail to see how such a taxing can be deemed a regulation of commerce which would have the objectionable effect referred to." And it was further there said: "In *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489, 30 L. ed. 694, indeed, the majority of the court held that a statute of Tennessee requiring 'all drummers, and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample,' to pay a certain sum, weekly or monthly, for a license, was, as applied to persons soliciting orders for goods on behalf of houses doing business in other states, unconstitutional as inconsistent with the power of congress to regulate commerce among the several states. . . . The distinction on which the judgment proceeded is clearly brought out in the following passages of the opinion: 'As soon as the goods are in the state, and become a part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held by this court in the case of *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257. When goods are sent from one state to another for sale or in consequence of a sale, they become a part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they are not taxed by reason of being brought from another state, but only taxed in the usual way, as other goods are. *Ibid.*; *Howe Mach. Co.* v. *Gage*, 100 U. S. 676, 25 L. ed. 754. But to tax the sale of such goods or the offer to sell them, before they are brought into the state, is a very different thing, and seems to us clearly a tax on interstate commerce itself.' 'The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state, is interstate commerce.'" And quoting from the opinion of *Mr. Justice* Field in *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347, involving a state statute discriminating against goods from other states, it was further said, in *Emert* v. *Missouri*, *supra*, that, "the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character. That power protects it, even after it has entered the state, from any burdens imposed by reason of its foreign origin."

In the case now before us, the goods, as shown by the agreed state of facts, had been sent by the owners and manufacturers from one state into another—from Massachusetts to Indiana—for sale; reaching their final destination and resting place before they were sold, or offered to be sold, and before appellee's employment in connection with them commenced. His employment was taxed by the ordinance, and that was, under the authorities cited, a tax upon the goods themselves, it is true; but before such employment began the goods had reached their final destination and place of rest, and ceased to be subjects of interstate commerce, and had become incorporated in the general mass of property in this state, and liable to be taxed as other property, there being no discrimination made in the ordinance against them as goods from another state,—they not being taxed by reason of being brought from another state, but only taxed in the usual way as other goods are. There was no attempt, in the ordinance in question, to tax the sale of goods, or the offer to sell them, before they were brought into the state. There was no negotiation of sales of goods which were in another state, for the purpose of introducing them into this state. It will have been observed that in the case we have been quoting from (*Emert* v. *Missouri*, *supra*) the Supreme Court of the United States is careful to note that, while the defendant Emert's

occupation was offering for sale and selling sewing machines manufactured and owned in New Jersey, yet that there was nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time, and that his dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one state to another. Had it been otherwise, the case would have been ruled by *Brennan* v. *Titusville, supra.* There is no conflict between the two cases, as appellee's counsel seems to suppose. On the contrary, the opinion in the latter case expressly mentions the former as following the rule laid down in *Robbins* v. *Shelby County Taxing Dist., supra,* and is in harmony with the rule laid down in the case then before the court; the conclusion there reached being that the Missouri statute then involved was in no wise repugnant to the power of congress to regulate commerce among the several states, but was a valid exercise of the power of the state over persons and business within its borders. That conclusion is decisive of the question here involved and discussed by counsel on both sides. But appellee's counsel seeks to avoid the force of that conclusion by contending that the facts agreed upon do not bring the present case within that rule, because, as he contends, "the defendant was engaged in the sale of chairs on the installment plan. When a purchaser was found, only a conditional sale was made, the title being retained in the foreign owner until some indefinite time in the future. It might never vest in the purchaser, for the reason that he might never comply with the conditions of the sale." And the further contention is that an actual sale is necessary to bring the defendant within the rule laid down in *Emert* v. *Missouri, supra,* by the Supreme Court of the United States. It is a sufficient answer to that contention to say that, while that case was one where an actual sale had been made, yet no rule was there laid down that an actual sale was necessary in that or any other case, though the prosecution was for a violation of a statute providing that "no person shall deal as a peddler without a license." Whether that statute was actually violated, or not, by Emert, was not discussed or decided by the Supreme Court of the United States, because that was not a federal question, and that court has no jurisdiction on a writ of error to the supreme court of a state, as was the case there, to decide anything but federal questions. The ordinance here involved, however, was very different from the Missouri statute. The ordinance prohibited hawking and peddling without a license, and, under the authorities already cited, that forbade selling and offering to sell. The Missouri statute would probably have been held by the supreme court of that state, had the question been presented, to require actual dealing by a peddler to constitute a violation thereof. But the learned counsel for the appellee himself speaks of the transactions of his client, as shown in the agreed facts, as a "sale," and the persons to whom such sales were made as "a purchaser." This is significant. It indicates that the learned counsel, though deeply interested in showing that such transactions were not sales, and that the persons with whom his client had them were not purchasers, yet, with all his learning, could find no word in the English language that would so aptly and tersely express what the acts of his client meant or amounted to, or would so correctly characterize them, as the word "sale," and no word that would so correctly characterize the persons with whom his client had the transactions as the word "purchaser." The circumstance that the sales were on the installment plan, the title being retained in the foreign owner until the terms and conditions of the sale were complied with, did not wholly eliminate from the transaction all characteristics of a contract of sale. In an executed contract of sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded, and without regard to the fact whether the goods be delivered to the buyer or remain in the possession of the seller, whereas, in an executory contract of sale, the goods remain the property of the seller till the contract is executed. 21 Am. & Eng. Encyclop. Law, p. 476, and numerous authorities there cited in *note 1,* among which are *Straus* v. *Ross,* 25 Ind. 300, and *Lester* v. *East,* 49 Ind. 588. Most of the sales made by commercial travelers or drummers are mere conditional sales, yet no one thinks of denying that they are sales, the title to the property remaining in the seller until the conditions of the sale are fully complied with. And yet those transactions are correctly denominated "sales." Where personal property is sold for cash on delivery, the sale is conditional, and the title to the property will not vest in the purchaser until the terms of the sale are complied with. *Lanman* v. *McGregor,* 94 Ind. 301; *Evansville & T. H. R. Co.* v. *Erwin,* 84 Ind. 457. And yet no one would, in his senses, think of denying that such a transaction was a sale. If such contention were to prevail, all sales by hawkers and peddlers might escape all restraint by cities, by inserting such a provision in the contract.

It is lastly contended that the agreed facts do not show that appellee was guilty of a violation of the ordinance, because there is no statement therein "that, while so engaged, the defendant sold and delivered to one Emma Wright one rattan rocking-chair, for the sum of six dollars," as was charged in the complaint. It is true that statement was in the complaint, and is not found in the agreed facts, and if that were the only charge in the complaint the trial court would have been justified in finding for the defendant. In addition to the above charge, the complaint charges "that the defendant, on the 12th day of September, 1894, at the city and county aforesaid, violated sections 24 and 25 of the ordinance [describing it], by carrying on the business of hawking and peddling within the corporate limits of the city of South Bend, by carrying, exposing, offering, and crying for sale articles of merchandise, to wit, rattan rocking-chairs, in the public streets of said city, without having

a license for that purpose." Among other things, the agreed facts are that "the defendant, . . . at the time of his arrest, and before, was engaged in selling chairs within the corporate limits of the city of South Bend, by going personally from house to house within said city, and selling the chairs, and delivering the same at the time of sale," etc. He could not be selling chairs without making actual sales, and if he did it by going personally from house to house in said city, selling the chairs and delivering the same, as he has agreed that he did, then he violated the ordinance, in both hawking and peddling.

The necessary conclusion, upon authority as well as upon principle, is that the ordinance in question is in no wise repugnant to the power of congress to regulate commerce among the several states, but is a valid exercise of the police power of the state, vested by the state statute in the city, over persons and business within its borders. It follows that the finding and decision of the circuit court were contrary to law and the evidence, and that it erred in overruling the motion for a new trial.

The judgment is reversed and the cause remanded, with instructions to sustain the motion for a new trial, and for further proceedings in accordance with this opinion.

Howard, *Ch. J.*, took no part in this decision.

VERMONT SUPREME COURT.

Charles McBURNEY *et al.*
v.
J. W. YOUNG, Impleaded, etc.

(67 Vt. 574.)

The low-water mark, which in Vermont defines the limit of private ownership of land abutting upon a navigable lake, is the ordinary low-water mark, and not the point to which the water recedes in an exceptionally dry season.

(July 17, 1895.)

EXCEPTIONS by defendant to rulings of the Franklin County Court made during the trial of an action to recover a penalty and damages under Acts 1884, No. 79, for alleged trespass on plaintiff's property for shooting game. *Judgment reversed.*

Plaintiff owned some land bordering on Lake Champlain, at a place called Gander Bay, the waters of which are at all times very shallow. He had, in compliance with Acts 1884, No. 79, posted notices prohibiting shooting, trapping, or fishing on the land. Defendant rowed in a boat into the bay to a point where some wild rice and wild oats had been sown by the plaintiff, and, against a warning of plaintiff's servants that he was trespassing upon plaintiff's land, fired a gun at a flock of wild ducks passing over. The referee found that the place where the gun was fired was about forty rods from dry land, that the water at the time was about eight inches deep, and that in propelling the boat to where it rested, some of the rushes had been broken down, and that the boat when removed left a mark in the mud upon the bottom. The referee also reported that the place where the boat rested was in ordinary times covered with water to the depth of six or eight inches, and that in the season of 1882, which was an exceptionally dry one, the water so far receded as to leave the place where the boat rested uncovered.

Further facts appear in the opinion.

Messrs. **Dillingham, Huse & Howland**, for defendant:

Lake Champlain is a public water and the title to the soil below low-water mark cannot be conveyed to nor held by any person.

Gould, Waters, § 203; *Fletcher* v. *Phelps*, 28 Vt. 262; *Austin* v. *Rutland R. Co.* 45 Vt. 228; *Waterman* v. *Johnson*, 13 Pick. 261.

The term "low-water mark" as used by law writers means the "ordinary low-water mark."

2 Am. & Eng. Encyclop. Law, p. 505, and cases there cited; *Jones* v. *Parker*, 99 N. C. 18, *Canal Appraisers of New York* v. *People*, 17 Wend. 571; Gould, Waters, § 82; *Glover* v. *Jack*, 60 Pa. 339, 100 Am. Dec. 566; *Seaman* v. *Smith*, 24 Ill. 524; *Delaplaine* v. *Chicago & N. W. R. Co.* 42 Wis. 225, 24 Am. Rep. 386, *Sloan* v. *Biemiller*, 34 Ohio St. 513.

Messrs. **H. A. Burt** and **D. G. Furman**, for plaintiffs:

Land bounded by Lake Champlain or any of its bays extends to low-water mark.

Fletcher v. *Phelps*, 28 Vt. 257; *Jakeway* v. *Barrett*, 38 Vt. 316.

Low-water mark is "that part of the seashore to which the water recedes when the tide is lowest."

Rapalje, Law Dict. p. 776; *Wood* v. *Kelley*, 30 Me. 47; *Waterman* v. *Johnson*, 13 Pick. 265; *Dutton* v. *Strong*, 66 U. S. 1 Black, 30, 17 L. ed. 31.

All the private or individual use and enjoyment of which the land is susceptible, subordinate to and consistent with the public right, belongs to the riparian owner as against any other person seeking to appropriate it to his individual use.

Rice v. *Ruddiman*, 10 Mich. 125.

Land bounded by a pond extends to the pond at all stages of the water, which is equivalent to saying that it extends to low-water mark.

Stevens v. *King*, 76 Me. 197, 49 Am. Rep. 609.

Thompson, *J.*, delivered the opinion of the court:

The plaintiff's land is bounded by the wa-

NOTE—For rivers and lakes as state boundaries, see *note* to Buck v. Eilenbolt (Iowa) 15 L. R. A. 187.

For right to soil under navigable waters, see *notes* to Mills v. United States (C. C. S. D. Ga.) 12 L. R. A. 677; Eisenbach v. Hatfield (Wash.) 12 L. R. A. 632; Miller v. Mendenhall (Minn.) 8 L. R. A. 89; Case v. Loftus (C. C. D. Or.) 5 L. R. A. 664.

ters of Lake Champlain. Both parties concede that by the law of this state the plaintiff's land does not extend beyond low-water mark. Such is the law of this state. *Fletcher* v. *Phelps*, 28 Vt. 257; *Jakeway* v. *Barrett*, 33 Vt. 316; *Austin* v. *Rutland R. Co.* 45 Vt. 228. The contention is over the meaning of the term "low-water mark," as used by the courts and law writers. The plaintiff insists that it means the lowest point to which the water has ever receded. The defendant says that it means ordinary low-water mark. By the common law all that portion of land on tide waters between high and low water mark, technically known as the "shore," originally belonged to the crown, and was held in trust by the king for public uses, and was not subject to private uses without a special patent or grant. *Mobile* v. *Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325; *Pike* v. *Monroe*, 36 Me. 309, 58 Am. Dec. 751; 3 Kent, Com. 11th ed. *427. In Maine the common law was changed by an ordinance of 1641, which declares that proprietors of land adjacent to the tide waters "shall have propriety to the low-water mark," "where the sea doth not ebb above a hundred rods, and not more wheresoever it ebbs further." For the whole article, see *Com.* v. *Alger*, 7 Cush. 67. In *Gerrish* v. *Union Wharf Proprs.*, 26 Me. 384, 46 Am. Dec. 568, the court was called upon to define the meaning of "low-water mark" as used in that ordinance, and in passing upon the question said: "It evidently contemplates and refers to a mark which could be readily ascertained and established, and that to which the tide on its ebb usually flows out would be of that description. That place to which the tide might ebb, under an extraordinary combination of influences and of favoring winds, a few times during one generation, could not form such a known boundary as would enable the owner of flats to ascertain satisfactorily the extent to which he could build upon them. Much less would other persons, employed in the business of commerce and navigation, be able to ascertain with ease and accuracy whether they were encroaching upon private rights or not, by sinking a pier or placing a monument. It would seem to be reasonable that high and low water marks should be ascertained by the same rule. The place to which tides ordinarily flow at high water becomes thereby a well-defined line or mark, which at all times can be ascertained without difficulty. If the title of the owner of the adjoining land were to be regarded as extending, without the aid of the ordinance, to the place to which the lowest neap tides flowed, there would be found no certain mark or boundary by which its extent could be determined. The result would be the same if his title were to be limited to the place to which the highest spring tides might be found to flow. It is still necessary to ascertain his boundary at high-water mark in all those places where the tide ebbs and flows more than one hundred rods, for the purpose of ascertaining the extent of his title towards low-water mark. It is only by considering the ordinance as having reference to the ordinary high and low water marks that a line of boundary at low-water mark becomes known, which can be satisfactorily proved, and which, having been once ascertained, will remain permanently established." Sir Matthew Hale, in his treatise De Jure Maris, chap. 4, says: "The shore is that ground that is between the ordinary high and low water mark." He remarks also: "It is certain that that which the sea overflows, either at high spring tides or at extraordinary tides, comes not, as to this purpose, under the denomination of '*litus maris*,' and consequently the king's title is not of that large extent; but only to land that is usually overflowed at ordinary tides." This treatise has been received by judicial tribunals and by distinguished jurists, both during the earlier and later years of the law, with unqualified approbation and commendation. The authorship of this work has been questioned, but it has often been recognized in this country by the courts, and has become a text-book. Houck, Rivers, § 80. In *Storer* v. *Freeman*, 6 Mass. 436, 4 Am. Dec. 155, it was in effect held that low-water mark, as applied to the seashore, is ordinary low-water mark. In *Canal Comrs.* v. *People*, 5 Wend. 423, cited in Gould on Waters, § 82, *Chancellor* Walworth, while holding that the common-law rule was applicable to the navigable fresh rivers of New York, said: "The principle itself does not appear to be sufficiently broad to embrace our large fresh-water lakes, or inland seas, which are wholly unprovided for by the common law of England. As to these there is neither flow of tide nor thread of stream, and our local law appears to have assigned the shores down to the ordinary low-water mark to the riparian owners, and the beds of the lakes, with the islands therein, to the public." In *Sloan* v. *Biemiller*, 34 Ohio St. 492, low-water mark is defined to be "ordinary low-water mark;" and in *Seaman* v. *Smith*, 24 Ill. 521, it is said to be the "line where water usually stands when unaffected by any disturbing cause." The question of what is meant by low-water mark as a terminus of boundary was discussed and passed upon in *Stover* v. *Jack*, 60 Pa. 339, 100 Am. Dec. 566, and it was held to be the ordinary low-water mark. While the opinion of the court disclaimed the application of any law except that of Pennsylvania to the question, the reasoning of the court is very satisfactory. It said: "To adopt any other rule than low-water mark, unaffected by drought, as the limit of title, would carry the rights of riparian owners far beyond boundaries consistent with the interests and policy of the state, and would confer title where heretofore none has been supposed to exist. . . . Ordinary high water and ordinary low water each has its reasonably well-defined mark, so nearly certain that there is not much difficulty in ascertaining it. The ordinary rise and fall of the stream usually finds nearly the same limits. But to bound title by a nick which is set by an extraordinary flood or an extreme drought would do injustice, and contravene the common understanding of the people."

These suggestions, as well as the others quoted, apply with great pertinency to the

case at bar. Lake Champlain is a public, navigable water. It does not appear that at any other time in its history its waters have receded to the point to which they did in the exceptionally dry season of 1882. We think that upon reason and authority low-water mark, as a terminus of boundary, must be held to mean ordinary low-water mark. This being so, defendant Young did not enter upon the premises of the plaintiff, as the referee finds that Young's boat, from which he fired at the ducks passing overhead, at the time of such firing, was at a place in the lake below ordinary low-water mark. To dispose of the case it is not necessary for us to determine what right, if any, the public has to sail over lands bordering Lake Champlain between ordinary high and ordinary low-water marks, when such lands are covered with water; nor is it necessary to decide in respect to the right of the inhabitants of this state under chapter 2, section 40, of our State Constitution, in seasonable times "to hunt and fowl on the lands they hold, and on other lands not inclosed," nor in respect to the constitutionality of Statute 1884, No. 79, and we do not consider either of these questions.

Judgment reversed as to defendant Young, and judgment that he recover his costs.

Tyler, J., being engaged in county court, and **Start, J.**, having been of counsel, did not sit.

INDIANA SUPREME COURT.

Agnes E. ANDERSON *et al.*
v.
Martha E. BELL *et al.*

(.....Ind.....)

1. The meaning judicially given to words in a statute will be taken as that intended when used in a subsequent similar statute.

2. Brothers and sisters of the half blood are included in a statutory provision for descent to brothers and sisters, unless a contrary intention appears.

3. Inheritance is not confined to brothers and sisters of the half blood, to the exclusion of descendants of deceased ones, by a statute which merely excludes the half-blood kindred from inheriting an estate which came

NOTE.—*Descent and distribution among kindred of the half blood.*

I. *The common-law doctrine.*
II. *In the United States.*
III. *Meaning of the words.*
 a. *In general.*
 b. *Ancestor.*
 c. *Blood.*
 d. *Brothers and sisters.*
IV. *No distinction between the whole and half blood.*
V. *In the case of ancestral estates.*
VI. *When the statute not express.*
VII. *Cases wherein the whole blood is preferred.*
VIII. *When half blood preferred to remoter relative of the whole blood.*
IX. *When half blood take half portions.*
X. *Shifting descents.*
XI. *Equitable conversion.*

Upon the question of inheritance by, through, or from an illegitimate, see *note* to Croan v. Phelps (Ky.) 23 L. R. A. 753 (1893).

I. *The common-law doctrine.*

By the common law as it existed in England prior to the Statute of Descents, 3 & 4 Wm. IV., chap. 106, the half blood were not entitled to inherit real estate as the collateral heir must have been the next collateral kinsman of the whole blood, to be able to take by descent. Litt. § 6; 2 Bl. Com. 224.

And therefore, by such law, if a man died seised of an estate of inheritance, leaving a brother of the half blood, but no heirs of the whole blood, the estate did not go to such brother of the half blood, but escheated to the lord for want of heirs. Brown v. Brown, 1 D. Chip. 360 (1815).

Section 9 of the above-mentioned statute, however, now governs the descent to the half blood, and provides that a kinsman of the half blood shall be capable of being heir; and that such kinsman shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman, when the common ancestor is a male, and next after the common ancestor when such ancestor is a female.

With respect to personal estate, there is now no preference given to the whole over the half blood in tracing the degrees of kindred in the distribution of an intestate's estate, as, by the cases of Moor v. Barham, cited in 1 P. Wms. 53 (1723); Jessopp v. Watson, 1 Myl. & K. 665, 2 L. J. Ch. N. S. 197 (1833); Burnet v. Mann, 1 Ves. Sr. 156, 1 Myl. & K. 672, *note* (1748); Smith v. Tracy, 1 Mod. 209 (1676); and Crooke v. Watt, 2 Vern. 124 (1690),—brothers and sisters of the half blood have an equal claim with those of the whole blood.

And this is so even in the case of an alien of the half blood. Crooke v. Watt, *supra*.

And in the case of estate tail the half blood coming within the description of the entail may inherit as effectually as the whole blood, the rule of *possessio fratris* not applying. Doe, Gregory, v. Whichelo, 8 T. R. 211 (1799).

Under the English Statute, 1 James II., chap. 17, brothers and sisters of the half blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother after the death of the intestate's father, in the personal property of the intestate dying without wife or children. Jessopp v. Watson, *supra*.

In Earl of Winchelsea v. Norcliffe, 1 Vern. 435 (1686), the court was of the opinion that where there was a brother of the whole blood of the intestate, and a sister of the half blood, the sister should have taken half a share, but this decision was reversed in Crooke v. Watt, *supra*.

In Burnet v. Mann, 1 Ves. Sr. 156, 1 Myl. & K. 672, *note* (1748), the claim of a posthumous brother of the half blood was allowed, under the English Statute, 1 James II., chap. 17, § 7, the testator having died leaving a widow and three children, bequeathing a certain sum to one of his sons, who afterwards died an infant in the lifetime of his mother and before the birth of a half brother by the second marriage of his mother.

In Collingwood v. Pace, 1 Vent. 424 (1668), it was said that the brother of a half blood was nearer than an uncle, and was therefore preferred in the administration, as the uncle on the part of a father had no more blood of the mother than the brother

to the intestate by gift, devise, or descent from an ancestor, unless they are of the blood of such ancestor, or there are none of his blood in existence.

(February 6, 1895.)

APPEAL by descendants of the whole blood of Margaret Anderson, deceased, from a judgment of the Circuit Court for Carroll County permitting descendants of the half blood to inherit equally with descendants of the whole blood, in a proceeding for the partition of the estate and the determination of the rights of the several claimants thereto. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John H. Gould** and **George R. Eldridge**, for appellants:

At common law, the half blood was entirely excluded from the inheritance.

2 Bl. Com. 227; 3 Lead. Cas. Am. Real Prop. 428.

All enactments pertaining to the inheritance of kindred of the half blood are in derogation of the common law, and consequently must be strictly construed and not extended in meaning by judicial act.

"Half blood" is a term denoting the degree of relationship which exists between those who have one parent only in common.

1 Bouvier, Dict. p. 739; 9 Am. & Eng. Encyclop. Law, p. 261.

of the second venter, and he had the immediate blood of the father, which the uncle had not. To the same effect, Cowper v. Cowper, 2 P. Wms. 720 (1784).

Under the Spanish law, if a man dies leaving no descendant but his mother and brothers both of the whole and of the half blood, his mother succeeds to him to the exclusion of all the brothers. Cutter v. Waddingham, 22 Mo. 206, 260 (1855).

II. *In the United States.*

The question is dealt with by the legislatures of the several states of the Union, and is therefore dependent upon the terms and provisions of the state statutes, which, with but very few exceptions, make express provisions for the descent and distribution of estates among kindred of the half blood.

Most of the statutes dealing with the matter provide for the equal distribution of personal estate between the two classes, but make a distinction in the case of real estate when the estate descending is ancestral in its character, in which case those of the blood of the ancestor are preferred.

In a very few cases it will be found that the statutes make no provisions, either express or implied, regarding the half blood by which they are either included or excluded, but the courts have in such cases construed the intention of the legislature as leaning to the former rather than to the latter result, and they have therefore been admitted to take thereunder.

Some cases are to be found in which the half blood have been preferred to remoter issue of the whole blood, and others admitting those of posthumous birth. So cases are to be found wherein the legislature has thought fit to exclude or restrict them to half portions.

The exclusion of the half blood being looked upon as a hardship, and as no necessity growing out of our tenure exists for its continuance, it has been abrogated, except in the cases provided for by statute, and perhaps some exceptional cases not provided for by the express provisions of the act regulating descents; and in the state of New York there is no distinction between the whole and the half blood as to descents from brothers and sisters, except in the case of ancestral inheritance. Valentine v. Wetherill, 31 Barb. 655 (1860).

The question of descent and distribution among the half blood would seem to be a matter wholly within the control of state statutes, for the reason that the distribution and right of succession to the estates of deceased persons are matters exclusively of state cognizance. Cope v. Cope, 137 U. S. 682, 34 L. ed. 832 (1891).

And the different states have authority to regulate and provide a system of descents and distributions of estates within their respective jurisdictions in such cases. Cox v. Clark, 93 Ala. 400 (1891).

The transmission of property, whether by descent, succession, or purchase, among the half as well as the whole blood, depends upon the municipal regulations of each state, and no duty more delicate can be imposed on courts of justice than to pass upon and enforce these regulations. Kelly v. McGuire, 15 Ark. 555, 582 (1855).

The English rules or canons of inheritance, being of feudal origin, are not followed by the laws of Delaware; and the entire exclusion of the half blood has been deemed unreasonable, unnatural, a hardship, inconsistent with the character and policy of the government, and as not calculated to promote the true situations of the citizens. Doe, Kean v. Roe, 2 Harr. (Del.) 108, 29 Am. Dec. 336 (1836).

The common law of descents was entirely repealed by the Virginia Act of 1785, as revised by the Laws of 1792 and 1819, admitting the half blood. Davis v. Rowe, 6 Rand. (Va.) 355 (1828).

Whether or not property has been acquired by descent so as to admit the half blood must be determined by the canons of descent, and not by the equitable doctrine which follows a fund into whatever shape it may assume. Orr v. White, 106 Ind. 341 (1886).

III. *Meaning of the words.*

In this section the meaning placed upon the words therein specified is only considered so far as passed upon by the courts construing them, in considering the rights of kindred of the half blood under the various state statutes relating to descent and distribution among such kindred, and the section is therefore not intended to be an exhaustive collection of the authorities construing such words.

a. *In general.*

If the legislature makes use of a term without defining it, and it has by the common law received a settled meaning, it will be presumed that it is used in the same sense. Hillhouse v. Chester, 3 Day, 166, 3 Am. Dec. 265 (1808).

The above interpretation was placed upon the Connecticut statute of distribution prior to the Revision of 1784, by which real and personal estate were placed upon the same footing, the term "next of kin," as used therein, relating to both real and personal estate, and therefore the issue of the whole blood of the first purchaser were not alone entitled to real estate.

b. *Ancestor.*

Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation as his heir at law, an heir being he upon whom the law casts the estate immediately at the death of the ancestor, the estate so descending being the inheritance. Freeman v. Allen, 17 Ohio St. 527 (1867),—in which case the question arose as to the descent of an estate taken under the provisions of the Ohio statute relating to partition proceedings, under

Robert Anderson was a half brother of Margaret and of the blood of the common ancestor, and, had he survived Margaret, would have inherited. But Robert's children (appellees) are not half-blood relatives of Margaret, and under the Law of 1852 cannot inherit.

For many years prior to 1852, descendants of kindred of the half blood did inherit. By omitting the word "descendants" the legislature declared its intention to go back to the rule declared by the Ordinance of 1787, equalizing those of the whole and those of the half blood, children of a common parent.

Every act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law.

Potter's Dwarr. Stat. p. 155.

Courts are not at liberty to suppose or to hold that the legislature intended anything different from what their language imports.

Niagara County Supvs. v. *People*, 7 Hill, 513; Potter's Dwarr. Stat. p. 146; *United States* v. *Irwin*, 5 McLean, 178; *Nicholson* v. *United States*, Dev. Ct. Cl. 158.

The following cases are all the decisions of this court upon the act in question, and in no case is the right of descendants of kindred of the half blood considered. In parenthesis is the act under which the case arose.

Clark v. *Sprague*, 4 Blackf. 412 (1787); *Doe, Moore*, v. *Abernathy*, 7 Blackf. 442 (1818); *Henson* v. *Ott*, 7 Ind. 512 (1848); *Aldridge* v. *Montgomery*, 9 Ind. 302 (1831); *Cox* v. *Matthews*, 17 Ind. 367 (1831); *Greenlee* v. *Davis*, 19 Ind. 60

which one co-owner had elected to take the estate, and, having obtained a conveyance thereof, died intestate leaving issue of the whole and half blood, the point being whether the estate vested in such cotenant by descent or by purchase so as to exclude or include the half blood.

An estate by purchase is one acquired by sale or gift, or by any other method, except only that of descent, and the law knows no such distinction between a gift or devise by a stranger and a gift or devise by an ancestor, and nothing in any Maryland act warrants such distinction. Hall v. Jacobs, 4 Harr. & J. 245, 254 (1815),—wherein the question was as to whether an estate became vested in the deceased by descent or purchase to so admit the half blood.

As used in the Connecticut statute admitting the half blood (Gen. Stat. Rev. 1866, § 59, p. 415) the word refers to the immediate, and not to the remote, ancestor. Clark v. Shailer, 46 Conn. 119 (1878).

The word as found in Ind. Rev. Stat. 1843, § 114, p. 436, is not used in its usually defined meaning, but as synonymous with kindred, and must be construed as embracing all from whom a title by descent can be derived under any circumstances. Greenlee v. Davis, 19 Ind. 60 (1862),—where the question was, whether a half-brother of an intestate, who held under a devise, took equally with a brother of the whole blood.

Property acquired by descent is property which the law upon the death of the ancestor casts upon the heir. Orr v. White, 106 Ind. 341 (1886),—decided under the Indiana statute (Rev. Stat. 1881, § 2472), which provides that the whole blood only take such estates.

A husband or wife from whom property descends, is, within the meaning of the Indiana statute, an ancestor. Cornett v. Hough, 126 Ind. 337 (1890).

By section 15 of 1 N. Y. Rev. Stat., p. 753, relatives of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor are excluded from such inheritance. The term "ancestor" is used in the above section in its proper sense, and designates the immediate, and not the remote, source of the intestate's title and is not equivalent to the expression, "the parent or other kindred of the intestate," as used in the Rhode Island statute. Valentine v. Wetherill, 31 Barb. 655, 659 (1860).

The above section of the New York statute refers to the descent, devise, or gift last preceding the death of the intestate, the ancestor referred to being the immediate ancestor from whom the intestate received the inheritance by devise or gift. Wheeler v. Clutterbuck, 52 N. Y. 67 (1873).

It embraces collaterals as well as lineals through whom an inheritance is derived. *Ibid.*; Emanuel v. Ennis, 16 N. Y. Week. Dig. 430, 16 Jones & S. 430 (1882),—wherein the court construed the 15th section of the New York Statute of Descents, 1 Rev. Stat., 753, as appertaining to the half blood.

It means any one from whom the estate is inheritable, and the ancestor from whom it must in law be understood to have come to the intestate is he from whom it was immediately inherited: therefore, under the Ohio Statute of 1831, it is not to be understood as when used in common parlance; an uncle of the intestate from whom the latter inherited being his ancestor in the sense of such statute. Prickett v. Parker, 3 Ohio St. 304 (1854); Brewster v. Benedict, 14 Ohio, 385 (1846).

In the former case an intestate left two infant sons and a widow. Upon the death of the survivor of such sons unmarried and without issue, the other son having died under age and without issue, it was held that the latter became the ancestor of the survivor as to a moiety, and that, therefore, the half brothers and sisters by the subsequent marriage of the widow took such share. Prickett v. Parker, *supra*.

In Brewster v. Benedict, 14 Ohio, 368 (1846), the question arose upon the joint construction of the clause in a will and of the Ohio statute, so as to admit the half blood. The estate in that case, which came to the intestate under a will, was that which he would have inherited as heir at law in case of intestacy. The court excluded the half blood, holding that the estate descended only to those who were of the blood of the testator, no matter whether such person was a lineal ancestor of the intestate or not.

Where an infant daughter died seised of an estate which had descended from her grandfather to her father, and from the latter to her, it was held, upon her death intestate and without issue, that the same passed to the half-blood brothers and sisters of her father, as against the brothers and sisters of the whole blood of the grandfather, the father being the immediate ancestor from whom the estate came to the intestate, the daughter. White v. White, 19 Ohio St. 531 (1869).

So, in construing the section of the New Jersey statute admitting the half blood (Act of Jan. 29, 1817, Rev. Laws. 608), the court held that the inheritance was to descend, not from the ancestor, but from the person last seised, subject, however, to this restriction, that in a specified case they were not to take: the descent was not to be cast upon them unless they were of the blood of the ancestor, but was in all cases to fall on them, and on them exclusively, when of such blood, the words "such ancestor," as used in the proviso in the New Jersey statute, clearly meaning, and being exclusively confined to, the ancestor from whom the lands came immediately to the person dying seised, and not embracing other or more remote ancestors, although the

(1843); *Smith* v. *Smith*, 23 Ind. 202 (1852); *Armington* v. *Armington*, 28 Ind. 74 (1852); *Barnes* v. *Loyd*, 87 Ind. 528 (1852); *Robertson* v. *Burrell*, 40 Ind. 328 (1852); *McClanahan* v. *Trafford*, 46 Ind. 410 (1852); *Pond* v. *Irwin*, 113 Ind. 246 (1852).

Messrs. **Stewart T. McConnell** and **Albert G. Jenkines**, with *Mr.* **L. D. Boyd**, for appellees:

A person is properly said to be of the blood of another who has, however small a portion, the same blood derived from a common ancestor.

Gardner v. *Collins*, 27 U. S. 2 Pet. 87, 7 L. ed. 357; *Beebes* v. *Griffing*, 14 N. Y. 241.

There are but two classes of blood kindred. They are those of the whole blood and those of the half blood.

The term "brothers and sisters living and the descendants of such as are dead" is broad enough to include all brothers and sisters and their descendants, and Rev. Stat, 1881, § 2472, was enacted to remove the common-law limitation and place kindred of the half blood on equality with kindred of the whole blood.

Clark v. *Sprague*, 5 Blackf. 414.

McCabe, *Ch. J.*, delivered the opinion of the court:

A part of the appellees sued a part of the appellants for a partition of certain real estate in Carroll county, making the other ap-

lands might have passed from or through such ancestors to the immediate ancestor. Den, Delaplaine, v. Jones, 8 N. J. L. 419, 424, 426 (1824).

c. *Blood.*

A person is with the most strict propriety of language affirmed to be of the blood of another, who has a portion, however small, of the same blood derived from a common ancestor. Hart's App. 8 Pa. 33 (1848). To the same effect is Gardner v. Collins, 27 U. S. 2 Pet. 58, 7 L. ed. 347 (1829).

In the common law the word "blood" is used in the same sense. Gardner v. Collins, *supra*.

The phrase "of the blood," as contained in the Rhode Island statute, includes the half blood, such being the natural meaning of the word "blood," standing alone and unexplained by any context. *Ibid.*

A half brother or sister is of the blood of an ancestor, if each of them has some of the blood of a common parent in his or her veins. *Ibid.*

Whenever it is intended to express any qualification, the word "whole" or "half" blood is generally used to designate it, or the qualification is implied from the context or known principles of law. *Ibid.*

It is well settled that two persons are of the same blood, in part or in whole, who are descended from the same pair. If wholly descended from the same pair, as brothers and sisters having the same father and mother, they are wholly of the same blood, if they have different fathers and the same mother they are partly of the same blood, because they are descended from the same pair, namely their maternal grandfather and grandmother. Cole v. Batley, 3 Curt. C. C. 562 (1855).

The word "blood," in its technical and natural sense, includes the half blood. Kelly v. McGuire, 15 Ark. 555, 589 (1855); Baker v. Chalfant, 5 Whart. 477 (1855).

In construing the provisions of the New Jersey Statute of January 29, 1817, Rev. Laws, 608, relating to descent to the half blood, the court considered the meaning of the words "of the blood" of an ancestor as being that all are of the blood of an ancestor who may, in the absence of other and nearer heirs, take by descent from that ancestor, Den, Delaplaine v. Jones, 8 N. J. L. 419 (1824).

The term "descent," as used in the Ohio statute, has a fixed legal signification when used in relation to a transmission of title to real estate. Freeman v. Allen, 17 Ohio St. 527 (1867),—in which case the meaning of the word was considered with reference to the claim of the half blood, the question being whether an estate, which had descended to cotenants, part of which, under the Ohio partition act, the parties had taken by election according to the provisions of the 8th section of the Act, was acquired by descent or purchase so as to include or exclude the half blood.

The court in construing the term "the blood" of the ancestor, as used in the 15th section of the New York Act, held that it included the half blood, the words in their popular and ordinary sense including both those of the whole and the half blood, the term "of the blood" not indicating the quantity, but simply that there is some of that blood, whether the whole, or the half, or a smaller portion. Beebee v. Griffing, 14 N. Y. 235 (1856).

The kindred referred to in the 6th section of the Indiana Act must be kindred of the person last seised. McClanahan v. Trafford, 46 Ind. 410 (1874),—wherein the children of the widow by a former marriage sought, upon the widow's death, to inherit her share along with the issue of her second marriage, the court holding them so entitled. Smith v. Smith, 23 Ind. 202 (1864), to the same effect.

The word "family" as used in the section of the New Jersey statute providing for inheritance by the half blood, is to be construed in that sense in which the law uses it when speaking of descents, and in that restriction will comprehend only the descendants of such ancestor,—those who have his blood running in their veins,—and in that sense is nearly, if not quite, of the same import as the word "issue." Den, Pierson, v. De Hart, 8 N. J. L. 73 (1809).

The case of Brown v. Brown, 1 D. Chip. 360 (1815), did not involve the question whether the half blood stood in the same degree of kindred as brothers of the whole blood, but whether they were at all akin to each other. The court held that they had, as respects each other, but half of the blood of the common stock from which the descent was to be reckoned; but whether two persons are akin to each other does not depend upon the quantity of common blood, but on their actual derivation from the common stock; and that by such laws brothers and sisters of the half blood inherited the real estate and took the personalty as next of kin to each other. See, also, Cutter v. Waddingham, 22 Mo. 206, 261–263 (1855), *infra*, head V.

d. *Brothers and sisters.*

The expression "brothers and sisters" includes the half blood. Gardner v. Collins, 3 Mason, 408 (1824), 27 U. S. 2 Pet. 58, 7 L. ed. 347 (1829); Cox v. Clark, 93 Ala. 400 (1891); Clark v. Sprague, 5 Blackf. 412 (1840); Doe, Moore v. Abernathy, 7 Blackf. 442 (1845); Aldridge v. Montgomery, 9 Ind. 302 (1857); Sheffield v. Lovering, 12 Mass. 490 (1815); Clay v. Cousins, 1 T. B. Mon. 75 (1824); Rowley v. Stray, 32 Mich. 70, 75 (1875); Marlow v. King, 17 Tex. 177 (1856); Prescott v. Carr, 29 N. H. 458, 61 Am. Dec. 652 (1854); Beebee v. Griffing, 14 N. Y. 235 (1856); Wood v. Mitchell, 61 How. Pr. 43 (1881); White v. White, 19 Ohio St. 536 (1869); Oliver v. Sanders, 8 Ohio St. 501 (1858); Martin v. Falconer, 5 Ohio Co. Ct. Rep. 584, 585 (1891); Baker v. Chalfant, 5 Whart. 477 (1845); Luce v. Harris, 69 Pa. 423 (1876); Shull v. Johnson, 55 N. C. 202 (1855); State v. Wyman, 59 Vt.

pellees defendants, and the other appellants coplaintiffs, with themselves. Upon the issues formed there was a trial by the court without a jury, and at the request of both parties the court made a special finding of the facts, and stated its conclusions of law thereon. The conclusions of law are assigned for error.

As shown by the facts, John B. Anderson died testate on the 1st day of June, 1870, owner in fee simple of the real estate in controversy in this action. Margaret Anderson, a daughter of said John B. by his second wife, died intestate, August 27, 1880, owner in fee simple of said real estate, which she had received by devise from her father, John B. That she left surviving her no father, no mother, no husband, and no children, or their descendants. Robert Anderson, who died long previous to the death of said Margaret, was a son of said John B. Anderson, by his first wife, and consequently was a half-brother of the said Margaret Anderson, of the blood of the common ancestor, John B. Anderson. Robert left surviving him his half-sister, Margaret, and several children, appellees herein, who in this action claim that they are of the blood of John B. Anderson, and are kindred of the half blood to Margaret, and, as descendants of Margaret's deceased half-brother, inherit Robert's interest in Margaret's said real estate. And

537 (1887); Shelley v. State (Tenn.) 31 S. W. Rep. 492 (1895).

In Clark v. Pickering, 16 N. H. 295 (1844), it was held that, by the term "surviving brothers and sisters," the New Hampshire statute (N. H. Laws, ed. 1851, 207) did not intend to embrace a different class of persons from those indicated in the same clause by the words "children of the intestate."

And in Sheffield v. Lovering, 12 Mass. 490 (1815), these words were given the same construction.

Brothers and sisters, as used in subdivision 2 of section 1915 of the Alabama Code include those of the half blood, all inheriting equally the estate of a deceased brother or sister dying intestate without descendants, except as qualified and limited by section 1919 of the same. Cox v. Clark, 98 Ala. 400 (1891).

The words "relatives of the half blood shall inherit equally with those of the whole blood in the same degree," in section 15 of the New York Statute, mean that such relatives shall inherit precisely as they would have done had they been of the whole blood, and it cannot be doubted that they must be applied to every case of descent for which the preceding sections of the chapter were meant to provide, and that therefore, applying them as thus construed to section 8, in all cases of a newly purchased inheritance arising under section 8 of the Act, all brothers and sisters and their descendants of the half blood are to take as relatives of the whole blood. Brown v. Burlingham, 5 Sandf. 418, 422 (1852).

Under the 4th subdivision of the Ohio Law of 1835, the half brothers and sisters of the ancestor are included in the words "brothers and sisters of such ancestor," and are preferred to the brothers and sisters of the intestate of the half blood, who are not of the blood of the ancestor from whom the estate came. Oliver v. Sanders, 8 Ohio St. 501 (1858).

Half-brothers of the intestate are of the blood of such ancestor, but not of the whole blood. *Ibid.*

In the above case the court stated that to limit the words of the 4th subdivision to brothers and sisters of the ancestor of the whole blood would not be in accordance with the presumptive intention of the legislature.

"Brothers and sisters," in section 4162 of the Revised Statutes of Ohio, mean both the whole and the half blood. *Ibid.*; White v. White, 19 Ohio St. 536 (1869).

The Ohio Statute of 1877 was passed to change section 4159 of the Ohio Statute of Descent and Distribution, as under such section, according to the case of Brower v. Hunt, 18 Ohio St. 311 (1868), the estate would go to brothers and sisters of the whole blood alone. Stone v. Doster, 7 Ohio Co. Ct. Rep. 315 (1892).

To say that brothers and sisters or their legal representatives should be read to mean brothers and sisters of the whole blood, and, if there are none, to brothers and sisters of the half blood, violates one of the cardinal rules of construction, that when an estate goes to a class of persons each of the class takes. *Ibid.*

In Stone v. Doster, 7 Ohio Co. Ct. Rep. 8 (1892), the question for the decision of the court was the construction of Ohio Rev. Stat. § 4162, and was whether the words "one half to the brothers and sisters of such deceased husband or wife from whom such personal or real estate came" included in the words "brothers and sisters" both brothers and sisters of the whole and half blood when both classes existed, the court answering the same in the affirmative, stating that those who take property as a class of persons described, where there is nothing in the law making the appropriation to distinguish their respective rights, take in equal shares; citing the language of the court in Knapp v. Windsor, 6 Cush. 156 (1850).

There are cases, however, which hold that the half blood are not included in such expression; thus—

In Lawson v. Perdriaux, 1 McCord, L. 456 (1821), the court, in construing the provision of the South Carolina Act of 1797, held that if brothers and sisters comprehend those of the whole and half blood then not only would brothers of the whole and half blood and parents be placed upon the same footing and constitute but one class instead of three, but, by the provision of the act, the issue of the half blood would be made to take by representation, or *per stirpes*, equally with the issue of the brother of the whole blood, and that such a change in the rules of the Act of 1791 should be imperatively ordered before being adopted, otherwise new principles might, by construction, be introduced.

The term of the South Carolina Act of 1797 is, "brothers and sisters," and the strict import of the words used conspires with the apparent object which led to the act, to confine the meaning of brothers and sisters to those of the whole blood, an act amending a prior one not being construed to alter the rules laid down in the primary act, except so far as is plainly required, the prior Act of 1791 not only giving the whole estate to the brothers and sisters of the whole blood in exclusion of the half, and to parents in exclusion of both, but confining the right of taking by representation among collateral kindred to the issue of brothers and sisters of the whole blood. Lawson v. Perdriaux, *supra*.

Whenever in the rules of descent and distribution of real estate, the word "brother" is used in an uncertain sense, it should, by analogy to the meaning of the same word in the canons of descent, be construed brothers of the whole blood, where the canons of descent are in force, except so far as they may have been altered or have become inapplicable. *Ibid.*

In Wren v. Carnes, 4 Desaus. Eq. 405 (1813), it was held that, under the provisions of the South Carolina Act of 1791, the half blood were postponed one

the trial court so held. This presents the principal legal question in the case, viz., Do the descendants of kindred of the half blood inherit equally with kindred of the whole blood? The solution of the question rests upon the statute law of Indiana, for the law of descent is a matter which each state must regulate for itself. *Cope* v. *Cope*, 137 U. S. 682, 34 L. ed. 832. Considering the legislation chronologically, we find that the Ordinance of Congress of July 13, 1787, provided rules of inheritance in the territory of which the state of Indiana was formed, and it was therein provided that there should, "in no case, be a distinction between kindred of the whole and half blood," and that such law should "remain in full force until altered by the legislature of the district." Rev. Stat. 1843, p. 20. The 2d section of the Act to Regulate Descents, approved January 2, 1817 (the first enactment by the state), provided generally that "brothers and sisters of such deceased person dying intestate, and their descendants," shall inherit equally. Ind. Laws 1818, p. 183; Ind. Rev. Laws 1824, p. 154. The next act regulating descents was that of January 29, 1831, and there was no change in this respect. Rev. Stat. 1831, p. 208, § 2. The Act of February 17, 1838 (sec. 2), provided that "if there be no father or mother, then the whole shall be equally divided among the brothers and sisters, or their

degree to the whole blood in the succession to both real and personal property, and that the Act of 1797, which referred to the Act of 1791 and related to the same subject, must be taken to be one system and construed consistently; and that the general words "brothers and sisters" were broad enough to include brothers and sisters of the half blood, but that the Act of 1797 was open to two constructions, one consistent, and the other inconsistent, with the Act of 1791, the court adopting the former, holding that the same postponement took place thereunder.

In Sharp v. Kleinpeter, 7 La. Ann. 264 (1852), the question turned upon the meaning of the words "lawful heirs" as used in the testator's will, the court construing them to mean the half as well as the whole blood, and, they being free from ambiguity, and evidence to prove that the testator meant only a portion of her heirs at law was refused.

IV. *No distinction between the whole and half blood.*

In considering what ancestral estates are within the meaning of the state statutes, the courts in general hold that those acquired by gift, descent, or devise are mostly within the exceptions relating to such estates.

In the following cases, however, the courts have held that the whole and half blood take equally:

Thus, it has been held in Alabama that money, the product of the hire of an intestate's slaves after distribution, is not a part of the inheritance, and is therefore not acquired by descent, devise, or gift, and is therefore distributable between the whole and half blood, under section 1756 of the Code. Johnson v. Copeland, 35 Ala. 521 (1860).

The statute of that state abolishes the distinction between the whole and the half blood as to the descent of estates, except in the single instance of the inheritance coming from an ancestor who was of the blood of one and not of the other class. Eatman v. Eatman, 83 Ala. 478 (1888).

In that case the intestate was twice married, there being children by each marriage, and the land was allotted to her after the death of her last husband by virtue of the statutes as a homestead exempt from sale for the husband's debts, and which she was permitted to retain until it was ascertained whether his estate was solvent or insolvent. The estate being vested in her absolutely, was held to be acquired by her, not by inheritance from an ancestor, but by statutory right, and the children of both marriages therefore stood in the same degree of relationship and no distinction was made between them, as the words of the statute, "came to the intestate by descent, devise, or gift from or of some one of his ancestors," had no application to the case. *Ibid.*

All property owned by an intestate dying without lineal descendants, leaving brothers and sisters of the whole and half blood, and not coming to him by descent, devise, or gift from or of some one of his ancestors, and which may be called a "new acquisition," goes equally to the brothers and sisters, whether of the whole or half blood, by virtue of section 1919 of the Alabama Code of 1886. Cox v. Clark, 93 Ala. 400, 408 (1891); Johnson v. Copeland, 35 Ala. 521 (1860).

Brothers and sisters, as stated in section 1914, subdiv. 2, of the Alabama Code of 1886, include the half blood, and all inherit equally except as qualified by section 1919. And it has been held that children, or their descendants, of an intestate, or an intestate dying without children, leaving brothers and sisters or their descendants, take by representation without regard to degrees; that is, the children or grandchildren take the same share that their deceased parents would have inherited if living, and by representation they are held to be in the same degree as such ancestor if he were living. Cox v. Clark, *supra*; Hitchcock v. Smith, 3 Stew. & P. (Ala.) 29 (1832).

The children of a deceased half brother and sister by right of representation stand in equal degree of relationship to the intestate with the surviving brothers and sisters of the whole and half blood, and *per stirpes* they are entitled to the distributive shares in the estate which their parents would have received if living. Stallworth v. Stallworth, 29 Ala. 76 (1856),—in which case the intestate died, leaving several brothers and sisters both of the whole and of the half blood, and nephews and nieces, the children of deceased brothers and sisters of the half blood.

So in newly acquired estates they inherit equally with the whole blood in the same degree, in Arkansas. Kelly v. McGuire, 15 Ark. 555, 582 (1855).

In Clark v. Russell, 2 Day, 112 (1805), the half blood were held entitled to an equal share with the whole blood, in estates coming from the common ancestor, under the Connecticut statute of distribution previous to the Revision of 1784.

The general object of the intestate law of Delaware is to continue the estate in the family of the intestate, without regard to the families or connections of those from whom it may have descended to the intestate, looking principally to a paramount claim of proximity of blood to the intestate. Doe, Kean, v. Roe, 2 Harr. (Del.) 114, 29 Am. Dec. 236 (1836).

The Delaware statute does not exclude the half blood from inheriting if there be no heir of the whole blood. *Ibid.*

It classes the persons who are to inherit in succession, and requires that they shall have a certain connection or relation to the intestate, but does not require them to connect themselves by blood or otherwise with any one beyond the intestate, or with the first purchaser from whom the estate descended to the intestate, except where the estate passes to brothers and sisters under that act. *Ibid.*

Under such laws the lands of an intestate descend to his children and their issue, and, in the absence

descendants." And "that half brothers or sisters, or their descendants shall, if there be brothers or sisters or their descendants alive, inherit each to the amount of one half the share of each full brother or sister or their descendants alive, then the half brothers or sisters, or their descendants shall inherit in the same way as if they were full brothers or sisters, or their descendants." Rev. Stat. 1838, p. 236, § 2. By the Statute of 1843, "kindred of the half blood and their descendants shall inherit equally with those of the whole blood in equal degree of consanguinity to the intestate." Rev. Stat. 1843, p. 436, § 114. And such was the law until 1852, when the law now in force was enacted, and is section 2472 of the Revised Statutes of 1881 (Burns' Rev. Stat. 1894, § 2627).

It is contended by the appellants' learned counsel that the Revision of 1852, which has been carried forward into that of 1881, made a change in the rule of inheritance, as to kindred of the half blood, so that, since, no kindred of the half blood can inherit unless they are brothers or sisters of the half blood. It is conceded that all kindred of the half blood—that is brothers and sisters of the half blood and their descendants—could inherit equally with those of the whole, in this state, from the organization of the territory under the Ordinance of 1787 up to the Revision of

of such, to brothers and sisters of the whole blood and their issue, and, in case of their failure, to brothers and sisters of the half blood and their issue, the half blood not being excluded if there be no heir of the whole blood. *Ibid.*

The law being thus declared by the Delaware statute, it cannot be held, in that state, that no one shall inherit lands as heir, unless he be of the blood of the first purchaser, or that he who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate must be of the same blood, and make himself heir to such purchaser at the time the remainder or reversion falls into possession. *Ibid.*

The half blood are entitled to and must be admitted to share in the distribution of personal estate in equal degree with the whole blood in all cases where they are not by express statutory provision excluded by preference conferred by it on others, under the Delaware statutes. McKinney v. Mellon, 8 Houst. (Del.) 277 (1864). In that case children of deceased sisters of the whole and half blood of the father of the intestate were held equally entitled, the Delaware statute only having preferred brothers and sisters of the whole blood to brothers and sisters of the half blood.

So the distinction is abolished in Illinois. Elder v. Bales, 127 Ill. 425 (1889); Oglesby Coal Co. v. Pasco, 79 Ill. 164 (1875).

The Illinois statute of wills (Gross, Stat. 1869, p. 805), providing that in no case shall there be a distinction between the kindred of the whole and the half blood, has been held to apply, not only to cases where the ancestor from whom the estate is derived leaves children by different mothers, but also the children of the same mother who have different fathers, children of the same mother, but having different fathers being no less brothers and sisters of the half blood than those who are the children of a common father but having different mothers. Oglesby Coal Co. v. Pasco, *supra*.

In Clark v. Sprague, 5 Blackf. 412 (1840), the bill alleged that the intestate died without issue, and without father or mother or wife him surviving, leaving the complainants, the brothers and sisters of the half blood and their descendants, and the defendants, brothers and sisters of the whole blood and their descendants, him surviving, leaving personal and real estate not derived by purchase with the estate of or by descent from the father or mother of the intestate. Under the Indiana Act of 1831, the half blood were entitled equally with the whole.

Under the Indiana Laws of 1818, brothers and sisters of the half blood inherited the estate of a deceased brother equally with those of the whole blood. Den, Moore, v. Abernathy, 7 Blackf. 442, 449 (1845).

In Henson v. Ott, 7 Ind. 512 (1856), the petition alleged that the deceased died unmarried, without children or heirs of his body, or any lineal descendants him surviving; that his father and mother were dead; the nearest relation surviving on the right ascending line being his paternal grandmother; he also left brothers and sisters of the half blood. Under the Indiana Act of 1843, it was held, that the brothers and sisters of the half blood were entitled to the personal estate, of which the money derived from the sale made by the intestate of his real estate constituted a part.

But if the estate has come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor can inherit. Armington v. Armington, 28 Ind. 74 (1867).

Where lands were conveyed by a man and his wife to their daughter and her husband, and the daughter died leaving two children, the husband marrying again and having seven children by such second marriage, the real estate descended to the children of the first and second marriage equally, as the case did not come within the provision of the Indiana statute regulating descents (1 Gavin & H. 292), the estate not coming to the intestate by gift, devise, or descent from such ancestor of the intestate, the father and mother conveying such property not being ancestors of their daughter's husband. Barnes v. Loyd, 37 Ind. 528 (1871).

In construing the provisions of the Indiana statute of descent, which provide that "kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those kindred of the half blood only who are of the blood of such ancestor shall inherit; provided, that on failure of such kindred of the half blood having the blood of such ancestor, other kindred of the half blood shall inherit as if they were of the whole blood,"—the court stated that it was not reasonable to suppose that the legislature, after having liberally provided for kindred of the half blood in the revision of the Indiana Revised Statutes of 1838 and 1843, intended by the Revision of 1852 to postpone them until after there was a failure of all kindred of the intestate who had the blood of the ancestor from whom the estate descended, however remote in degree. Robertson v. Burrell, 40 Ind. 328 (1872).

Where land acquired by descent was sold, and the proceeds invested in the purchase of other lands, such lands are acquired by purchase, and not by descent, devise, or gift within the meaning of the Indiana Revised Statutes relating to the laws of descent, § 2472. Orr v. White, 106 Ind. 341 (1886).

Mortgage liens upon land received by will, and subsequently foreclosed and exchanged, are not acquired by gift, devise, or descent from any ancestor, but are acquired by purchase, and are therefore not within the meaning of the above section of the Indiana Revised Statutes. Cornett v. Hough, 136 Ind. 387 (1893).

Where the testator died leaving no children or

1852, because the previous statutes provided, or had been construed to mean, that kindred of the half blood and their descendants should inherit equally with those of the whole blood, and that the provision in favor of the descendants of the half blood was omitted from the Revision of 1852. It is contended that such omission evinced an intent to limit the inheritance of the half-blood kindred to half-brothers and half-sisters, and to cut off their descendants. In short, it is contended that a descendant of a half-blood brother or sister is not kindred of the half blood, and hence cannot inherit until the legislature restores the provision in favor of the descendants of the kindred of the half blood.

The solution of the question thus raised depends upon the proper construction of sections 2470, 2472, Rev. Stat. 1881 (Burns' Rev. Stat. 1894, §§ 2625, 2627). Counsel concede that these two sections must be construed together, and, as we may properly say, they ought to be construed as if they were but one and the same section. And yet counsel, having made that concession, proceed to build up their whole theory on the absence of the words "their descendants" from the latter section. The first section above provides that "if there be neither father nor

father or mother surviving, but leaving his widow as his sole heir at law, and devised to her his entire estate absolutely, and she died intestate owning lands part of which were those in dispute, the title to a portion of which she acquired by a deed of gift from her husband, and other portions by conveyance in satisfaction of a mortgage and by foreclosure, the court held that such portion as she did not take by way of gift, devise, or descent, under Ind. Rev. Stat. 1881, § 2472, but were acquired by purchase, went to the half blood equally with the whole. *Ibid.*

In Talbott v. Talbott, 17 B. Mon. 1 (1856), the question was whether the brothers and sisters of the whole and the half blood of an infant, who derived the estate under devise from the common father, took, upon the death of such infant, as lineal descendants of the father as though directly from him, or as collaterals of the infant deriving their right through a common ancestor, and the court construed the sections of the Kentucky Statute (Rev. Stat. p. 280, §§ 3, 9), as not designed to alter the character of the descendants, making collaterals lineals, but that the language "to that parent and his or her kindred" merely imported a restriction of the descent to the kindred of that parent to the exclusion of the kindred of the other, as qualified in the section; and held that the statute simply limited the descent of the real estate of an infant dying without issue to that side of the house from which it came, and therefore the half blood took half shares only with those of the whole blood.

The Kentucky statute (Rev. Stat. p. 280, §§ 3 and 9) does not alter the well-settled rules as to collateral and lineal descents, the rule simply limiting the descent of real estate of an infant dying without issue to that side of the house from which it came. *Ibid.*

In Pearson v. Grice, 6 La. Ann. 232 (1851), the question was, whether a sister of the half blood of the father of the deceased was entitled to share equally with a sister of the whole blood of the mother of the deceased; article 910 of the Civil Code providing that, among the collateral relations, he who is the nearest in degree excludes all the others, and if there are several in the same degree they take equally and by heads according to their number, the propinquity of consanguinity being established, by article 895, by the number of generations, each generation being called a degree. The court held that the language of the articles was free from ambiguity, and that the plain import of the words applied equally to relations of the half and of the whole blood; and that therefore in collateral successions those of the whole and those of the half blood shared alike, as under the new articles adopted from the French code, in collateral successions the proximity of degree was alone to be looked to, without regard to the question whether the relationship to the deceased was of the whole or half blood.

By the Maryland laws, if a man seised of an estate dies intestate leaving a brother of the whole blood, who survives him and dies without issue and without being seised, the half blood of the person seised will inherit. Chirac v. Reinecker, 27 U. S. 2 Pet. 613, 7 L. ed. 538 (1829).

The above case was decided upon the principle that a person claiming as heir must prove himself heir of the person last seised. *Ibid.*

In Seekamp v. Hammer, 2 Harr. & G. 9 (1827), the intestate died leaving a mother, a brother of the whole blood, and four brothers and sisters of the half blood. The court held that under the Maryland Act of 1798, chap. 100, subchap. 11, § 11, a half sister took a sixth, and that the expression, "and there shall be no distinction between whole and half blood," which ran through the whole of the subchapter, included the whole and the half blood in the distribution of personal estate, there being no ambiguity in that part of the act.

Where the deceased died intestate leaving a child by a first, and two children by a second, wife, another son being born after his decease, his first son by the second marriage dying without issue before the birth of his brother, the question was whether or not the complainant, the daughter of the testator's first marriage, together with the children of the second marriage, were equally entitled to the portion of the land which descended to the deceased brother from the father, or whether the same descended to the brother and sister of the whole blood of the second marriage to the exclusion of the sister of the half blood of the first marriage. The court held they were equally entitled to the portion of the land which descended to the deceased brother from the father, there being no distinction to direct descents between brothers and sisters of the whole and half blood, where they are children of the same father from whom the estate descends, under the Maryland Act of 1786. Lowe v. Maccubbin, 1 Harr. & J. 550 (1805).

In Sheffield v. Lovering, 12 Mass. 489 (1815), the intestate left a child and widow him surviving the child subsequently dying without having been married, leaving brothers and sisters of the half blood by the former marriage of the intestate's widow. The court held that such half blood took equally with the mother under the Massachusetts provisional act, which adopted the language of the English Statute of Charles, which was construed as admitting the half blood in the distribution of the estate.

Under a clause in a will devising the residue of the estate in trust for the benefit of a son during life, and directing trustees, upon the son's death leaving no children or descendants of children, to divide the same "among the next of kin of said son, or those persons to whom the property would go provided my said son owned the property and he died without issue and intestate," it was held that the children of the half sisters of the testator took equally with the children of his brothers and sisters of the whole blood in the distribution, by virtue of

mother, the brothers and sisters of the intestate living and the descendants of such as are dead shall take the inheritance as tenants in common." Counsel assume, as a foregone conclusion, that the language of the section above quoted excludes brothers and sisters of the half blood. If they are right in this, the court erred in its conclusions of law. But, if they are wrong, then the court did not err. The statute uses the words "brothers and sisters" without qualification or restriction. Webster defines the word "brother" to mean a male person who has the same father and mother with another person, or who has one of them; and the word "sister," as a female who has the same parents with another person, or who has one of them only. This meaning of the words "brothers" and "sisters" was adopted by this court in construing a similar statute fifty-five years ago, in *Clark v. Sprague*, 5 Blackf. 412, 413. This court there said, at pages 414, 415, that "our statute of descents and distribution, as is well known, makes no reference to the first purchaser. That statute, or so much of it as is applicable to the present case, is as follows, viz.: That the real and personal estate of any person dying intestate shall descend to his or her children or their descendants in equal parts, that is, to the children of a

Mass. Gen. Stat., chap. 91, § 5, providing that kindred of half blood shall inherit equally with those of the whole blood in the same degree, the plain purpose of the statute being to admit the kindred of the half-blood relation in different degrees to an equal participation in the distribution of the estate, thereby changing the rule of the common law. Larrabee v. Tucker, 116 Mass. 562 (1875). See also Conant v. Kent, 130 Mass. 178 (1881), *infra*, head VIII.

In Michigan in lands acquired by purchase the half blood inherit equally with the whole. Van Sickle v. Gibson, 40 Mich. 170 (1879),—where the deceased patented the lands and died seised without having been married, and without father or mother, but leaving a half-sister, and after her the children of a deceased sister, the only surviving and next of kin.

See also Rowley v. Stray, 32 Mich. 70 (1875); Henderson v. Sherman, 47 Mich. 267 (1882); and Ryan v. Andrews, 21 Mich. 229 (1870), *infra*, head V.

Under the Mississippi Act of 1846, § 6, declaring that if a married woman "die possessed of slaves or other personal chattels as her separate property" leaving issue of her body either by a former husband or by her surviving husband, such slaves and personal chattels shall descend to her child or children in equal shares. The children by a first marriage are entitled to an equal share of the deceased mother's property with the children of the second marriage. Marshall v. King, 24 Miss. 85 (1852).

In Bates v. Cotton, 32 Miss. 266 (1856), an intestate during her marriage acquired separate property in slaves under the Mississippi Act of 1839, and died leaving her second husband and three children by her first marriage and three by the second her surviving. The court held that all the children of the wife, though born of different marriages, were entitled to succeed to her separate estate. Marshall v. King, 24 Miss. 90 (1852), followed.

Under the New Hampshire Statute of 1789, brothers and sisters of the half blood inherit with the mother the estate of a deceased brother or sister of full age who died intestate and unmarried. Clark v. Pickering, 16 N. H. 284, 295 (1844).

The property of a deceased not derived by descent, or devise from his father or mother, will fall to his mother, the father being dead, and to all his brothers and sisters, and their representatives of the half as well as the whole blood. Prescott v. Carr, 29 N. H. 458, 61 Am. Dec. 652 (1854).

In Pennington v. Ogden, 1 N. J. L. 198 (1796), a tenant in fee devised property to a son for life, and after his death to his son and the heirs of his body, and the grandson died having been twice married leaving issue by each marriage, and the question was whether sisters of the whole blood of the person last seised took to the exclusion of the sisters of the half blood. The court held that the sisters of the half blood were entitled to their proportionate share as coheirs of the body of the deceased (the grandson).

In Arnold v. Den, Phœnix, 5 N. J. L. 862 (1820), the lands to which title was claimed were acquired by the intestate by means of a deed of gift from her father. The court held that, under section 3 of the New Jersey Act, March 24, 1780, her brothers and sisters of the half blood on the mother's side were entitled to inherit with the half-sister on the father's side, in the manner and proportions between male and female directed by the 1st section of the said Act, the property not coming to the intestate by descent.

Where the money came from the mother by gift, the donee has the right to lay it out as she pleases, and if invested in land it must descend in the same manner as if the money had been earned by the donee's own exertions, and therefore the whole and half blood take equally, the property being acquired by purchase, and not by descent. Champlin v. Baldwin, 1 Paige, 562 (1829).

In successions to personal estates, relatives of the half blood in equal degree of cognition to the intestate take equally with relatives of the whole blood, and they also take by representation, where representation would be allowed among relatives of the whole blood. Hallett v. Hare, 5 Paige, 315 (1835).

Where the decedent at the time of her death left no relatives in a direct line of ascent or descent, her nearest collateral relations being an aunt of the half blood of her father, and another aunt of the half blood on the side of the mother, the two aunts were entitled to share equally in the distribution of the personal estate. *Ibid.*

Where the next of kin of the person last seised were the sisters of the whole blood of his father, and a descendant of a deceased sister of the father, and the brothers and sisters of the half blood of the father, it was held that, under 1 Rev. Stat., § 10, subdiv. 1, p. 752, the half blood took equally with those of the whole. Beebee v. Griffing, 14 N. Y. 235 (1856).

In Emanuel v. Ennis, 16 Jones & S. 480 (1882), the intestate died unmarried and without issue, leaving brothers of the whole and half blood, and seised of real estate which descended to him from a deceased brother of the whole blood, to whom the property descended from the mother. The court followed the decision in Wheeler v. Clutterbuck, 52 N. Y. 67 (1873), holding that the half blood took equally with the whole.

And in *Re* Southworth, 6 Dem. 217 (1888), the decedent died intestate leaving surviving him no widow or child or other descendant, and no father, mother, brother, or sister; but the children of two brothers and two sisters of the whole, and children of one brother of the half blood. It was contended that the nephews and nieces of the half blood were not entitled to share in the distribution of the decedent's personal estate, but the court held otherwise, the next of kin all being related to the decedent "in equal degree," under subdivision 9 of the New York Statute of Distribution (2 Rev. Stat. 96,

deceased child, the share of their deceased parent; if there be no children, nor their descendants, then to the father; and if there be no father, then in equal parts to the mother, brothers, and sisters of such deceased person dying intestate, and to their descendants. Rev. Stat. 1831, p. 207. In construing this statute, we are trammeled by no artificial rules. The only question is, whether the term 'brothers' and 'sisters' necessarily exclude brothers and sisters of the half blood. It is manifest that there is not in the statute

§ 75), taking share and share alike, not by representation, the parent's share in such personal estate.

See Valentine v. Wetherill, 31 Barb. 655 (1860), head V., *In the case of ancestral estates.*

In Pipkin v. Coor, 6 N. C. 231 (1813), the question was whether the defendant, a maternal brother of the half blood to the lessors of the plaintiff, was entitled to share with them, the case turning upon the construction of the third clause of the North Carolina Act of 1784, regulating descents. The court held that it was the aim of the legislature to abolish the rule of common law, which totally excluded the half blood from the inheritance; and to allow them to inherit, first, where there were no nearer collateral relations, and second, where the brother or sister of the whole blood acquired the estate by purchase.

Where testator devised lands to his son and his heirs, with remainder, in case the son died without heir lawfully begotten of his body, to his testator's brother and his heirs, the brother of the testator dying before the son, the question was whether, upon the subsequent death of the son, the nephews and nieces of the testator, who claimed as heirs at law on the paternal side of the son, took in preference to half sisters and brothers on the maternal side, and this depended on the question whether the son took the estate by purchase or by descent. The court held that the son took the estate by purchase in the true sense of the word, and that the half blood took in preference to the nephews and nieces on the paternal side, the fact that the Act of 1784 converted the estate tail as taken by the son into an estate in fee simple not affecting the question. Ballard v. Griffin, 2 N. C. Law Repos. 258 (1815).

Where the lands originally descended from a father to a son, who died in the year 1808, seised, leaving a paternal cousin of the whole blood, and brothers and sisters of the half blood, by the second marriage of his mother, the court held the half blood, although of the maternal line, were entitled to inherit under the North Carolina Act of 1784, chap. 22, even though the lands came to the person last seised by descent. Ballard v. Hill, 7 N. C. 410 (1819).

Where the grandfather devised the lands in question to his grandson and died having, when the will was made, several daughters and one son, the father of the grandson, the daughters surviving him and the son dying before him, the grandson thus becoming one of the heirs at law, and the grandson also had two sisters of the whole blood, one of whom subsequently died without issue, the estate being claimed by the children of the mother of the grandson by a second marriage, brothers and sisters of the half blood on the maternal line of such grandson, as against his surviving sister of the whole blood,—the question was, whether the land should be divided between them and the defendant, the sister of the whole blood of the grandson, her brother, or whether the latter should take the whole. The court held that the grandson must be considered as taking the land by purchase, and that therefore the half blood were entitled to inherit equally with the whole blood, but that if the lands had been taken by descent the sister of the whole blood would have excluded all those of the half blood. McKay v. Hendon, 7 N. C. 209, 213 (1819).

In Ross v. Toms, 9 N. C. 9 (1822), the devisee under a will was held to take by purchase, and dying intestate his maternal half brother and heirs of a sister of the whole blood take equally.

Where the controversy was between the paternal uncle on the one side and a maternal aunt of the half blood on the other side, the lands having descended from a maternal grandmother no portion of whose blood flowed in the veins either of the lessor to the plaintiff, or of the defendant, the court held that both parties, being in the same degree of consanguinity to the intestate, were equally entitled, although some were of the half blood. Pritchard v. Turner, 9 N. C. 435 (1823).

The only qualification required by the North Carolina law in case of a collateral descent is that the claimant be the nearest collateral relation, and in case of a descended estate, that he be of the blood of the first purchaser, the preference of the male over the female line, and the whole over the half blood, being entirely abolished. Bell v. Dozier, 12 N. C. 383 (1827).

Where a father died leaving two sons, to one of whom he devised the land in question, and such son subsequently died intestate without issue leaving a sister of the whole blood and the issue of a sister of the half blood on the mother's side, the issue of the sister of the half blood took one moiety of the land. Burgwyn v. Devereux, 23 N. C. 563 (1841).

If the title of the intestate comes to him by descent, the estate will pass, under the Ohio statute regulating descents, to the brothers and sisters of the intestate, whether they are of the whole or half blood; but if the estate does not come to the intestate by descent, it passes to the brothers and sisters of the whole blood only. Freeman v. Ailen, 17 Ohio St. 527 (1867).

In that case the lands had descended to the heirs, who instituted proceedings in partition, and one of them exercised the election to purchase, given by section 8 of the Ohio Partition Act, and subsequently died intestate. It was held that the lands acquired by him by such election were acquired by him by purchase, and descended to his brothers and sisters of the whole blood, but that the remaining land, which was acquired by him by descent, passed to brothers and sisters of the blood of the ancestor, whether of the whole or half blood of the intestate. *Ibid.*

In Preston v. Hoskins, 2 Yeates, 545 (1800), the intestate died subsequent to the Pennsylvania Act of April 19, 1794, leaving neither wife nor children, but leaving a sister of the whole blood and children of a brother and sister of the whole blood, and a sister and brothers of the half blood. The half blood were held entitled equally with those of the full blood, it being a case of *casus omissus* in the Act of 1794.

Where one acquired an estate by devise or descent from his father, and died seised, his next of kin on his father's side being uncles and aunts; the Pennsylvania Intestate Laws of 1833, §§ 7, 8, and 9, make no distinction between the whole and the half blood among such uncles and aunts, it being enough for inheritance that they are "of the blood of the ancestor of the inheritance;" but in the case of brothers and sisters inheriting from each other, the whole blood are preferred under sections 4 and 6 of the Act." Danner v. Shissler, 31 Pa. 289 (1858).

In Graham's Estate, 6 W. N. C. 402 (1879), the intestate died unmarried and without issue, possessed of personal and real estate, among the latter

any legislative intention expressed to exclude the half blood. If it is excluded, then, it is upon general principles of law, not from any positive enactment. According to the uniform construction which the English statute of distributions has received, especially since the decision of the case of *Crooke* v. *Watt*, 2 Vern. 124, a brother of the half blood is a brother within the meaning of the law. That statute directs that the personal estate of an intestate, under certain circumstances, shall be distributed among the next of kin in equal

of which were ground rents, leaving her surviving cousins of the whole blood, children of uncles on the part of her father, and aunt of the whole blood on the part of the mother, and two cousins, children of an aunt of the half blood on the part of the mother, the latter claiming to share in the distribution on an equal footing with those of the whole blood. The court held that the cousins of the half blood were to participate in the distribution of the fund, which arose as wholly from personal estate.

In Dorsey v. Van Horn, 9 W. N. C. 95 (1879), the bill set forth that the intestate died seised of ground rents purchased by her, leaving eight cousins of the whole blood and two of the half blood, and prayed partition among those of the whole blood only, but the court held that the cousins of the half blood were entitled to take, distinguishing the case from Lane's App. 28 Pa. 487 (1857); Brenneman's App. 40 Pa. 115 (1861), and Hayes' App. 7 W. N. C. 11 (1879).

In Davis's Estate, 9 W. N. C. 479 (1881), deceased died intestate, unmarried and without issue, leaving as his heirs at law and next of kin first cousins, some of the half and others of the whole blood, seised *inter alia* of real estate part of which was acquired by purchase and part by descent from a brother who had purchased it and died intestate, unmarried, and without issue. A petition for partition being filed by the cousins of the half blood, the court held that under the Pennsylvania Acts of April 8, 1833, and April 27, 1855, the children of deceased uncles or aunts of the half blood were entitled to share with those of the whole blood, the distribution being made *per stirpes* under the latter act, even though the parties stood in the same degree of consanguinity to the intestate.

The expressions in the Pennsylvania Act of April, 1833, as to the preference given to the whole blood, being confined to the case of the inheritance of real estate by brothers and sisters and their descendants, the rule of construction excludes the implication that, in any other case, such preference was intended; while the fact that, in providing for inheritance by the next of kin, personal estate, as to which there is, concededly, no distinction of blood, is blended with real estate—the latter being subject only to the provision that no estate of inheritance therein shall pass to one not "of the blood" (that is, either of the whole or half blood) of the first purchaser, showing conclusively and affirmatively that the omission in the case of the next of kin was not accidental. Davis's Estate, *supra*, citing Baker v. Chalfant, 5 Whart. 477 (1840), and Danner v. Shisler, 31 Pa. 289 (1858).

The above case was followed in Kiegel's App., 12 W. N. C. 179 (1882), wherein first cousins, the children of deceased uncles and aunts of the whole blood, and first cousins of deceased uncles and aunts of the half blood only, were upon partition brought by one of the half blood, held equally entitled.

In Lynch v. Lynch, 132 Pa. 423 (1890), a testator who had acquired the real estate by purchase died seised, leaving a widow and one child him surviving, the latter subsequently dying leaving a widow, the plaintiff in the action, but without issue, the testator's widow also dying prior to action. By will the testator devised the real estate to his wife for life, remainder to his son for life, with remainder in fee to the issue of the son, if any, living at the time of the first life-tenant's decease, and in default of such issue for charitable uses. The trust for the charity being declared absolutely void, the ultimate remainder went to the residuary legatee or devisee, next of kin or heirs according to law. The court held that, there being no residuary legatee, the remainder over passed under the intestate laws to the son and heir at law, who therefore took the fee subject to his mother's life estate, and that as he died without issue such estate went to the next of kin who were the brothers and sisters of the half blood (of the intestate's father) and to a brother of the whole blood, who took equally, there being no distinction between the whole and half blood, all being of the blood of the first purchaser under the 8th section of the Pennsylvania Act of April 8, 1833. Danner v. Shisler, 31 Pa. 289 (1858), and Parr v. Bankhart, 22 Pa. 291 (1853), followed.

Where the estate was devised to a daughter in fee, and upon her death descended to her children, two of whom died intestate and without issue, the third becoming heir to her brothers and seised of the whole estate, who subsequently died, it was held that, under the provisions of the Rhode Island Statute of 1822, two thirds of the estate which was acquired by the last-mentioned deceased from deceased brothers and sister, descended to the children of the husband of the testator's daughter by a former marriage, being half-blood brothers and sisters, the remaining third, which came immediately by descent from the mother, going to the heirs of the whole blood of the testator. Gardner v. Collins, 27 U. S. 2 Pet. 58, 7 L. ed. 347 (1829).

Where the intestate died without issue, and the estate came to her by descent from a deceased brother, it was held that her mother, brothers, and sisters took equally, being of the same degree of kindred with the intestate, according to the rules established by the Rhode Island Statute of 1822. Smith v. Smith, 4 R. I. 1 (1854).

In Guerard v. Guerard, 4 Desaus. Eq. 405, *note* (1813), it was held that in cases of remoter relation not within the cases enumerated in the South Carolina Statute of 1791, the half blood in the same degree with the whole blood took equally.

But in *Ex parte* May, 2 Rich. L. 61 (1845) under the fourth section of the South Carolina Act of 1791 (5 Stat. at L. 162) the children of a predeceased brother were not entitled to take with his uncles, brothers of the intestate of the half blood, section 7 only providing for them to come in as next of kin, the legislature when providing for brothers' and sisters' children of the whole blood, and also for brothers and sisters of the half blood carefully abstaining from bringing in their children. The court further construed the act as providing that if there had been no brother or sister of the half blood, then, under section 7, the children of a deceased half brother or sister would have come in as next of kin, the act making no special provision for the half blood after brothers and sisters.

In that case the intestate left neither wife nor child, nor lineal descendent, nor lineal ancestor, nor brother nor sister of the whole blood, nor children of such brother or sister, but left brothers of the half blood and children of a predeceased brother of the half blood.

Where a father-in-law conveyed land to his son-in-law, who devised it to his wife and died without issue, leaving brothers of the half blood on the mother's side, and brothers and sisters of the whole blood who survived him, the half blood were held entitled to inherit equally with the whole blood. Nicol v. Dupree, 7 Yerg. 415 (1835).

degree. When the next of kin are brothers and sisters, no distinction is made between those of the whole and half blood. Being related to the intestate by blood, the half blood as well as the whole blood are within the degree mentioned in the statute. And in *Tracy* v. *Smith*, 2 Lev. 178, it is said that a brother of the half blood is a 'brother' as well as a brother of the whole blood. The construction given to that statute shows that, except where an artificial rule of evidence has been introduced for a special purpose, the

In Edwards v. Barksdale, Riley, Eq. 16, 2 Hill, Eq. 416 (1836), the commissioner found that the next of kin of the intestate were a first cousin of the whole blood and four first cousins of the half blood, and the court held that the cousins of the half blood were equally entitled with the cousin of the first blood as next of kin of the intestate in equal degree, as the half blood could not be postponed by one degree.

Under the South Carolina Act of 1865, declaring that every child theretofore born is the legitimate child of its mother, half brothers and sisters of an intestate are entitled to inherit with him where they have a common mother, especially where she has been separated from previous husbands by sale and removal, equivalent to a divorce or release *a vinculo matrimonii* before her marriage to his father according to plantation custom, with the owner's consent. Clement v. Riley, 33 S. C. 66 (1890).

Where an intestate died without issue, seised and possessed of real and personal estate derived from his father, leaving brothers and sisters of the whole blood and a sister of the half blood on the part of the mother, the half blood were held entitled to take equal shares in the personal estate, the real estate descending to the brothers and sisters of the whole blood, the half sister on the maternal side having no inheritable blood. Deadrick v. Armour, 10 Humph. 588, 597, 598 (1850).

In Nesbit v. Bryan, 1 Swan, 468 (1852), plaintiffs claimed, as the paternal uncles and aunts of an intestate dying without issue, property which descended to the deceased from his father, the defendants being the maternal brothers and sisters of the half blood. The contention was that as the estate was derived by descent from the ancestor of the intestate, the plaintiffs were entitled to inherit in preference to the half blood of the maternal line, upon the ground that the plaintiffs were and the defendants were not of the blood of the ancestor from whom it descended, but the court held that under the Tennessee Act of 1784, chap. 22, § 8, the half blood were entitled to inherit.

The extent of the exception or qualification contained in the Tennessee Act of 1784 is only to exclude, or rather to postpone, the half blood of the line from which the estate did not descend, until the line of brothers and sisters from which the inheritance descended is exhausted, there being nothing in the proviso indicating a design to carry the exclusion of the former further than this. The conclusion that the legislature meant only the line of brothers and sisters of the blood of the ancestor from whom the estate had descended, and not the whole line of collateral kindred, being almost irresistible from the words "until such line is exhausted of the half blood." Nesbit v. Bryan, 1 Swan, 468, 471 (1852).

Not only where the line of brothers and sisters of the half blood on the part of the ancestor from whom the estate descended is exhausted, does the estate descend to the half blood of the other line, but also where the intestate dies without brothers or sisters of the whole or half blood on the side of the parent from whom the inheritance came, but having brothers or sisters of the half blood of the other line, the latter will inherit under the Tennessee Act of 1784, chap. 22. *Ibid.*

See this case further upon the question of the construction of the proviso therein in relation to ancestral estates, *infra*, head V., and Chaney v. Barker, 3 Baxt. 424 (1874), *infra*, head VIII.

Where the intestate left brothers and sisters of the half blood and children of brothers and sisters of the whole blood him surviving, the brothers and sisters of the half blood were held equally entitled, the children of either predeceased brothers or sisters of the whole blood taking a share equal to the share of such brothers and sisters of the half blood, under the South Carolina Act of 1791, § 1, clause 5, which regulated the distribution of both real and personal estate, under the 5th clause of which the brothers of the half blood and the nephews of the whole blood were entitled to the succession, the only question being as to the proportions in which they shared the estate. Felder v. Felder, 5 Rich. Eq. 509 (1853).

The whole and half blood have equal rights in the distribution of personal estate under the Tennessee law. Kyle v. Moore, 3 Sneed, 183 (1855).

So where property has been received by gift from a father, brothers and sisters of the half blood take equally with the sisters of the whole blood, under section 2420, subsection 8, of the Tennessee Code. Prichitt v. Kirkman, 3 Tenn. Ch. 390 (1875).

Where there are no descendants of the whole blood, the half brothers and sisters are, by the Texas statutes, entitled to the entire portion which descended to the brothers and sisters, they not being excluded by the act. Marlow v. King, 17 Tex. 177 (1856).

In Hatch v. Hatch, 21 Vt. 450 (1849), the intestate died leaving no issue, widow, father, mother, brother or sister, his nearest surviving relatives being children of a deceased brother and sister, some of the whole and some of the half blood, and grandchildren of some of his deceased brothers and sisters, the parents of the said grandchildren having also predeceased the intestate. The court affirmed the order of the probate court, which decreed the estate to the children of the intestate's brothers and sisters, both of the whole and half blood equally, and excluded the grandchildren, the Vermont statute decreeing that the kindred of the half blood shall inherit equally with those of the whole blood in the same degree. Vt. Rev. Stat. chap. 52, § 1.

The 5th subdivision of section 1, chapter 68, of the Wisconsin Revised Statutes provides that if the intestate shall leave no issue, no widow, and no father, mother, brother, nor sister, his estate shall descend to his next of kin in equal degree with certain exceptions therein provided; and the 4th section provides a degree of kindred shall be computed according to the rules of the civil law, and kindred of the half blood shall inherit equally with the whole blood in the same degree with certain exceptions, and therefore, where the claimants were all in equal degree of kindred computed according to the rules of the civil law and not within the exceptions, the half blood take equally with the whole blood under the statute. McCracken v. Rogers, 6 Wis. 278 (1858).

When an intestate died leaving a mother, and nieces, and nephews of the half blood him surviving, they were held entitled to take *per stirpes*. Moore v. Conner (Va.) 20 S. E. Rep. 986 (1890).

V. *In the case of ancestral estates.*

In allowing inheritance by the half blood the leg-

word 'brother' does by law mean as well a brother of the half as of the whole blood. Following that construction, and applying the same rules to the construction of our statute, we think the right of the complainants to participate in the distribution of the personal estate of their deceased brother is clearly established. And so we think they are also entitled to a partition of the real estate of the deceased. . . . In deciding the question before us we are aided by a few decisions which have been made in the courts

islatures of the various states have invariably preferred those of the blood of the deceased ancestor, where such estates pass by descent, devise, or gift of some ancestor, those not of the blood of the ancestor being rejected or excluded.

This will be found to be the case in Alabama, Arkansas, California, Dakota, Delaware, Idaho, Indiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Ohio, Rhode Island, Utah, Vermont, and Wisconsin. The wording of the sections of the different state statutes is not, however, identical, and the reader is therefore referred thereto for further information.

In North Carolina and Tennessee the Statute of 1784 relates only to descended estates.

The Alabama Civil Code, ed. 1886, § 1919, p. 452, provides that there shall be no distinction made between the whole and the half blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift from or of some one of his ancestors; in which case all those who are not of the blood of such ancestor are excluded from the inheritance as against those of the same degree.

In Cox v. Clark, 98 Ala. 400, 404 (1891), the court stated that but for the words "as against those of the same degree," it would have followed the decisions in other states, that those who are not of the blood of the ancestor from whom the inheritance came were excluded until that line was exhausted, the exclusion of those who are not of the blood of the ancestor from whom the inheritance came not extending to the exhaustion of that ancestral line, but only when there are those of that line in the same degree, the "same degree" not affecting the rights of lineal descendants or the descendants of a brother or sister of the ancestral line of inheritance. See this case further, *supra*, head IV.

Such language has been construed "to limit the qualified preference of the whole over the half blood to estates which the intestate inherited as contradistinguished from those otherwise acquired by him." Eatman v. Eatman, 88 Ala. 478 (1888); Stallworth v. Stallworth, 29 Ala. 76 (1856). See these cases *supra*, head IV.

In Hitchcock v. Smith, 3 Stew. & P. (Ala.) 29 (1832), the question was whether, under provisions of the Alabama statute preferring kindred of the whole blood in equal degree, the brothers and sisters of the half blood, or the nephews or nieces of the whole blood, were to be preferred. The court held that under the statute the descendants of brothers and sisters as to all other kindred occupied precisely the same situation which their parents did, and that the children of a deceased brother of the whole blood were to be preferred to the brothers and sisters of the half blood.

Where slaves constituted the bulk of the intestate's estate, which descended to her from her father, they were distributed to her half brother and sister of the blood of the father, brothers and sisters of the half blood on the mother's side being excluded, by virtue of sections 1576 and 1581 of the Alabama Code; but the money which was the product of the hire of the intestate's slaves after they had been distributed to her was held not an inheritance, not coming to her by descent, devise, or gift, and was therefore, under section 1576 of the Code, equally distributable between brothers and sisters, the children of the father and the children of the mother. Johnson v. Copeland, 35 Ala. 521 (1860).

With reference to the 10th section of the Arkansas Statute (pt. 1) it has been stated that the manifest intention of the legislature was to preserve ancestral estates in the line of the blood whence they came; the section being a partial adoption or recognition of the common-law principle which followed the line of the blood. Kelly v. McGuire, 15 Ark. 555, 582 (1855).

In the above case the lands descended to the intestate, and were claimed by his half sisters, and the court held that under the construction placed upon the above statute they were excluded by an express provision, not because they were of the half blood merely, but because the estate was ancestral, the claimants not being of the blood of the ancestor who transmitted it to the intestate; and that upon the same principle the intestate's mother and all his kindred on her side were peremptorily excluded, only his paternal kindred being entitled to inherit, but that the sisters of the half blood, as next of kin of the intestate, were entitled *per capita* to share and share alike to his own personal estate, to the exclusion of all other persons. Kelly v. McGuire, 15 Ark. 555, 590 (1855).

A full construction was placed upon the Arkansas statute by the court in that case, showing the degrees in which the whole and half blood took; the half blood and their descendants taking personalty as well as realty, equally with the whole blood, except that they are excluded from real estate when ancestral, if they lack the blood of the transmitting ancestor, but not if they can show that they are of the blood of the ancestor from whom it was transmitted to the intestate. Kelly v. McGuire, 15 Ark. 555, 588, 589, 590 (1855).

Here the court held that the first section of the Arkansas Statute was general and comprehensive and embraced all lands whether ancestral or newly acquired, subject to exceptions relating to real estate alone, the section constituting the table by which real estate descended and personal property was distributed; the design of the legislature being, where there were descendants of the intestate, to send down both to them, *per capita* if in equal degree, and *per stirpes* if in unequal degree, without any regard to the fact as to how the property had been acquired; and as to personal property, where there were no descendants of the intestate, collaterals take in the same way as descendants, if there had been any, without inquiry as to how it was acquired, and *per capita* if in equal degree and *per stirpes* if in unequal degree. Kelly v. McGuire, 15 Ark. 555, 582 (1855).

In Scull v. Vaugine, 15 Ark. 695 (1844), the court approved of the construction placed upon the Arkansas statute of descent and distribution as to real estate acquired by descent, as laid down by the court in Kelly v. McGuire, *supra*.

And in Oliver v. Vance, 34 Ark. 564 (1879), the laws as so construed were considered as *stare decisis*.

The rules of descent and distribution as deduced from the provisions of the Arkansas statute by the court in Kelly v. McGuire, *supra*, have been followed in that state until they have become rules of property, so much so that the rules in Kelly's Case have been oftener cited and are more familiar than the rule in Shelley's Case, 1 Coke, 88, and it must now be left to the legislature to disturb them if right and justice may ever seem to require it. Oliver v. Vance, *supra*.

Real estate coming from a relative in blood of a father must be considered as ancestral, the court

of our own country. In the case of *Gardner* v. *Collins*, 3 Mason, 396, Fed. Cas. No. 5,223, a statute of the state of Rhode Island, which, except that it is exclusively a statute of descents, is in almost all other respects similar to our Statute of 1831, came under consideration. The terms of the statute are: 'When any person having title to any real estate of inheritance shall die intestate as to such estate, it shall descend and pass in equal portions to his or her kindred in the following course: To his or her children or their

in Kelly's Case (Kelly v. McGuire, 15 Ark. 555 (1855), not meaning that in such cases the donor or devisor becomes himself the *propositus* from which the descent was to be traced, the person last in title to possession or last invested with the vested remainder remaining the *propositus* whose nearest heirs are to be traced, such heirs being of the blood of the person from whom the benefit came. Oliver v. Vance, *supra*.

An estate given by a paternal uncle is ancestral as if it descended from the father, coming of bounty from one of the father's blood, and the same rule would apply on the mother's side. *Ibid.*

Where land devised to a daughter descended on her death to her son, who died intestate and without issue, and without brothers and sisters or their representatives, it was held that the land was no longer to be construed as ancestral estate, and that it descended to the next of kin of the son, though not of the blood of the testator. Clark v. Shaller, 46 Conn. 119 (1878).

Under the construction placed upon the Indiana statutes (see page 547, *ante*), sisters and brothers of the half blood will only be postponed to those who are of the blood of the ancestor from whom the lands descend, and uncles and cousins of the blood of such ancestor will not have preference, and where no brothers or sisters of the blood of such ancestor survive, brothers and sisters not of such blood will inherit. Robertson v. Burrell, 40 Ind. 328, 335 (1872).

Kindred of the half blood inherit equally in Indiana, except in case of estates coming by gift, devise, or descent from an ancestor, when the whole blood only inherit. Armington v. Armington, 28 Ind. 74 (1867).

In Cox v. Matthews, 17 Ind. 367 (1861), an intestate died seised, leaving a widow and a daughter, the daughter dying without issue, or brother, or sister, or their descendants, but leaving uncles and aunts half blood of the father. The father of the intestate had also issue by a first wife. The widow of the intestate married again and had two children, a son and a daughter, after the decease of the intestate's daughter. Upon the death of the daughter, the lands descended to the brothers and sisters of the intestate (the father), though of the half blood only, to the exclusion of her brothers and sisters of the half blood through the maternal line, who were equal in degree with the half brothers and sisters on the paternal side, half brothers and sisters born after the death of such daughter not being entitled to take the estate from the uncles and aunt in whom it had become vested, the doctrine of shifting descents not prevailing in Indiana.

Where an intestate died leaving one child by a first marriage, and one by a second marriage, and his second wife him surviving, upon the latter dying seised of her third without having married again, it was held that the husband's estate upon his death went to the widow and his two children in thirds, and that upon her decease her child, to the exclusion of the half-sister of such child, was entitled to her share, the widow being the ancestor, and the kindred mentioned in the Indiana statute being kindred of the person last seised. Smith v. Smith, 23 Ind. 202 (1864); McMakin v. McMichaels, 23 Ind. 462, 465 (1864).

A widow inherits in fee subject only to such qualifications as are prescribed by the statute of descent, and therefore the children of her husband by his former marriage, not being of the blood of such widow, cannot inherit lands of which she died seised in fee. McMakin v. Michaels, 23 Ind. 462 (1864),—in which case the widow acquired the land by purchase at a commissioner's sale. See also Heavenridge v. Nelson, 56 Ind. 90 (1877), *infra*, to the same effect.

But where lands descended on the death of the husband intestate to his widow and child, and the widow died leaving a child by a former marriage, her portion of the estate went to the children equally, section 6 of the Indiana Statute of Descent not governing the descent in that case, there being no question of half blood, the children being related to her in equal degree, each one having as much of her blood as the other, each being her child although by different husbands. McClanahan v. Trafford, 46 Ind. 410 (1874).

So in Heavenridge v. Nelson, *supra*, where intestate left a widow and children by his marriage with her and also by a former marriage him surviving, upon the death of the widow intestate leaving the children, and also children by a former marriage, her interest descended to all her children equally to the exclusion of the husband's children by the former marriage, the children of the husband by the former wife not being the heirs of his widow. McClanahan v. Trafford, *supra*, followed.

In Pond v. Irwin, 113 Ind. 243 (1888), the court, in applying section 2472 of the Indiana Statute of 1861, looked upon it as meaning that if the deceased had also left surviving her a half brother or half sister on her mother's side,—that is of the blood of the mother,—he or she would have taken the estate which descended from the mother to the entire exclusion of one who was not of the same maternal blood, but that as the deceased left no brother or sister either of the whole blood or half blood on the mother's side, her entire estate descended to kindred of the half blood, although not on the mother's side, as if to the whole blood.

In this case the intestate left no children or other lineal descendants, the next of kin representing or constituting the shares of seven brothers and sisters. One of such sisters married and soon afterwards died leaving one child and her husband her surviving. The husband married again and had issue a son. These two children survived him and became his heirs at law. The child of the husband by the first wife (the sister of the intestate) was the only lineal descendant of her deceased mother, and as such took a seventh share, and subsequently died unmarried and without issue leaving her brother of the half blood her surviving, such brother claiming her share upon partition proceedings. In this case the court stated that when a statute did not really require a different interpretation, justice was best promoted by preferring brothers and sisters of the half blood to others more distantly related. Pond v. Irwin, 113 Ind. 243, 247 (1888).

See Barnes v. Loyd, 37 Ind. 523 (1871), head IV., *supra*, *No distinction between the whole and half blood;* also Cornett v. Hough, 136 Ind. 337 (1893), under same head; Robertson v. Burrell, 40 Ind. 328 (1872), and Pearson v. Grice, 6 La. Ann. 582 (1751), head IV., *supra*.

In Hall v. Jacobs, 4 Harr. & J. 245 (1815), the testator devised his real estate to his three children as tenants in common. After his death two of such devisees died seised, intestate and without issue, their shares descending to their brother, the other devisee, who also died intestate and without issue, leaving no brother or sister of the whole blood, or

descendants, . . . then to the father of such intestate; if there be no father, then to the mother, brothers, and sisters of such intestate and their descendants, or such of them as there be,' etc. [Rev. Laws 1822, p. 222]. The action was ejectment, and was brought to recover an estate which the plaintiff claimed as a brother of the intestate of the half blood, and the defendants claimed the same as heirs of the whole blood. *Judge* Story, in commenting upon the fourth paragraph of the Statute above noticed, said:

descendants of such brother or sister, but leaving three brothers and two sisters of the half blood, children of his mother by a second marriage, and also an uncle and two aunts, a brother and sister of the whole blood of the father. The court held that the question, whether the land descended to the brothers and sisters of the half blood, or to the uncle and aunts of the whole blood on the part of the father equally, or to the uncle to the exclusion of the aunts, depended upon the provisions of the Maryland Act of 1786, chap. 45, and that therefore, as to the interest which such son took under the will of his father, and which was acquired by purchase, his half brothers and sisters were entitled; and that with respect to the estate which came to him through the decease of his two brothers, the half blood were not entitled, but that it descended to the uncle, the brother of the testator, to the exclusion of his aunts, the sisters of the testator.

In that case the court in construing the Maryland Act of 1786, held the words "and not derived from or through either of his ancestors" to mean, "and not by descent."

The rules and canons of descent as established by the English law, and which originated from the feudal system, were changed by the Maryland Act of 1786, which provides that upon the death of an intestate and the failure of lineal heirs in the descending line, if the estate descended to the intestate on the part of the father, the estate should descend to the brothers and sisters of the intestate of the blood of the father without discriminating between those of the whole and the half blood, and therefore, when an estate descended from a father to two sons, and upon the death of one son descended to the other, that though the whole descent is immediate from the person last seised, yet the inheritable blood is from the ancestor from whom the estate descended. Stewart v. Jones, 8 Gill & J. 1 (1836).

By section 2616 of the Compiled Laws of Michigan the degrees of kindred are to be computed according to the rules of the civil law, and kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor are to be excluded from such inheritance.

The Michigan statute has been looked upon as the expression of a general policy characterizing the legislation of that state, and as putting the half blood on a footing of equality with the whole in the laws of descent; a discrimination against the half blood being the exception, not to be extended by construction beyond the obvious intent, such half blood only being excluded when there are others in the same statutory class preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate. Rowley v. Stray, 32 Mich. 70 (1875); Ryan v. Andrews, 21 Mich. 229 (1870).

Section 4313 of the Michigan Statute does not apply to personal estate, nor does it deal with the mode of distribution, but only with descents. Henderson v. Sherman, 47 Mich. 267 (1882).

Where the deceased, seised of lands derived by inheritance from his father, left surviving him no brother nor sister, no paternal grandparent, or maternal grandfather, and no paternal uncle nor aunt, or the issue thereof of the whole blood, but left surviving him paternal uncles and aunts of the half blood, and also a maternal grandmother and maternal uncles and aunts, the court held that, as there was no one else in the same degree of kindred with the maternal grandmother, she was the nearest of kin, and that the estate devolved solely upon her to the exclusion of the remoter kindred. Ryan v. Andrews, *supra*.

The question in the above case turned upon the construction of section 2616 of the Michigan Compiled Laws, the court holding that if there be but a single next relation, he or she would take the whole estate without reference to whether the kindred is on the side of the one parent or the other, but that if there are several next of kin, and they are not all related on the same side, then only such of them will take as are of the blood of the ancestor from whom the estate was derived.

By the 12th section of the Missouri Act of July 4, 1807, there is no distinction in the distribution of any intestate's estate between kindred of the whole or half blood, unless the inheritance has come to the said person so seised by descent, devise, or gift of some one of his or her ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Under such act it has been held that the law intended that the estate should continue in his blood from whom it was originally derived, therefore, where the deceased received the land by descent from his father, his estate under the law descended to his blood on the part of his father. Childress v. Cutter, 16 Mo. 24, 42, 44 (1852).

The Missouri Act of 1807 superseded the Spanish law of succession, and by the 12th section there is no distinction in the distribution of any intestate's estate between kindred of the whole or half blood, unless the inheritance came to the person so seised by descent, devise, or gift of some one of his or her ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from the inheritance. The court, in construing the words "of the blood," as used in the above section, held that wherever the case that is provided for occurs, none can inherit who are not "of the blood" of the ancestor; and that the words "of the blood" excluded those only who have none of the blood, without reference to proportion or quantity, such as have none of the blood being entirely excluded; and then those "of the blood" who stand next in degree of proximity are, in reference to this inheritance, the next of kin and take as such, and therefore, if the property comes by descent, devise, or gift of a father, the half-brothers are entirely excluded and the paternal aunts are the next of kin and inherit if the deceased died after the law took effect. Cutter v. Waddingham, 22 Mo, 206, 261-263 (1855).

So the court held that the expression, "came to the person so seised by descent, devise, or gift of some one of his or her ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance,"—was limited to the exclusion of those who were not of the blood of the immediate antecedent ancestor; and that therefore, where the estate descended to two brothers, and one died his half passing to the other, the intestate, the half brother of such intestate of the mother's side, is not excluded from inheriting the portion of the estate that came to the intestate

"The question is, whether brothers and sisters of the half blood are not within the purview of this clause. Unless the court can say that brothers and sisters of the half blood are not brothers and sisters in the general sense of the law, it is impossible to doubt the title in this case. The statement of the proposition carries its own answer. Brothers and sisters of the half blood are recognized by law as of kin in the degree of brothers and sisters, and as the act contains no qualification as to whole or half blood,

from the deceased brother, and will succeed to the exclusion of paternal aunts. Cutter v. Waddingham, 22 Mo. 206, 266 (1855).

In Clark v. Pickering, 16 N. H. 284, 294, 295 (1844), it was contended that by the term "surviving brothers and sisters," as used in the New Hampshire Act of February 8, 1789, was embraced those of the half blood as well as others, in conformity with the construction given to the statutes of distribution as applied, not only to cases of intestacy in general, but also to those in which the blood of the intestate die unmarried and of age, in the lifetime of the mother. The court held that the term was not intended to embrace a different class of persons from those indicated in the same clause by the words "children of the intestate," and concluded that upon the death of a son unmarried and under age, his share of the estate derived by descent or intestacy from his father descended among his surviving brothers and sisters who were the children of the intestate, and to no other, and that therefore brothers and sisters of the half blood were excluded.

In granting letters of administration the half blood is admitted as well as the whole, being of the kindred of the intestate, and were formerly excluded from the inheritance of land upon feudal reason, and therefore a brother of the half blood excludes the uncle of the whole blood. Clark v. Pickering, 16 N. H. 284, 286 (1844).

Where the intestate died leaving children, and one of such children subsequently died under age and unmarried, leaving his brothers and sisters of the whole blood and also brothers and sisters of the half blood on the mother's side him surviving, the court held that, under New Hampshire Rev. Stat. 1842, his estate descended to his brothers and sisters of the whole blood to the exclusion of those of the half blood. Crowell v. Clough, 23 N. H. 207 (1851).

In the above case in passing upon the Revision Act of 1842, which omitted the word "surviving" in speaking of brothers and sisters, the court held that the legislature did not intend to make any such a change as would alter a rule of descent of an intestate's estate as established in that state, and that therefore, upon a child dying under age and unmarried his share was to be regarded as part of the deceased parent's estate, the intention of the legislature being to retain the entire rule, leaving the share of the deceased child to be divided among the surviving children of the deceased parent, so that the whole estate should be distributed as if the child had died in the lifetime of the parent, and not to introduce an exception to the general operation of the rule, wholly inconsistent with the reason upon which it was manifestly founded. Crowell v. Clough, 23 N. H. 207, 210, 211 (1851).

The New Hampshire statute of descent is taken from the English statute of distribution, and no distinction has been admitted between the whole and the half bloods, except where the statute has interfered to change the descent of property, which may have been derived in the particular manner set forth in the second section, which provides for cases in which an infant dies "under age and unmarried" when estates derived by descent or devise from a father or mother descend to the brothers and sisters, or their legal representatives, if any, to the exclusion of the other parent. Prescott v. Carr, 29 N. H. 483, 61 Am. Dec. 652 (1854).

In the civil law code the half blood is not excluded, but postponed to the whole; no rule exists to limit the descent of the inheritance to the blood of the first purchaser, nor is any consideration had, whether the estate first came by the father's or mother's side. Den. Delaplaine, v. Jones, 3 N. J. L. 419 (1824), citing, 1 Bro. Civil Law, 223.

When the lands, tenements, or hereditaments come to the person dying seised, by descent, devise, or gift from some one of his ancestors,—that is, from some person from whom lands might by the established canons of descent come to him by descent in the absence of other and nearer heirs,—then brothers and sisters of the half blood of the person dying seised who are of the blood of the ancestor from whom the lands, tenements, or hereditaments come, shall inherit the lands; but brothers and sisters of the half blood who are not of the blood of such ancestor shall be excluded from the inheritance. Den. Delaplaine, v. Jones, *supra*.

In Den. Lloyd, v. Urison, 2 N. J. L. 197 (1807), the question turned upon the construction of the 2d section of the New Jersey Law which is as follows: "If any person possessed of, or entitled to, real estate in his or her own right in fee simple shall die without disposing thereof, and without any brother or sister of the whole blood, or any issue of such brother or sister, and shall leave a brother or sister of the half blood, such half blood shall inherit the estate as directed in the 1st section of the Act,"—the court construing the section as meaning that such half blood did not inherit where the estate did not come from a common ancestor, or was not acquired by the deceased; but in the above case there was a dissenting opinion by *Justice* Pennington.

Where the exclusion of the half blood is not the exclusion of the issue of an ancestor by different venters, which was intended to be prevented by the New Jersey statute, it does not carry the inheritance out of the family of the ancestor according to the interpretation of the term "ancestor," to the great injury of his remaining issue, which was the only evil sought to be remedied by the New Jersey statute, but keeps it out of the hands of strangers, preserves it in the family of the ancestor, and casts it upon the remaining issue of such ancestor. Den. Pierson, v. De Hart, 3 N. J. L. 78 (1809).

In Den. Stretch, v. Stretch, 4 N. J. L. 182 (1818), the New Jersey statute enabling the half blood to inherit was looked upon as extending only to brothers and sisters of the half blood, and not to the issue of such brothers and sisters, or to other collaterals related in a more distant degree.

By the proviso to the 5th section of the New Jersey Act of January 29, 1817, Rev. Laws, 606, if the lands, tenements, or hereditaments came to the person so dying seised by descent, devise, or gift of some one of her ancestors, all those not of the blood of such ancestor are to be excluded from such inheritance, and therefore, where the lands in question came to the deceased, "the person so dying seised," "by descent," and of "some one of her ancestors," they were within the operation of the proviso, which was not intended to form any new, distinct, or independent canon or rule of descent, its sole purpose being to limit and restrain the generality of the body of the section, by which, without the proviso, the half blood would in all cases inherit. Den. Delaplaine, v. Jones, 3 N. J. L. 419, 423 (1824).

The purport of the New Jersey statute declaring

the words must be taken in their common and usual sense.' The same case was afterwards taken to the Supreme Court of the United States, where the plaintiff had judgment. 27 U. S. 2 Pet. 58, 7 L. ed. 347. In the case of *Sheffield* v. *Lovering*, 12 Mass. 490, the same determination was made. By a statute of Massachusetts for the settlement and distribution of intestates' estates, it was enacted that the real estate of the intestate, when he shall leave no issue, shall descend to his father; if no issue nor father, it shall descend in

that under certain circumstances the half blood shall be excluded is proved by the general nature of the proviso, its general object being to qualify, limit, or restrain the general enactment preceding it, and by the style and purport of the proviso, which is manifestly in its style merely exclusive and in its purport solely framed to limit and restrain what otherwise would have been general. Therefore where the person last seised became so by descent, devise, or gift from an ancestor, the proviso merely declares that those who are not of the blood of such ancestor shall not inherit, leaving those who are of the blood of such ancestor to inherit by force of the general language of the body of the section. *Ibid.*

It is not necessary that he that inherits be always heir to the purchaser, it is sufficient if he be of his blood, and heir to him who was last seised, and if, in the consideration of the proviso, the quality of the half blood be not disregarded, the exposition which would make these terms of the same import may be safely indulged, for if the inheritance be given to the next of blood of the ancestor among the half blood, the design of the legislature will be accomplished. Id. 419, 427, 428.

The person dying last seised is the *propositus* in the cases within the proviso of the New Jersey Statute of 1817, as well as in those within the body of the section, and the ancestor mentioned in the proviso does not in the former cases become the *propositus*. There is nothing in the language of the proviso to shift the character of the *propositus* from the person last seised to the ancestor; and to make the ancestor the *propositus* would totally exclude the half blood, as such, from the inheritance where the lands came to the person last seised by descent, devise, or gift from some ancestor. Id. 419, 428.

The case of Den, Lloyd, v. Urison, 3 N. J. L. 197 (1807), in which the majority of the courts held, notwithstanding the plain language of the section of the Act of 1780, that it meant only brothers and sisters of the half blood on the side of the parent from whom the land descended, was overruled by the later case of Arnold v. Den, Phœnix, 5 N. J. L. 862 (1820), in which the court of errors held to the literal meaning of the words in the section. Prior to the decision in the last case, the legislature repealed the section of the Act of 1780, and passed an Act Februrary 15, 1816, expressly excluding all those who were not of the blood of the ancestor from whom the estate came, from inheriting, which act was repealed and supplied by the 5th section of the Act of 1817, Rev. Stat. 609, which again expressly excluded from the inheritance in such cases all who were not of the ancestral blood through which the estate came; and with the same exclusive provision, this act was readopted under the Revision of 1846, Rev. Stat. 339, § 5, so that there is not, on the whole, anything in the course of legislation or judicial construction in that state which evinces any intention to abandon the general rule. Den, Banta, v. Demarest, 24 N. J. L. 431, 434 (1854).

In the fourth case specified in the New York Statute of Descents, 1 Rev. Laws, 53, it is provided that brothers and sisters of the half blood shall inherit equally with those of the whole blood, and the only exception to this rule is where the inheritance came to the intestate by descent, devise, or gift of some one of his or her ancestors. Champlin v. Baldwin, 1 Paige, 562 (1829).

Where the intestate died, leaving a widow and three children him surviving, and the widow married again and died leaving one child by such second marriage, the court held that so far as the title came by descent the child of the widow by the second marriage, being of the half blood, was not entitled to take along with her half brothers and sisters of the whole blood of the intestate, in the share of the estate which descended directly from the intestate, and which was derived by one of the children of the whole blood of the intestate directly from the father, such estate coming to her by descent, but that as to the portion of the widow, which came remotely or indirectly by intermediate descent from the same source, and which formed no part of the ancestral inheritance, the half sister was entitled. Valentine v. Wetherill, 31 Barb. 655 (1860).

The common-law rule, which gives a preference to the blood of the father in the descent of a newly purchased inheritance, and which applies only where there are relatives on the side both of the father and mother, is expressly abolished by section 13 of 1 N. Y. Rev. Stat. p. 753. Brown v. Burlingham, 5 Sandf. 418, 421 (1852).

In Brown v. Burlingham, *supra*, it was contended that, although the Revised Statutes of New York abolished the distinction between the whole and the half blood, so as to render the latter capable of inheriting, yet they had not abolished the rule of the common law, declaring that when the intestate was the first purchaser of the inheritance, relatives on the side of the father should be first entitled to take so as to exclude those on the side of the mother, until the blood of the father should be wholly exhausted. The court held, however, that such contention could not be reconciled with the terms of the statute, and was plainly inconsistent with its intent and spirit, and that such a rule was only applicable when the descent, for the want of nearer relatives, could only pass to collaterals on the side of the father or mother, and when, consequently, those only could be entitled to take who were able to trace their descent from a common ancestor, but that as between brothers and sisters it was settled law that the descent was not necessary to be traced from the common ancestor, but is immediate in the same sense as that from the father to a son.

In construing the provisions of the New York statute under consideration in that case, the court held that, in respect to brothers and sisters of the father and mother of the half blood, the rule of the common law was necessary to be abolished, since otherwise it would have applied, but that in respect to brothers and sisters of the half blood of the intestate its abolition was unnecessary, since by removing the disability of the half blood it ceased to be applicable. Brown v. Burlingham, 5 Sandf. 418, 423 (1852).

With respect to cases of descent not provided for by the New York statute, the rigid and technical rule might retain all its authority, and the common-law incapacity of the half blood may not have been removed, but upon this point the court gave no decided opinion. *Ibid.*

Where the land was part of property which descended to two as tenants in common, each being so seised solely and severally of an undivided share, it was held that upon the death of one intestate unmarried and without descendants, leaving no father, the fee descended to his mother to the exclusion of the brothers and sisters of the half

equal shares to his mother, if any, and to his brothers and sisters; if no issue, father, brother, nor sister, it shall descend to his mother if any; but if no mother then to his next of kin in equal degree. The plaintiff demanded one fifth of the estate of which the intestate, Mary Marsh, died seised, and the question before the court was, whether a brother or sister of the half blood could claim as heir to Mary Marsh, or whether the whole of her estate descended to her mother. The court admits that this could not be made a

blood, who were not of the blood of the ancestor. Conkling v. Brown, 57 Barb. 265, 8 Abb. Pr. N. S. 345 (1870). Morris v. Ward, 36 N. Y. 587 (1867), followed.

In a case where the relatives of the half blood claimed under section 10 of the New York Statute (1 Rev. Stat. 752), which provides that if there be no heir entitled to take under the preceding sections, the inheritance (if it came to the intestate on the part of the father) shall descend to the brothers and sisters of the father of the intestate in equal shares, if all be living, and, if any be living and any be dead leaving issue, then to the living brothers and sisters, and to the descendants of those who have died; and that in all cases the inheritance shall descend in the same manner as if all such brothers and sisters had been the brothers and sisters of the intestate,—in construing the above section along with sections 8, 9, and 15 of the same Act, in a case wherein the next of kin to the person last seised were the sisters of the whole blood of his father and a descendant of a deceased sister of the father, and the brother and sisters of the half blood of the father, the court held that the relatives of the half blood, and those of the whole blood, each derived title from the person last seised as if they were his brothers and sisters, and he had derived his title from his father, who would stand, for the purposes of the inheritance, as if he were the father of all of them, although by different venters; then, although the inheritance came to the intestate by descent from his ancestor (in that case from his father), there were none who were not of his whole blood. Beebee v. Griffing, 14 N. Y. 235, 239 240 (1856).

In Wheeler, v. Clutterbuck, 52 N. Y. 67 (1873) the intestate died leaving a widow and two infant children his only heirs at law. The widow afterwards intermarried. The two children also dying without issue, leaving no lineal descendants or father, the question was as to what estate the half brother by the second marriage of the widow took. It was held that, as to the half of the property which came to the survivor of the two children of the former marriage of the widow by descent from his father, the half-brother had no title, not being of the blood of the intestate, but as to the other share which came to the deceased half-brother by descent from his sister, the brother of the half blood took subject to the life estate of his mother, all being born of the same mother although issue of different fathers, and being of the blood of the deceased sisters, it not being necessary to his capacity to take under the statute that he should be of the full blood.

This decision was followed by the court in special term, August, 1883, in Dargin v. Wells, N. Y. Daily Reg. August 9, 1883.

In *Re* Suckley, 11 Hun, 344 (1877), the deceased died intestate leaving him surviving a brother and sister and four grandchildren of a deceased half brother. The court held that the grandchildren were not entitled to share in the distribution, stating that the claimants, instead of being a brother's children, were grandchildren of a half-brother, and were therefore one degree beyond the statute.

Where the intestate died after the date of the North Carolina Act of 1784, and before the year 1795, leaving five sons, one of whom died between the years 1794, and 1808 intestate and without issue, leaving four brothers of the whole blood and a brother of the half blood on the mother's side him surviving, it was held the former took in preference to the latter. Pipkin v. Coor. 6 N. C. 221 (1813).

Under the North Carolina Act of 1784, the half blood cannot inherit when out of the common-law stocks of lines, although in equal or nearer degree. Doe, Sheppard, v. Sheppard, 7 N. C. 383 (1819).

The North Carolina Act of 1784, letting the half blood into the inheritance when in the line of inheritance, does not change or alter the stock or genealogical lines of the common law, the only difference being the addition of the half blood when in those lines, together with the ascent of real estate in certain cases. Id. 383, 408; Ham v. Martin, 8 N. C. 423, 424 (1821).

When lands descend on the part of the father to a son, who dies without issue, leaving a half-blood brother on the maternal side, and an uncle or more remote relative of the whole or half blood on the paternal side, those next in degree on the paternal side shall inherit to the exclusion of the maternal half blood, because they are of the blood of the first purchaser; the proviso to section 3 of the North Carolina Act of 1784 declaring that the maternal half blood shall not inherit until such paternal line be exhausted of the half blood (and of course of the whole blood), the heirs being sought in the paternal line *ad infinitum* before any on the maternal side can inherit, no matter how near in degree, and *e converso*, where the lands descend on the maternal side. Doe, Sheppard, v. Sheppard, *supra*.

In Ballard v. Hill, 7 N. C. 410 (1819) the claims of the half blood in a case of a descended estate prior to the North Carolina Act of 1808, chapter 4, were considered.

In that case the intestate died leaving a son, who took by descent, a brother who afterwards died leaving a son, and a widow who married again and had issue, the issue of such second marriage surviving their brother of the whole blood of the intestate, who died in the year 1808. It was held that the half brothers and sisters, although on the mother's side, took under the Act of 1784, in preference to the cousin, the son of the intestate's brother, even though the estate vested in the person last seised by descent.

Where a son took as heir to his mother, and held until his death in 1803, when he left a niece the daughter of his sister of the whole blood under whom the defendant claimed, and brothers and sisters of the half blood, being issue of his father's second marriage, him surviving.

The defendant's claim was preferred, being governed by the two provisions of the 3d clause of the North Carolina Act of 1784; the first giving a preference, where intestate dies without issue, to the brothers and sisters of the half blood, on the side of the acquiring ancestor, in exclusion of the brothers and sisters of the half blood on the other side; the act by preferring one set of half blood necessarily preferring the whole blood of the ancestor from whom the estate descended, to the half blood of the one from whom it did not descend; the other proviso to the clause giving the same right to the issue of a brother or sister of the intestate dying in the lifetime of the intestate which their ancestor would have had if he had lived. Ham v. Martin, 8 N. C. 423, 424 (1821).

An uncle of the whole blood, where he represented the acquiring ancestor, would exclude an aunt of the half blood who did not, but to prefer him where he did not so represent the acquiring

question at the common law, but says that the rules governing the descent and distribution of real and personal estate have generally been alike in their courts, depending wholly on the statutes of that commonwealth. The judicial construction of the English statute of distribution was adopted by the court, and judgment given for the demandant. From the terms of our statute, therefore, as well as from the construction given by other courts to statutes of similar import, we are of opinion that brothers and sisters

ancestor would virtually repeal the law entitling the half blood to inherit. So held in Pritchard v. Turner, 9 N. C. 435, 436 (1823).

Here the controversy was between the paternal uncles on one side, and a maternal aunt of the half blood on the other side, the lands having descended from a maternal grandfather, no portion of whose blood flowed in the veins of either contestant, the parties being in equal degree of consanguinity to the intestate. The court held they took equally even if some were of the half blood. *Ibid.*

Where the lessor of the plaintiff was a paternal brother of the half blood, and the estate descended to his brother from his mother, the record not disclosing that there were any heirs nearer in degree on the mother's side, the court held the plaintiff entitled. Seville v. Whedbee, 12 N. C. 160 (1827).

In Bell v. Dozier, 12 N. C. 333 (1827), an estate acquired by purchase descended from a father, who left a mother and a maternal brother of the half blood, paternal uncles of the half blood, and more distant paternal collaterals. It was held that, under the North Carolina Act of 1808, provision 6, the mother took a life estate, the paternal uncles of the half blood taking the remainder in fee.

In Felton v. Billups, 19 N. C. 308 (1837), land was devised to a grandson, who was otherwise the heir at law, who died without issue, leaving cousins on the part of his grandfather and half brother *ex parte materna*. It was held that the former took in preference to the latter, who were not of the devisor's blood, under the North Carolina Act of 1808.

Where the land had been transmitted by descent from an ancestor to an only child, who died intestate leaving an only child a daughter, who died intestate and without issue leaving a brother and two sisters of the half blood *ex parte paterna*, the blood of the ancestor having become extinct the question was whether the land escheated to the university, but the court held that the inheritance descended according to the 5th Rule of the Canons of Descent (N. C. Rev. Stat. chap. 38) to the nearest collateral relations of the paternal line of the person last seised, who were the brothers and sisters of the half blood children of the father. Den, University of North Carolina, v. Brown, 23 N. C. 387 (1841).

In McMichal v. Moore, 56 N. C. 471 (1857), the petition alleged that the person last seised died intestate leaving no issue, nor brother nor sister, nor the issue of such, but leaving her father her surviving. The inheritance was derived from an uncle who died intestate, the petitioners being the uncles and aunts and the children of uncles and aunts of such party last seised (brothers and sisters of the uncle from whom the inheritance was derived), the party last seised also leaving half brothers and sisters by the second marriage of her father. The court held that the petitioners, the uncles and aunts and their children, were of the blood of the ancestor from whom the land descended, and that the defendants the half brothers and sisters, although nearer in degree than the petitioners, were not of the blood of the ancestor, and that consequently the petitioners were entitled to the land as against the half blood, but, the father being alive, he was, under the general provisions of the 6th Rule of the Canons of Descent of the Revised Code of North Carolina, chapter 38, entitled to the inheritance without regard to the blood of the first purchaser or ancestor from whom the land descended.

The doctrine declared in the last case,—McMichal v. Moore, *supra*—, was followed by the court in Little v. Buie, 58 N. C. 10 (1859), the court holding that the father, upon the death of a son, took his entire interest in the land, and the half-sisters not being of the blood of the transmitting ancestor took nothing.

In Dozier v. Grandy, 66 N. C. 484 (1872), the intestate died seised of land inherited from his father, leaving a widow, who subsequently married and had issue, a daughter which survived her. Intestate also left a son to whom the lands descended as heir, but who died without issue or brother or sister of the whole blood, but leaving his half-sister *ex parte materna*, and near collateral relations of the intestate, him surviving. The court held that the latter took and followed the decision in Bell v. Dozier, 12 N. C. 333 (1827), and Lawrence v. Pitt, 46 N. C. 344 (1854), holding that such collaterals took in preference to the half-sister.

In Armstrong v. Miller, 6 Ohio, 118 (1833), lands which were inherited by an infant from his father were sold and converted into money under order of the court of chancery, and the infant died without attaining his majority leaving half brothers and sisters on the part of his mother by a second marriage. It was held that such half blood were entitled to such property as personal estate, but that had the property remained in the shape of land as it was transmitted to the intestate from his father, it would have passed upon the death of the intestate to his uncles and aunts or their descendants on the part of the father, and not to his half brothers and sisters on the part of his mother by a subsequent marriage, under the Ohio Statute Regulating the Distribution of Estates, 16 Ohio Laws, p. 36.

In Prickett v. Parker, 3 Ohio St. 394 (1854), the purchaser of lands died intestate, leaving two sons and a widow who married again him surviving, the plaintiff's lessors being the issue of the second marriage. One of the intestate's sons died intestate and without issue before the birth of the issue of the second marriage, the other son also dying intestate and without issue. The party in possession was a brother of the purchaser. The court held that upon the death of the first son of the purchaser he became the ancestor of the survivor who took his moiety of the land to which the half-brothers became entitled, under the 4th clause of the 1st section of the Ohio Statute Regulating the Descent and Distribution of Personal Estates, of 1831 (Swan's old ed.) 286.

The 9th section of the Pennsylvania Act of April 8, 1833, after making provision for the half blood in broad and general terms, provides that no person who is not of the blood of the ancestors, or other relatives from whom any real estate descended, or by whom it was given or devised to the intestate, shall in any of the cases before mentioned take any estate or inheritance therein.

The words in the proviso of the Pennsylvania Statute of 1833 have been held to no more exclude the half blood from the succession of an ancestral estate than they excluded it from the succession to a purchased one; any exclusion of a brother or sister being unnatural and impolitic, and were not to be supposed to have been intended by anything less than an express enactment or irresistible

of the half blood are not excluded by the Act of 1851, but that the words 'brothers' and sisters' include as well brothers and sisters of the half as of the whole blood."

It thus appears that at the time of the enactment of the Statute of Descents of 1852, and continued in force to the present time, the words "brothers" and "sisters," used in a statute of descents, had a judicial construction so as to include by them as well brothers and sisters of the half as of the whole blood. It is a universal rule of construction,

implication. Baker v. Chalfant, 5 Whart. 477, 479 (1846).

Where the land descended to an intestate from his mother, who was the devisee of her father, who took by devise from his father the purchaser, it was held that the grandchildren of the brother of such intestate's maternal grandmother were not of the blood of the first purchaser, and could not hold as against nephews of the father. Lewis v. Gorman, 5 Pa. 164 (1847).

In Lewis v. Gorman, *supra*, it was admitted that the plaintiff was not entitled by virtue of the 11th section of the Pennsylvania Act of 1833 giving the real and personal estate of an intestate, in every case not expressly provided for, to his next of kin "without regard to the ancestor or other relation from whom such estate may have come, for, they being the grandchildren of the intestate's paternal grandfather, the plaintiff was not next of kin, being one degree further removed, plaintiff based his claim upon the fact that he was the blood of the intestate's mother, from whom the estate was immediately derived by descent, and was therefore to be preferred to the kindred in nearer degree who had none of this blood in their veins. The court excluded him from any portion of the inheritance by virtue of the operation of the proviso in the 9th section of the Act of 1833, not being of the blood of those from whom the estate descended or by whom it was given or devised.

In order to ascertain who are the ancestors or other relations, within the meaning of the Pennsylvania statute, the first purchaser must be looked to as such person as the *propositus* from whom the inheritable blood is to be traced. Hart's App. 8 Pa. 33, 37 (1848); Lewis v. Gorman, *supra*.

Under the Pennsylvania Act of April 27, 1833, in the distribution of an intestate's estate the next of kin of the blood of the ancestor or other relation from whom real estate descended, or by whom it was given or devised, are alone entitled to such real estate if found entirely within the blood of such ancestor, without regard to the other relationship which they bear to the intestate. Ranck's App. 113 Pa. 96 (1886).

In May v. Espenshade, 1 Pearson (Pa.) 189 (1858), an infant inherited, under a void bequest, land acquired by his father by purchase, and died leaving his mother, grandmother on his father's side, and uncles and aunts, half-blood brothers and sisters of his father, him surviving. The half blood were held entitled before the grandmother or the mother of the infant, under the 9th section of the Pennsylvania Act of 1833, as being of the blood of the first purchaser, standing in the same right, as far as regards other kindred, as the whole blood, although they would have been postponed to the whole-blood brothers and sisters.

The provision in the Rhode Island Statute of 1822, which provides that an ancestral estate, where there are no children of the intestate, "shall go to the next of kin to the intestate of the blood of the person from whom such estate came or descended, if any there be," was a proviso to the canons of the statute, pointing out the degree of kindred prescribed by the act itself, and reckoned according to its canons. Smith v. Smith, 4 R. I. 1 (1854).

In Butler v. King, 2 Yerg. 115 (1830), it was held that if property came from a father by descent, it went on the death of the heir to the brothers and sisters of the whole and half blood *ex parte paterna*, but that if such property had been derived from a father by gift, upon the death of the son after the decease of a father, it would have vested in the heirs on the part of the father. *Ibid.*

Thus where the testator left a wife and two sons, and devised his real estate to his sons, and the wife married again and had a daughter by such marriage, one of the sons dying without issue and intestate, the surviving brother was held entitled to inherit to the exclusion of the sister of the half blood. *Ibid.*

The Tennessee Act of 1796, chap. 14, was construed as intending to let in sisters of the whole and half blood to share equally with brothers of the whole and half blood, where the estate, by the Act of 1784, was divided between brothers and sisters of the whole and half blood; in such a case by the Act of 1796, the estate being divided equally between brothers and sisters of the whole and half blood, brothers of the half blood who cannot inherit under the Act of 1784, not inheriting under the Act of 1796. *Ibid.*

The Tennessee Act of 1784, chap. 22, § 2, embraces the case of every person dying intestate seised of an inheritance, regardless of whether it has been acquired by descent or purchase, and also regardless of the source of the intestate's title, and places the whole and half blood upon precisely equal footing, not distinguishing between the half blood of the paternal and maternal lines, and if it were not for the restrictive qualifications found in the proviso, both would stand in exactly equal right to the inheritance, in all respects, without regard to whether the intestate had acquired the estate by descent or purchase, or whether it had descended from a paternal or maternal ancestor. Nesbit v. Bryan, 1 Swan, 468, 470 (1852).

But the provision in the Tennessee act of descents, giving a preference to the line of the transmitting ancestor, as between brothers and sisters of the half blood in the descent of real estate, is not to be applied to personalty. Kyle v. Moore, 3 Sneed, 188 (1855).

Where an intestate died without issue, seised and possessed of real and personal estate derived from his father, leaving brothers and sisters of the whole blood and a sister of the half blood *ex parte materna*, the former were held entitled to the real estate to the exclusion of the latter, who had no inheritable blood. Deadrick v. Armour, 10 Humph. 588, 597, 598 (1850).

The Vermont act for the settlement of testate and intestate estates, passed March 8, 1787, provides *inter alia*, that the remainder both of the real and personal estate shall descend in the proportions therein mentioned to every of the brothers and sisters of the intestate of the whole blood, and such as legally represent them, or if there be no such kindred, then to the parent or parents of the intestate, and if there be no parents, then in proportion as aforesaid to every of the brothers and sisters of the half blood of the intestate; but if there be no parent, brother or sister, then in proportion as aforesaid to every of the next of kin of the intestate in equal degree and those who legally represent them, kindred of the whole blood taking in preference to kindred of the half blood in the same degree. Brown v. Brown, 1 D. Chip. 360 (1815).

In that case, brothers and sisters of the intestate of the half blood claimed a moiety as next of kin, the court reversing the decision of the court below, which gave the whole estate to the widow, holding the half blood entitled.

without an exception, that in enacting statutes the legislature will be presumed to have acted with reference to the construction given to former statutes couched in substantially the same language, and that they used the words in that sense. *State* v. *Swope*, 7 Ind. 91; *Wiggins* v. *Keiser*, 6 Ind. 252; *Broses* v. *State*, 5 Ind. 75; *Bowman* v. *Conn*, 8 Ind. 58; *Garrigus* v. *Parke County Comrs.* 89 Ind. 73; *Indianapolis, B. & W. R. Co.* v. *Fountain County Comrs.* Id. 215; Endlich, Interpretation of Statutes, p. 12; Sutherland, Stat. Constr. p. 546, § 424.

It follows that the provision quoted from

With respect to the share of the intestate's son, who predeceased his brother, under age and unmarried, and which descended to the brother, the court held that, under the Wisconsin statute, such portion did not descend as a portion of the estate of a deceased brother, but as a portion of the estate of his deceased father, and that therefore the inheritance came to such son by descent from his father, and not by descent from his brother, and that therefore the sisters of the half blood were not entitled, and that the lands descended to the living brothers and sisters and the children of deceased brothers and sisters of the original intestate. Perkins v. Simonds, 28 Wis. 90, 95 (1871); Kirkendall's Estate, Cramer's App. 43 Wis. 167 (1877).

In the latter case the court held that kindred of the intestate of the half blood inherited equally with those of the whole blood in the same degree, in all cases except in ancestral estates, when only such half blood as are of the blood of the ancestor from whom the estate came shall inherit. Kirkendall's Estate, Cramer's App. *supra*.

In Perkins v. Simonds, *supra*, the contention was that section 4 of chapter 92 of Wis. Rev. Stat. 1858 was not applicable to a case where the intestate left issue, or a widow, father, mother, brother, or sister, but only where he left no such relative, and where his estate went to his "next of kin" pursuant to the provisions of subdivision 6 of section 1 of the same chapter, and that therefore, as the intestate's son last deceased left sisters of the half blood, they were not within the exceptions contained in section 4; but the court held that the statute did not admit of such construction, but applied to all cases falling within its terms, and was not limited to those in which the intestate died not leaving issue or a widow, father, mother, brother, or sister.

So in construing the same section the court, in a later case, held that by the word "unless" no general rule of inheritance was established—but a mere particular exception to the half blood as defined in the prior clause, and that a next of kin of the full blood of an intestate would take, though not of the blood of the ancestor of such intestate, holding the plain grammatical construction of such clause to be that kindred of the intestate of the half blood shall inherit equally with those of the whole blood in the same degree in all cases, except that if the estate was ancestral, only such kindred of the half blood as were of the blood of the ancestor from whom the estate came shall inherit, approving of the construction as given by the court in Perkins v. Simonds, 28 Wis. 90 (1871), although in the present case there were no kindred of the half blood to be affected by the provisions of the statute. Kirkendall's Estate, Cramer's App. 43 Wis. 167, 174 (1877).

Where land acquired by devise descended to the devisee's three children, two of whom died, the survivor thus acquiring the whole, it was held that, under the Rhode Island Statute of 1822, the portion or third part vested in such survivor passed upon her decease to the heirs of the whole blood of the original testator. Gardner v. Collins, 27 U. S. 2 Pet. 58, 7 L. ed. 347 (1829).

It was the purpose of the legislature of Rhode Island to keep estates in the blood of the ancestor who was the stock of descent, such distinction being the only one intended to be made between ancestral and other estates. Cole v. Batley, 3 Curt. C. C. 562 (1855).

VI. *When the statute not express.*

In some few cases the state statutes make no express provision for the inheritance of the half blood, but yet the courts have construed them as admitting the half blood to an equal position.

This was the case in Indiana under the Statute of 1831, the case of Clark v. Sprague, 5 Blackf. 412, 414 (1840), deciding that, although the statute was not express in its terms, yet, there being no express exclusion of the half blood, they were equally entitled with the whole blood to the real and personal estate of the deceased.

So the Iowa statute makes no express provision for the half blood, yet in Neeley v. Wise, 44 Iowa, 544 (1876), where deceased died intestate without parents or issue seised of real estate, leaving brothers and sisters of the whole and half blood and a husband, who claimed half the estate upon partition, the brothers and sisters claiming the residue, the widow of the father of the deceased by his second marriage with her children of such marriage also claiming part,—the court held that under the revised code the children of the half blood inherited equally with those of the whole in cases where the inheritance was derived through a common parent.

The same conclusion would seem to have been reached by the court, under the Louisiana Civil Code, article 910, in the case of Pearson v. Grice, 6 La. Ann. 282 (1851). See this case more fully under head IV., *supra*.

So the Supreme Court of the United States placed a like construction upon the Rhode Island Statute of 1822, in the case of Gardner v. Collins, 27 U. S. 2 Pet. 58, 7 L. ed. 347 (1829), holding that the phrase "of the blood," as used therein, meant and included the half blood. See also this case, head III., *supra*.

VII. *Cases wherein the whole blood is preferred.*

In some states a preference is given to the whole blood; thus—

Where legacies were vested, the enjoyment only being postponed, and one legatee died before the happening of the contingencies mentioned in the will, leaving a child by a first and three by a second marriage, two of the latter dying, their portions in their father's legacy were held to vest in their sister of the whole blood to the exclusion of the sister of the half blood, the Alabama Statute (Clay's Digest, 168), section 2, preferring the whole blood in equal degree to the kindred of the half blood in the same degree. McLemore v. McLemore, 8 Ala. 687 (1845).

The Delaware statute only prefers brothers and sisters of the whole blood to brothers and sisters of the half blood. McKinney v. Mellon, 3 Houst. (Del.) 277 (1864).

Again, in King v. Neely, 14 La. Ann. 160 (1859), the heirs at law were the children of two sisters of the full blood and a sister of the half blood, and the property of the deceased was situate in Mississippi, the statute of which state, regulating the distribution of estates among collateral heirs, provided that when there shall be no children of the intestate, nor descendants of such children, the estate shall descend to the brothers and sisters of the intestate and their descendants in equal parts, the descendants of a sister or brother of the intestate to have in equal parts among them their deceased parent's share, there being no representation among collaterals, except with the descendants of the brothers and sisters of the intestate, and in no

section 2470, Rev. Stat. 1881 (Rev. Stat. 1894, § 2625), casting the descent upon the brothers and sisters of the intestate living and the descendants of such as are dead, includes as well brothers and sisters of the half blood and their descendants, as those of the whole blood, unless this meaning is in some way controlled or modified by some other section. Sutherland, Stat. Constr. § 238, says that "one who contends that a section of an act must not be read literally must be able to show one of two things,—either that

case a distinction between the kindred of the whole and half blood, except the kindred of the whole blood in equal degree being preferred to the kindred of the half blood in the same degree. The court therefore held that the nephews and nieces of the full blood excluded the sister of the half blood by effect of representation.

The system of descent established by statute in Delaware as to real estate provides that when any person, having title or any manner of right, legal or equitable, to any lands, tenements, or hereditaments, dies intestate as to the same, such lands descend and pass in fee simple, (1) to the children of the intestate, and the lawful issue of any such child or children who may have died before the intestate; but if there be no such child or children, or issue of such child or children, then, (2) to the brothers and sisters of the intestate of the whole blood and to the issue of such deceased brothers and sisters who may have died before the decease of the intestate; but if there be none such, then, (3) in like manner to the brothers and sisters and issue of such of the half blood, the statute not excluding the half blood from inheriting if there be no heir of the whole blood. Doe, Kean, v. Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 336 (1836).

In Fatheree v. Fatheree, Walk. (Miss.) 311 (1828), plaintiff, a half-brother of the defendant, claimed a distributive share of a deceased brother's estate, the defendant claiming as heir of the intestate. The intestate left neither wife nor descendants. Under the Mississippi statute of distribution, the court held that among collaterals, such as brothers and sisters, those of the whole blood were to be preferred to those of the half blood; but if there were no collaterals of the whole blood, but of the half blood, then the half blood collaterals inherited, the same rule applying to both real and personal estate.

The Mississippi statute, under which the above case of Fatheree v. Fatheree was decided, provides that "there shall be no representation among collaterals, except with the descendants of the brothers and sisters of the intestate; and there shall in no case be a distinction between the kindred of the whole and half blood, except that the kindred of the whole blood in equal degree shall be preferred to the kindred of the half blood in the same degree."

In Hulme v. Montgomery, 31 Miss. 105 (1856), the court approved of the construction placed upon the Mississippi statute in the case of Fatheree v. Fatheree, Walk. (Miss.) 311 (1828), *supra*, stating that the language was so plain and unambiguous as scarcely to admit of construction at all, and that, even if they were doubtful as to the propriety of the interpretation which was then put upon the act, they would not feel authorized to dissent from it.

So in Scott v. Terry, 37 Miss. 65 (1859), the question was whether, when the brothers and sisters of the whole blood of a party dying intestate all died, leaving children, such children were entitled to the inheritance under the statute of descent and distribution by right of representation of their parents, to the exclusion of the sister of the half blood of the intestate who survived her brothers and sisters of the whole blood. The court held that such children were entitled by right of representation to the exclusion of such sister of the half blood.

In Ravenscroft v. Shelby, 1 Mo. 694 (1826), it was held that lands in that territory did not, in the year 1807, descend to the half blood as well as to the whole.

In Den, Hance, v. McKnight, 11 N. J. L. 456 (1829), the testator devised a specific portion of his real estate to his executors with power to dispose of the same, and also the remainder of his real estate, as they might see best, together with the remainder of the personal estate. The proceeds to be applied to the support of his wife and children until the latter respectively attained the age of twenty-one years, when the overplus was to be equally divided between the wife and children or the survivors. The widow survived and only one child of the testator attained twenty-one and took the fee simple in equal portions with the mother. The widow dying leaving a child by a second marriage, the court held that upon the death of such surviving child of the testator without issue leaving no brother or sister of the whole blood, his moiety descended to his sister of the half blood by the same mother by virtue of the construction of section 3 of the New Jersey Act of 1780, adopted by the court in Arnold v. Den, Phœnix, 5 N. J. L. 862 (1820), to the exclusion of her half-sister by the second marriage of her father, the second husband of the widow of the testator.

The New Jersey Statute of May 24, 1807, provides that if any person possessed of or entitled to real estate in his or her own right in fee simple shall die without making a will disposing thereof, and without any brother or sister of the whole blood, and shall leave a brother or brothers, a sister or sisters, a brother and sister or sisters, or brothers and sister of sisters of the half blood, the said real estate of such person shall descend to and be inherited by such kindred, as the case may be, of the half blood, in the manner and proportions between male and female directed by the 1st section of this Act." Den, Pierson, v. DeHart, 3 N. J. L. 73 (1809).

In the above case the testator devised real estate to his wife for life, remainder in fee to his grandson, who died under age and without issue leaving a sister of the whole blood, who also died under age without issue, and a brother and sister of the half blood *ex parte materna* by the second marriage of his mother, and also uncles and aunts, children of the testator, under whom the defendant claimed. The widow, the mother of the grandson, also had issue of a third marriage, after the death of the sister of the grandson of the testator before the decease of the testator's widow under whom the plaintiff claimed. The court held the defendants entitled and excluded the half blood, such exclusion not being that of the issue of an ancestor by different venters, not carrying the estate out of the family of the ancestor.

See also Den, Lloyd, v. Urison, 3 N. J. L. 197 (1807); Den, Stretch, v. Stretch, 4 N. J. L. 182 (1818); Den, Delaplaine, v. Jones, 8 N. J. L. 419 (1824), the latter case decided under the New Jersey Act of 1817, *supra*, head V.

Under the laws of New Mexico, brothers and sisters of the half blood are excluded from the participation in the personal property of an intestate where there are brothers and sisters of the whole blood. In the Goods of Mercure, Tucker, 288 (1867),—in which case the half blood were excluded in the distribution of shares as next of kin in the personal estate of the intestate in the state of New York.

there is some other section which cuts down or expands its meaning, or else the section itself is repugnant to the general purview." There is no claim that the section referred to is repugnant to the purview. But it is assumed by appellants' learned counsel that the only provision for kindred of the half blood is made by section 2472, Rev. Stat. 1881 (1 Burns' Rev. Stat. 1894, § 2627), and, as it omits descendants of the half blood, none of the kindred of the half blood can inherit but half-brothers and half-sisters. It

If the estate does not come to the intestate by descent, but by purchase, it passes to the brothers and sisters of the whole blood only. Freeman v. Allen, 17 Ohio St. 527 (1867).

In Stembel v. Martin, Stone v. Doster, 50 Ohio St. 495, 521 (1893), the question presented was whether, when the relict of a former deceased husband or wife dies intestate and without issue, possessed of real or personal estate which came to the intestate from such husband or wife, in the manner contemplated by the Act of April 11, 1877 (74 Ohio Laws, 81), the one half of the property passed and descended, under the provisions of that act and the statute to which it is supplemented, to the brothers and sisters of the whole blood of the former husband or wife and their representatives, in preference to those of the half blood and their representatives, or to both classes equally. The court was of opinion that half of the property which went to the brothers and sisters of the former deceased husband or wife descends in the same way: first, to the brothers and sisters of the whole blood or their representatives, and if there were none then to those of the half blood and their representatives, the other half going to brothers and sisters of the deceased relict and their representatives in like order, the statute, employing the same language in disposing of each half, must be presumed to have used it with respect to both in the same sense, there being nothing to indicate a different intention. The section in dispute was 4162 of the Revised Statutes of Ohio. (*Justice* Minshall dissenting.)

So it has been held that a moiety passing, under the provisions of § 4162 of the Ohio Revised Statutes, to brothers and sisters of a former deceased husband or wife, is governed by the statute to which such act is supplementary, and therefore those of the whole blood have precedence. Martin v. Falconer, 5 Ohio C. Ct. Rep. 584, 585 (1891).

The statute in force at the time of the passage of the Ohio Statute of April 11, 1877, supplementary to the act regulating descents and the distribution of personal estate (74 Ohio Laws, 81) shows the policy of the state to be that, excepting real estate ancestral in character, brothers and sisters of the whole blood take to the exclusion of those of the half blood. *Ibid.*

The pertinent provision of such act is that the estate shall pass, "one half to the brothers and sisters of such deceased husband," and full effect is given thereto by decreeing that the property passes to such brothers and sisters in the order established by §§ 2 and 4 of the former Act, that is to the whole blood, and, if none of such blood, then to those of the half blood and their legal representatives. *Ibid.*

In Cresoe v. Laidley, 2 Binn. 279, 285, 286 (1810), an intestate died seised in fee simple of lands which had come to him by descent from his father, leaving a mother, a brother of the half blood on the part of the mother, a maternal grandfather and grandmother, a paternal great aunt who was the plaintiff in the suit, and several cousins, children of paternal great uncles and great aunts. The plaintiff claimed a fifth as one of the next of kin and the defendant held under the heir at common law. The question was whether the case was included in either of the acts directing the descent of real estate of persons dying intestate. The court held that the plaintiff was not entitled to recover, not bringing her case within either of the acts of assembly of the 19th day of April, 1794, and the 4th day of April, 1797, the former of which enacts that "the real and personal estate of any person dying intestate, in case such person leaves neither widow nor lineal descendant, nor father or mother, nor brother or sister of the whole or half blood, nor lawful issue of any brother or sister of the whole or half blood, shall descend to and be divided among the next of kin of equal degree," the Act of 1797 making no alteration in the above provision, it being a *casus omissus* in the interstate laws, the heir at common law taking in such cases.

In Stark v. Stark, 55 Pa. 62 (1867), real estate was devised to a daughter, who died intestate leaving brothers and sisters of the whole and half blood. It was held that, under the Pennsylvania Act, § 27 (1 Brightly's Purd. Dig. 808), those of the whole blood took the estate in preference to the half.

When the half blood are called upon to inherit under section 9 of the Pennsylvania Act of 1833, as being of the blood of the first purchaser, they stand in the same right, so far as regards other kindred, as the whole blood, although they would be postponed and not share equally with the whole brothers and sisters. May v. Espenshade, 1 Pearson (Pa.) 139 (1858).

With respect to brothers and sisters inheriting from each other, the whole blood is preferred, under the Pennsylvania Intestate Laws of 1833. Danner v. Shissler, 31 Pa. 289 (1858). See also Baker v. Chalfant, 5 Whart. 477 (1840), *infra*, VIII.; *Ex parte* Mays, 2 Rich. L. 61 (1845).

In Lawson v. Perdriaux, 1 McCord, L. 282 (1821), it was held that under the South Carolina Act of 1791, as amended by the Act of 1797, a brother of the half blood was not entitled, as a brother or sister of the whole blood, to a distributive share of the real estate of an intestate, who died leaving no brother or sister of the whole blood but a mother him surviving, and that the mother took the whole estate.

Under the above statute and amendment a brother of the half blood is by no construction to be placed upon the same footing with a brother of the whole blood. *Ibid.*

In Charleston v. Hagermeyer, 1 Riley, Eq. 117 (1837), letters of administration were granted of the intestate's estate which was entirely personal, and no claim was interposed by the next of kin, and an inquisition of escheat was prosecuted, the amount in the hands of the administrator being paid over to the city council. Upon a bill filed for distribution of the estate among the intestate's next of kin, who were, a sister of the whole blood who died a widow intestate leaving three children, another sister of the whole blood who died a widow leaving children, and children of a sister of the whole blood who died prior to the intestate, and also sisters of the half blood,—the court held that if there had been no brother or sister of the whole blood surviving the intestate, the sisters of the half blood would have been placed upon the footing with the children of the deceased sister of the whole blood, but that by the act of distribution they were not to be permitted to take while there were sisters of the whole blood; and as the rights of the parties were fixed by the death of the intestate, the estate was distributable into three parts, one part to each of the three sisters of the whole blood and their descendants.

Brothers and sisters of the half blood cannot inherit from a colored man, under the South Carolina statutes legalising marriages between former

provides that "kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent from any ancestor, those only who are of the blood of such ancestor shall inherit: provided, that on failure of such kindred, other kindred of the half blood shall inherit as if they were of the whole blood." It is to be observed that the principal object and purpose of this section, as appellants' learned counsel contends, are to limit the right of inheritance

slaves, whether their mother is to be regarded under such statutes as the lawful wife of their father or not, where, without being sold or sent off in such a way as to make a dissolution of the marriage, the father left the mother for another woman, with whom he lived during the lifetime of the former and by whom he was the father of the man from whom the inheritance was claimed; and if the children of the first marriage are legitimate, the son of the second is not, and there can be no inheritance between them. Clement v. Riley, 88 S. C. 66, 83 (1890).

Where a testator died unmarried and without issue, leaving neither brother nor sister or their issue, nor father or mother, him surviving, having acquired lands in his lifetime, the question decided under subsection 2 of section 2420 of the Tennessee Code being as to the right of the heir on the part of the mother, who died leaving a brother and sister, the former dying unmarried and without issue, the sister marrying and having children, two of whom were living, the third having died leaving children, who also died without issue, the father of such last child marrying again and having five children by such marriage, such last-mentioned children claiming as half brothers and sisters, to inherit,—the court held that under the section of the code, the child of a sister of the mother took in preference to the half-brothers on the part of the deceased son of the deceased daughter of the sister, the statute calling for an heir "representing those in equal degree of relationship to the intestate," and not for a person representing one who is himself only a representative, subsection 1 of such section defining the representation of lineal descendants, and subdivision 2 providing for the representation of brothers and sisters by their lineal descendants. Selby v. Hollingsworth, 13 Lea, 145, 147, 148 (1884).

In Wardlow v. Miller, 69 Tex. 395, 398 (1887), it was held that by the civil law in force in Texas at the death of the deceased, in the year 1836, his brothers of the full blood and a daughter of a deceased brother of the full blood were entitled to inherit his estate to the exclusion of brothers and sisters of the half blood.

Again, in Franklin v. Piper, 5 Tex. Civ. App. 258, 259 (1893), where the land in question was patented to the heirs of the deceased, an unmarried man, who left brothers and sisters of the whole blood and brothers of the half blood and descendants of a brother of the half blood him surviving,—it was held that, under the law in force in Texas prior to the Act of 1848, the estate passed to the brothers and sisters of the whole blood to the exclusion of the brothers of the half blood and their issue, the laws of descent and distribution not having been changed until the Act of March 18, 1848. Wardlow v. Miller, *supra*, followed.

VIII. *When half blood preferred to remoter relatives of the whole blood.*

When a statute does not really require a different interpretation, justice is best promoted by preferring brothers and sisters of the half blood to those more distantly related. Pond v. Irwin, 113 Ind. 243 (1888).

In Cox v. Clark, 98 Ala. 400, 404 (1890), an action of ejectment, the owner died leaving three children, and grandchildren of two deceased children, a grandchild subsequently dying leaving no issue, and no brother or sister of the whole blood, but leaving brothers and sisters of the half blood, the plaintiffs in the action, neither father nor mother of the plaintiffs being a descendant of such deceased owner from whom inheritance was derived, the only title set up by them being that derived through the half-sister, the grandchild of such owner, who inherited a fifth, and who survived the intestate, her father. The court held that if the grandchild so dying had left surviving her a brother or sister on the maternal side, through whom the inheritance came, or children of such brother or sister, such would take to the entire exclusion of the half blood of the father's side; but, there being no child of the intestate, or brothers or sisters of the intestate on the maternal side, the half brothers and sisters, though on the father's side, were next in degree, and by force of the statute (Code, §§ 1915, 1919) and the qualifying words thereof, took in preference to the uncles and aunts, who were not in the same degree with the half brother or sister.

Where the intestate died owning lands which had descended to her from her husband, unmarried and leaving no children or other lineal descendants either of the whole or half blood, under the Indiana statutes a half brother of the blood of the ancestor took to the exclusion of kindred of the blood more distantly related. Pond v. Irwin, *supra*.

In Clay v. Cousins, 1 T. B. Mon. 75 (1824), the question was whether, on the death of an infant, lands which were derived from his father passed, by operation of law, to the brother and sister of his father, or descended to his half brother on the part of his mother. The court held the right of inheritance depended upon the principles established by civil institutions, and the legislature having enacted a law regulating the descent of estates in that state, the question was to be decided by the statute, and that under the statute of Kentucky, which contained the provisions of the Virginia Acts of 1785 and 1790, the estate descended to the brother of the half blood, and not to the brother and sister of the father.

In Conant v. Kent, 130 Mass. 178 (1881), the deceased died leaving no issue, father, mother, brother, or sister, but leaving nephews and nieces of the whole and half blood, and a grand nephew, son of a deceased niece of the whole blood. Under the Massachusetts Statute of 1876, chap. 220, § 1, providing that if a person dies intestate leaving no issue, and no father, mother, brother, or sister, his estate shall go to his next of kin in equal degree, the court held that the estate went to the children of deceased brothers and sisters as the next of kin of intestate to the exclusion of the children of deceased nephews and nieces, the nephews and nieces of the half blood taking equally with those of the whole blood, the Statute of 1880, chap. 219, abolishing the distinction and allowing the issue in whatever degree of every deceased brother or sister to share by right of representation in all such cases, not affecting the rights acquired under the Statute of 1876.

In Rowley v. Stray, 32 Mich. 70 (1875), the land in controversy descended to the deceased from his father, who died leaving the estate and a widow him surviving, the nearest surviving kindred of the intestate being his father's mother and the children of his mother's (the widow's) second marriage, the question being whether the father's mother or the brothers and sisters of the half blood inherited. The court held that the half blood took under the

by kindred of the half blood. But the limitation is not in the direction of confining the right of inheritance exclusively to the half-brothers and half-sisters, as contended by appellants; but it is to limit the right to those of the half blood only who are of the blood of the ancestor from whom the estate shall have come to the intestate by gift, devise, or descent, if there are any such half-blood kindred, or rather, to exclude from such inheritance kindred of the half blood who are not of the blood of the ancestor,

statute in priority to the grandmother, even though the latter was in the same degree of kinship to the intestate as computed by the rules of the civil law, and was of the blood of the ancestor from whom the estate came to the intestate, while the former were not.

And under the Spanish law, which prevailed in Missouri prior to September, 1807, if a man died without descendants or ascendants leaving brothers of the half blood only and paternal aunts, the brothers of the half blood succeeded to the exclusion of the paternal aunts. Cutter v. Waddingham, 22 Mo. 206, 260 (1855).

In Doe, Sheppard, v. Sheppard, 7 N. C. 383, 408, 404 (1819), the claim was one of the half blood, the lands having been devised in tail to the first, second, third, and fourth sons of the testator in succession, three of the sons being by his second wife. The first son, becoming seised in fee under the North Carolina Act of 1784, devised a portion to each of two of such brothers. One of such brothers dying intestate leaving issue who subsequently died without issue, the other brother also dying intestate without issue but leaving a maternal sister of the half blood by the second marriage of the testator's widow and a nephew of the whole blood, the question was whether the kindred on the paternal side, who were further in degree, or the maternal half sister, were entitled. The court held that the latter were entitled inasmuch as the lands were acquired by purchase.

In Ohio where the estate comes by purchase the husband or wife of the intestate, as well as the brothers and sisters of the half blood, stand before the uncles and aunts. Prickett v. Parker, 3 Ohio St. 394 (1854).

In White v. White, 19 Ohio St. 531, 536 (1869), it was held that the 5th clause of the Ohio Statute of 1857, section 1, relating to descent and distribution, was not to be read as a mere adjunct to the 4th clause, making both alike applicable exclusively to estates which come by deed of gift, such a rendering of the section or clause being against the plain language thereof, there being no good reason for making property coming from an ancestor by deed of gift descend otherwise than it would if acquired by descent or devise.

In that case the property had descended from a grandfather through the father to a daughter who died seised. It was held that upon the death of the latter it passed to the half brother and sister of her father in preference to the brothers and sisters of the grandfather, even though such half brother and sister were not of the whole blood of the immediate ancestor, nor of the blood of the grandfather under the 5th clause of section 1 of the Ohio Statute of 1857.

Where an intestate died seised of an estate by descent from a brother, leaving no widow nor children nor brother nor sisters of the whole blood, but leaving a sister of the half blood and uncles on the father's side, under the Pennsylvania Act of April 9, 1833, the sister of the half blood took in preference to remoter kindred of the whole blood. Baker v. Chalfant, 5 Whart. 477, 479 (1840).

In Simpson v. Hall, 4 Serg. & R. 387 (1818), the intestate died having made a small improvement upon vacant land, but without making any settlement or having a view to residence. Subsequently a warrant to include this improvement was issued to the brother on behalf of the daughter of the deceased, but the court held upon the death of the daughter that such estate did not come to her *ex parte paterna* but as a new acquisition, which, upon her death, descended to a brother of the half blood on her mother's side, in preference to more remote kindred of the whole blood.

In Hart's App., 8 Pa. 32 (1848), a lunatic died unmarried and without issue, or father or mother or brother or sister of the whole blood, or uncle or aunt on the father's side, but leaving three brothers and one sister of the half blood, the children of his mother by a subsequent marriage, and ten cousins, the children of deceased uncles on his father's side. A portion of the real estate having been sold for his maintenance under order of the court, the balance left was claimed by his half brothers and sister, upon the ground that the mother was a descendant of the lunatic's paternal great-grandfather from whom the real estate came, the cousins also claiming in the same line, a portion of the estate being also claimed from the grandfather of the intestate lunatic, the persons last seised by the intestate being his father and a paternal uncle who died intestate. The court held the half brothers and sister entitled in equal proportions, under the Act of April 8, 1833, and preferred them to the cousins.

Where an intestate died possessed of real and personal estate, leaving as his nearest relations an uncle and aunt of the half blood, and cousins of the whole blood, and other more distant relations, the uncle and aunt of the half blood, being in the third degree, under the South Carolina Statute of February 19, 1791 (abolishing the rights of primogeniture), were entitled to the estate in preference to the first cousins of the whole blood. Karwon v. Lowndes, 2 Desauss. Eq. 210 (1808). To the same effect, Perry v. Logan, 5 Rich. Eq. 202 (1853).

In Chaney v. Barker, 3 Baxt. 424 (1874), the question was whether half-sisters of a child of the second marriage took the interest in the land which descended from his mother, or whether the uncles and aunts on the mother's side were entitled. The court held that under the Tennessee code the half brothers and sisters were entitled, to the exclusion of the uncles and aunts, following the construction placed upon the provision of the Act of 1784 (Code, § 2420, subsec. 2) in the case of Nesbit v. Bryan, 1 Swan. 468 (1852), *ante*, head IV., although by such construction of the act the land passed entirely out of the blood of the ancestor from whom it was derived.

IX. *When half blood take half portions.*

The legislatures of some states have thought fit to make a distinction between the whole and the half blood in relation to the exact portions to be taken by each, giving the former the preference so far as the value or amount thereof is concerned.

This will be found to be the case in Colorado, under Stat. 1883, § 1041; Fla. Stat. 1881, chap. 92, § 4; Ky. Gen. Stat. 1881, chap. 31, § 3; La. Rev. Civ. Code 1875, § 918; Mo. Rev. Stat. 1879, § 2164, ed. 1889, vol. 1, p. 1023, § 4468; Tex. Rev. Stat. 1879, art. 1648; Va. Code 1873, chap. 119, § 2; W. Va. Laws 1882, chap. 94, § 2; and Wyoming Comp. Laws 1876, chap. 42, § 8, Rev. Stat. ed. 1887, p. 535, § 2223.

In Texas, however, the statute provides for their taking whole portions where they are all "of the half blood."

By section 27 of the Kentucky Act of 1827 (1 Statute Laws, 660) the personal estate of an intestate dying without wife or child is directed, after pay-

where there are other kindred of the half blood who are of the blood of the ancestor. In *Robertson* v. *Burrell*, 40 Ind. 328, this court construed this section as if it read as follows: "Kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate by gift, devise, or descent, from any

ment of debts, "to be distributed in the same proportions and to the same persons as lands are directed to descend in, by an act entitled 'An Act Directing the Course of Descent.'"

In Nixon v. Nixon, 8 Dana, 6 (1839), where the intestate died without father, mother, or child, leaving no descendants of a deceased brother or sister, his eight surviving brothers and sisters (seven of whom were of the half blood), his nearest collateral kindred were, by the 4th section of the Act of 1785, his only heirs and distributees. The 13th section of the Act provides that "if part of such collaterals be of the whole blood, and the other part of the half blood only, those of the half blood shall inherit only half as much as those of the whole blood, but if all be of the half blood they shall have the whole portions, only giving to the ascendants, if there be any, double portions." The question raised upon this clause was whether, when part of the collaterals are of the half blood and the other part of the whole blood, the statute intended that those of the half blood, as a class or body, should be entitled only to half as much as those of the whole blood as a class, or whether it intended that each of those of the half blood should be entitled to only half as much as each of those of the whole blood. The court held that the statute, in making the apportionment between collaterals of the whole and half blood, regarded the individuals of the two classes, and not the two classes collectively; and fixed the ratio of apportionment with reference to the individuals, and not to the classes as such, and therefore each one of the whole blood took twice as much as any one of the half blood, and each of the half blood half as much as any one of the whole blood.

So in Petty v. Malier, 15 B. Mon. 591 (1855), where the owner of land died, leaving a mother and sisters and brothers of the whole and half blood, the latter inherited half portions with the mother and brothers and sisters of the full blood.

Again, in Miller v. Calvert, 1 Met (Ky.) 472 (1858), a testator died leaving a widow and one child of such marriage and children by a former marriage, a child of the second marriage dying shortly afterwards, an infant and without issue, leaving his mother and half brothers and sisters him surviving, and the question was whether the collaterals, who were all of the half blood, took as brothers and sisters equally with the mother, as provided in section 1 of the Kentucky Statute (Rev. Stat. chap. 30). The court held that the language of the statute clearly meant nothing more nor less than that they should inherit only half as much as collaterals when they take with them, and the same proportion when they take with ascending kindred, the mother in that case being the ascending kindred, and as such entitled to take a share equal to a brother or sister of the whole blood, which in that case meant that they share double that of either of the collaterals of the half blood.

The effect of the 2d and 4th sections of the Texas Act of 1848, regulating descent and distribution (Hart's Digest, arts. 593, 595) is to give one half of the estate of the deceased (having no children) to the surviving husband, and if the intestate's mother be dead the other half is to be divided in equal portions, one to the surviving father and the other to brothers and sisters of the deceased, the term "brothers and sisters:" as used being general, and those of the half blood as well as those of the whole are strictly within their scope and signification, all doubt upon the question being dissipated by section 6 (art. 597), which declares that where the inheritance is directed to pass to the collateral kindred of the deceased, if part of such collaterals be of the whole blood and the other part of the half blood only of the intestate, those of the half blood shall inherit only half as much as those of the whole blood, but if all be of the half blood they shall have whole portions. Marlow v. King, 17 Tex. 177 (1856).

In that case deceased died without issue leaving her husband her surviving. Her mother had predeceased her and her father married again and had issue of such marriage who were of the half blood of the deceased. The brothers and sisters of the half blood and the father survived the deceased.

The provision, as contained in section 6 of the Texas Statute of 1848, is a qualification of the grant in the preceding sections, to the brothers and sisters, showing that half brothers and sisters are not excluded, but that they are entitled to only half as much as those of the whole blood. Marlow v. King, *supra*; Lee v. Smith, 18 Tex. 141 (1856).

In Browne v. Turberville, 2 Call (Va.) 391 (1800), the intestate died seised and possessed of real estate, part of which he took by devise from his father, and part by descent from his brother, leaving no issue or widow, but an uncle and cousins, the children of a deceased uncle of the whole blood on his mother's side, an uncle of the half blood on the mother's side, and relations on his father's side. The court ordered such estate to be divided into two portions, one of which the relatives on the father's side were to be entitled to and the other to go to those of the mother's side, the uncle of the whole blood taking two fifths, and the cousins two fifths, the uncle of the half blood taking one fifth.

Where a sister of the whole blood derived lands from a brother to whom they were devised by his father, and died without issue, leaving a mother and sister of the whole blood, and a brother and a sister of the half blood, her surviving, the court decreed a third to the mother and a third to the sister of the whole blood, and one sixth each to the brother and sister of the half blood. Blunt v. Gee, 5 Call. (Va.) 481 (1805).

Where a testator devised the residue of lands to his son, who died having attained the age of twenty-one, intestate and without issue, leaving a mother, two sisters of the whole blood, a brother of the half blood, and a sister of the half blood born after his decease, the court decreed two sevenths of such estate to the mother, and two sevenths to each of the two sisters of the whole blood, one seventh to his brother of the half blood, to the exclusion of the sisters of the half blood subsequently born. *Ibid.*

X. *Shifting descents.*

In the case of Cox v. Matthews, 17 Ind. 367, 370 (1861), head V., *supra*, after the death of the daughter of the intestate, the mother married again and had issue of such marriage three children, who were brothers and sisters of the half blood to such deceased daughter, and the court held that had they been born prior to her decease they would have inherited, but, the estate having upon her death vested in her uncles and aunts of the half blood prior to the birth of such brothers and sisters, the estate was not devested by their subsequent birth, the doctrine of shifting descents, although part of the common law, not prevailing in Indiana.

In North Carolina, if one purchases land and dies without issue, it descends upon his brothers and sisters then in being, but if any are subsequently

ancestor, those kindred of the half blood only who are of the blood of such ancestor shall inherit: provided, that on failure of such kindred of the half blood having the blood of such ancestor, other kindred of the half blood shall inherit as if they were of the whole blood." From the organization of the state to the enactment of the statute under consideration, kindred of the half blood inherited equally with those of the whole, without limitation or qualification. This section put a limit or qualification upon that

born they become equally entitled, and the same law prevails with relation to half blood where they are entitled to inherit. Cutlar v. Cutlar, 9 N. C. 324 (1823).

The next collateral relation to the person last seised, though *ex parte paterna*, is entitled to inherit, under the North Carolina Act of 1784, an estate descending *ex parte materna*, even though such collateral be of the half blood born after the decease of such person last seised. Seville v. Whedbee, 12 N. C. 160 (1827); Cutlar v. Cutlar, *supra*.

In Seville v. Whedbee, *supra*, the testator devised the lands to his wife, who subsequently married, had issue, and died, leaving a son and her second husband her surviving. Such husband married again and had further issue, the lessor of the plaintiff. The issue of the widow of the testator by her second marriage died seised before the birth of his half-brother. The court held that the case was not distinguishable from that of Ballard v. Hill, 7 N. C. 410 (1819), where the maternal half-brother was preferred to a more distant collateral, though the estate descended upon the brother under whom he claimed, from the father. In that case the contest was between the maternal brothers and sisters and the paternal cousin, who was heir at common law, while in the present case the lessor of the plaintiff was the paternal half-brother, and the estate descended to his brother from his mother. The plaintiff was allowed to recover, he becoming the heir although born after the death of his half-brother, the court following the case of Cutlar v. Cutlar, 9 N. C. 324 (1823), upon the latter point.

And the birth of a child by the mother's second marriage will displace the estate of uncles and cousins, and upon the subsequent birth of other children of that marriage the inheritance will open to admit them as coheirs with those previously born, under the North Carolina Act of 1784. Caldwell v. Black, 27 N. C. 463 (1845), citing Cutlar v. Cutlar, *supra*.

In Caldwell v. Black, *supra*, the intestate, who was seised by descent from her father, died prior to the North Carolina Act of 1808, intestate without issue and leaving no brothers or sisters or their issue, but leaving a mother and a paternal uncle. The land descended to the uncle, but was held devested by the subsequent birth (some prior to the year 1808) of half-sisters by the subsequent marriage of intestate's mother, who became entitled as heirs of the *propositus*, a half-brother born after the passing of such act being also entitled. The court, however, stated that if the title vested in the uncle had not become devested by the birth of such half brothers and sisters before the act of 1808, the birth of the half-brother after the date of such act would not have devested his estate. Ballard v. Hill, and Cutlar v. Cutlar, *supra*. Davis v. Cooke, 10 N. C. 608 (1825); Den, Trustees of University, v. Holstead, 2 N. C. Law Repos. 406 (1816); Allen v. Gentry, 2 N. C. Law Repos. 609 (1816); Bell v. Dozier, 12 N. C. 333 (1827); McBee v. Alexander, 12 N. C. 322 (1827); Gentry v. Wagstaff, 14 N. C. 270 (1831),—followed and approved.

Where one seised died leaving neither father, brother, sister, nor descendants, but leaving a mother, the estate went to his next of kin of the blood from which it came. It was held that, upon the mother's marrying again and having issue, such issue took as heirs of the half blood. Dunn v. Evans, 7 Ohio, pt. 1, p. 169 (1835).

The 4th clause of the Ohio Statute of Descents of 1824 (2 Chase's Statute, 1313, § 1), preferred the brothers and sisters of the intestate of the half blood to the next of kin to the intestate of the blood of the ancestor from whom the estate descended, provided such next of kin were more remote from such ancestor than his brothers and sisters or their representatives; therefore, if the brother of the half blood was living at the time of the death of the person last seised of the whole blood, he would take by descent. *Ibid.*

But in Drake v. Rogers, 13 Ohio St. 21, 40 (1861), the intestate died leaving an only child and his widow him surviving. The child subsequently dying without brothers or sisters or issue, the lands descended to the next of kin of the father. The court held that the issue of a subsequent marriage of the mother, half blood to the deceased child of the intestate, did not devest an estate vested in the father's next of kin, under the Ohio Act of March 14, 1853, the court distinguishing the case from that of Dun v. Evans, *supra*, on the ground that the latter case was decided under the Statute of 1824, the Act of 1853 differing somewhat from the former act.

In Baker v. Heiskell, 1 Coldw. 641 (1860) a half brother and sister born after the death of a half-brother dying seised and possessed of real estate were held entitled to inherit with the brothers and sisters of the whole blood, the law not being changed by the Tennessee Act of 1842, chap. 169, § 2.

But no share of the estate of a deceased brother or sister would vest in the brother or sister born after the death of such brother or sister, except they be born within the period fixed by law. Grimes v. Orrand, 2 Heisk. 398 (1871).

See also Lowe v. Macoubbin, 1 Harr. & J. 550 (1805), *supra*, head IV.

XI. *Equitable conversion.*

The doctrine of equitable conversion has in some instances been held to control the question of descent to the half blood.

Thus, where lands inherited by an infant were sold and converted into money under an order of the court of chancery, and the infant died under age leaving half brothers and sisters on the part of his mother, such half blood took the same as personal estate, although had such property remained real estate the half blood would have been excluded. Armstrong v. Miller, 6 Ohio, 118 (1833).

Section 4313 of the Michigan Statute does not apply to personal property, not dealing with the mode of distribution, but only with descents; therefore where property is devised to a trustee in trust for sale, the proceeds to be applied to the benefit of the *cestui que trust*, such property becomes personalty and not within the statute. Henderson v. Sherman, 47 Mich. 267 (1882).

In Orr v. White, 106 Ind. 341 (1886), the question was whether a wife took, by descent or purchase, title to property purchased by her with the proceeds of property inherited by her from her father and voluntarily sold by her, the court holding that she took as purchaser, equity not following the fund in such cases, and therefore half-blood relations were entitled to take along with the whole. Armington v. Armington, 28 Ind. 74 (1867).

The ancestral quality of the estate does not follow it in such cases. Brower v. Hunt, 13 Ohio St. 211 (1862); Fraser v. Clifford, 94 Ind. 483 (1883). E. W.

rule, and excluded the half-blood kindred only where they were not of the blood of the ancestor from whom the estate came by gift, devise, or descent to the intestate, where there were half-blood kindred of the blood of the ancestor. As before observed, that was the principal object of that section. But this section would be practically meaningless if section 2625, Rev. Stat. 1894 (Rev. Stat. 1881, § 2470), were left out. It is only by looking to that section—providing, as it does, for the inheritance by brothers and sisters living and the descendants of such as are dead, and carrying its provisions into force—that the section under consideration can be given any operation whatever. If there were no provision for inheritance by brothers and sisters, the provision in favor of kindred of the half blood would be an idle fulmination of words. So we must look to both sections to get the meaning of either, as though both sections formed and were but one. And thus the provision in section 2625, Rev. Stat. 1894 (Rev. Stat. 1881, § 2470), that the brothers and sisters of the intestate, and the descendants of such as are dead, shall take the inheritance,—meaning, as we have seen, brothers and sisters of the half blood and their descendants, as well as those of the whole blood,—may be looked to in determining the scope and meaning of the phrase, "kindred of the half blood shall inherit equally with those of the whole blood," in section 2627, Rev. Stat. 1894 (Rev. Stat. 1881, § 2472). If the two sections were one and the same section, no one could doubt that the phrase, "brothers and sisters of the intestate and the descendants of such as are dead," would all apply to the kindred of the half blood mentioned later on in the section, especially as that part of the section is silent as to whether the descendants of the kindred of the half blood that are dead are to inherit; and it is practically conceded by the learned counsel for appellants that the two sections should be construed as one section. And that is true, because the latter section is practically inoperative without the other. Thus construing the two sections, it is provided that kindred of the half blood, and the descendants of those that are dead, shall inherit equally with those of the whole blood, subject to the limitations and qualifications specified in the latter part of said section 2627, Rev. Stat. 1894 (Rev. Stat. 1881, § 2472). We therefore hold that the descendants of the half-blood brothers and sisters inherit equally with those of the whole blood. It follows that the court did not err in its conclusions of law.

The judgment is affirmed.

ILLINOIS SUPREME COURT.

City of CHICAGO, *Appt.*,
v.
Elise BURCKY.

(158 Ill. 108.)

1. Vacating a portion of a city thoroughfare across railroad tracks, and erecting a viaduct beside its location to carry travel over them, in such a way as to shut land cornering on the vacated portion off from all direct access from beyond both the tracks and the viaduct, and destroy its former availability for business purposes, entitles the owner to damages for the injury thus caused to his property.

2. The right of a land owner to damages for the vacation of a portion of a street so as to leave his property upon a blind court is not affected by his subsequently opening a street which separates his property from the vacated portion of the original street, as his rights are fixed at the time of closing the street.

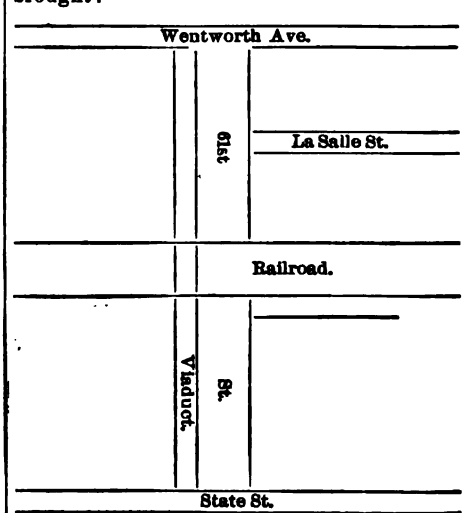
(October 11, 1895.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused by the closing of a public highway. *Affirmed.*

NOTE.—On the subject of the abandonment of a highway as affecting the rights of land owners, see also People v. Marin County (Cal.) 26 L. R. A. 659, and *note*.

Statement by **Craig**, *Ch. J.*:

This was an action brought by Elise Burcky against the town of Lake, to recover damages sustained to a tract of land fronting east 337 feet on State street and south 558 feet on Sixty-first street, in Chicago, caused, as is alleged, by the vacation of a portion of Sixty-first street, joining her land on the southwest. The following plat shows the location of plaintiff's property, the streets and railroads, at the time the action was brought:



As will be seen by the plat, west of plain-

See also 31 L. R. A. 695.

tiff's property several railroad tracks belonging to the Chicago, Rock Island & Pacific Railroad Company and the Lake Shore & Michigan Southern Railroad Company crossed Sixty-first street at about right angles. Just south of and adjoining Sixty-first street and State street those railroad companies owned a large tract of land, which was used by them for a switching yard and other usual railroad business, and was covered with numerous railroad tracks. The town of Lake and the railroad companies considered the railroad crossing at Sixty-first street dangerous, and the town, on the 14th day of January, 1885, passed an ordinance authorizing the making of a contract with the railroad companies, whereby the companies were to erect on a strip of land 25 feet wide belonging to them and adjoining the south line of Sixty-first street, a viaduct, extending from a point 170 feet east of the east line of Wentworth avenue to a point 210 feet west of the west line of State street, the town to build the approaches thereto from Wentworth avenue and State street. When completed, the viaduct and approaches were to become a public highway. When the companies completed the building of the viaduct, the town was, by proper ordinance, to vacate that part of Sixty-first street at the railroad tracks commencing 139 feet east of the east line of La Salle street, and running to a point 198 feet further east, and to the west line of plaintiff's property. The contract, as thus provided for in the ordinance, was duly executed, and the viaduct built, and on December 30, 1885, the 198 feet on Sixty-first street, at the railroad crossing as above described, was vacated.

When this writ was commenced plaintiff's property consisted of an entire tract, as shown by the plat heretofore mentioned, but before the trial of the cause in the circuit court plaintiff subdivided the land by opening through it two streets running north and south from Sixty-first street, one known as Butterfield street, on the west side of the tract, and the other about half way between Butterfield and State streets. The streets were each 66 feet wide, and the west line of Butterfield street is the west line of plaintiff's property as situated when the action was begun.

After the evidence was all introduced the defendant requested the court to instruct the jury as follows:

"The jury are instructed that, it being admitted that the fee-simple title to the street in question (Sixty-first street) was in the city, and it appearing from the evidence that the property claimed to be damaged does not abut upon that portion of Sixty-first street that was vacated, but is situated in another block east of the block in which the portion of said Sixty-first street was vacated, the plaintiff has failed to prove any actionable injury on account of the said vacation of Sixty-first street, and all evidence of any damage done to plaintiff's property by reason of the said vacation is not to be considered by the jury in arriving at a verdict in this case."

This instruction was refused, and the decision is relied upon as error.

Messrs. **John Mayo Palmer, W. S. Johnson,** and **Byron Boyden,** for appellant:

The diversion of anticipated trade, and the inconvenience to travel, were not proper elements of legal damages.

Hohmann v. *Chicago*, 140 Ill. 226.

The plaintiff has free access to all her property by public streets. She is merely disabled from going west on Sixty-first street at grade, and this disability is shared by the public generally.

That part of Sixty-first street that the town of Lake vacated was located between Butterfield and La Salle streets. Plaintiff's property was all located in the blocks between Butterfield and Dearborn and Dearborn and State streets, east of the block in which the vacation occurred.

Plaintiff cannot, therefore, recover for damages to her property by reason of the vacation.

East St. Louis v. *O'Flynn*, 119 Ill. 202, 59 Am. Rep. 795; *Chicago* v. *Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598; *Parker* v. *Catholic Bishop of Chicago*, 146 Ill. 158; *Buhl* v. *Fort Street Union Depot Co.* 98 Mich. 596, 23 L. R. A. 392.

A property owner has no cause of action against a municipality for damages to his property by the vacation of a public highway, where no part of his property abuts upon the portion of the highway vacated, with the two exceptions:

First. Where a property owner owns property situated on a street, sometimes called a court, opening only at one end, and the authorities of the city or town decide upon a discontinuance or a vacation of the street into which the court or stub of the street enters, then, although no part of the property upon the court would abut upon the street vacated, still his means of access to and egress from his property would be cut off, and, of course, his property damaged, and he would have a good cause of action against the municipality;

Second. If a person owned a tract of land connected by a private way or easement to a public highway, and the authorities should vacate the highway, then he would lose the benefit of his estate or be compelled to open a way at his own expense, which would be a direct and tangible damage, and he would have a right of recovery.

Dill. Mun. Corp. 3d ed. § 730; *Rude* v. *St. Louis*, 93 Mo. 408; *Houck* v. *Wachter*, 34 Md. 266, 6 Am. Rep. 332; *Anne Arundel County Comrs.* v. *Duckett*, 20 Md. 468, 83 Am. Dec. 557; *Shaw* v. *Boston & A. R. Co.* 159 Mass. 597; *Hammond* v. *Worcester County Comrs.* 154 Mass. 509; *Blackwell* v. *Old Colony R. Co.* 122 Mass. 1; *Brainard* v. *Connecticut River R. Co.* 7 Cush. 506; *Thayer* v. *Boston*, 19 Pick. 511, 31 Am. Dec. 157; *Stetson* v. *Faxon*, 19 Pick. 147, 31 Am. Dec. 128; *Davis* v. *Hampshire County Comrs.* 153 Mass. 218, 11 L. R. A. 750; *Hartshorn* v. *South Reading*, 8 Allen, 504; *Castle* v. *Berkshire County*, 11 Gray, 26; *Smith* v. *Boston*, 7 Cush. 254; *Spaulding* v. *Nourse*, 148 Mass. 490; *Brightman* v. *Fairhaven*, 7 Gray, 271; *Harvard College* v. *Stearns*, 15 Gray, 6; *Wesson* v. *Washburn Iron Co.* 13 Allen, 101, 90 Am. Dec. 181; *Willard* v. *Cambridge*, 8 Allen, 574; *Fall River Iron Works Co.* v. *Old Colony & F.*

See also 34 L. R. A. 769.

R. R. Co. 5 Allen, 221; *Brady* v. *Shinkle*, 40 Iowa, 576; *Ellsworth* v. *Chickasaw County*, 40 Iowa, 571; *Barr* v. *Oskaloosa*, 45 Iowa, 278; *Stubenrauch* v. *Neyenesch*, 54 Iowa, 567; *Powell* v. *Bunger*, 91 Ind. 65; *Indiana, B. & W. R. Co.* v. *Eberle*, 110 Ind. 542, 59 Am. Rep. 225; *People* v. *Kerr*, 27 N. Y. 188; *Coster* v. *Albany*, 43 N. Y. 399; *Fearing* v. *Irwin*, 55 N. Y. 486; *Seeley* v. *Bishop*, 19 Conn. 134; *Kimball* v. *Homan*, 74 Mich. 699; *Heller* v. *Atchison, T. & S. F. R. Co.* 28 Kan. 625; *Central Branch Union P. R. Co.* v. *Andrews*, 30 Kan. 590; *Dawson* v. *St. Paul Fire & Marine Ins. Co.* 15 Minn. 136, 2 Am. Rep. 109; *Shaubut* v. *St. Paul & S. C. R. Co.* 21 Minn. 502; *Adams* v. *Chicago, B. & N. R. Co.* 39 Minn. 297, 1 L. R. A. 493; *State* v. *Barton*, 36 Minn. 145; *Canman* v. *St. Louis*, 97 Mo. 92; *Fairchild* v. *St. Louis*, Id. 85; *McGee's App.* 114 Pa. 470; *Stanwood* v. *Malden*, 157 Mass. 17, 16 L. R. A. 591; *State* v. *Elizabeth*, 54 N. J. L. 462; *Coffee County Comrs.* v. *Venard*, 10 Kan. 95; *People* v. *Ingham County Supvrs.* 20 Mich. 95; *Polack* v. *San Francisco Orphan Asylum Trustees*, 48 Cal. 490; *Buhl* v. *Fort Street Union Depot Co.* 98 Mich. 596, 28 L. R. A. 392; *Glasgow* v. *St. Louis*, 107 Mo. 198; *Levee Dist. No. 9* v. *Farmer*, 101 Cal. 178, 23 L. R. A. 388; *Egerer* v. *New York Cent. & H. R. R. Co.* 180 N. Y. 108, 14 L. R. A. 881; *Concord & Pembroke's Petition*, 50 N. H. 530.

Mr. **Alex. Clark**, for appellee:

The law governing this class of cases is very clearly set out in *Chicago* v. *Union Bldg. Asso.*, 102 Ill. 379, 40 Am. Rep. 598. The court there says: "First, for any act obstructing a public and common right, no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person; second, an action will lie for peculiar damages of a different kind, though even in the smallest degree; third, the damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort; fourth, the fact that many others sustain an injury of exactly like kind is not a bar to individual actions of many cases of a public nuisance."

There would seem to be no difficulty about the right of recovery in the Burcky case. The property there is not only damaged in the smallest degree in a peculiar way, but in a manner where the damages seem so apparent that it is only necessary to understand the geography of the case to at once appreciate them. *Rigney* v. *Chicago*, 102 Ill. 64.

Although cities and villages have been given power by the legislature to vacate streets, yet this power was vested in them with the reservation of an action for damages to the property injured.

Parker v. *Catholic Bishop of Chicago*, 146 Ill. 158.

The measure of damages in this case is the difference between the value of the tract of ground, taken as a whole, as it stood before and after the closing of the street, and the construction and operation of the viaduct, and as affected by the same.

Page v. *Chicago, M. & St. P. R. Co.* 70 Ill. 324; *Springer* v. *Chicago*, 12 L. R. A. 609, 135 Ill. 552; *Chicago & E. I. R Co.* v. *Loeb*, 118 Ill. 203, 59 Am. Rep. 341.

Craig, *Ch. J.*, delivered the opinion of the court:

The viaduct and its approaches, constructed along the south line of Sixty-first street, were about one quarter of a mile long, and extended from Wentworth avenue to State street. The construction of the viaduct opposite the plaintiff's land prevented the laying out of any streets south, and stopped all travel in that direction, while the vacation of that portion of Sixty-first street crossed by the railroad tracks stopped all travel west, so that the property of plaintiff abutting on Sixty-first street between the railroad tracks and State street was shut in, and all access shut off from the south and from the west. By the construction of the viaduct south of plaintiff's property, and by closing the street west of the property, and thus stopping all communication south and west, it is plain that plaintiff's property was seriously damaged. But it is contended that the damages she has sustained are not special in their character, but are of the same kind as those sustained by the general public, and upon this ground no recovery can be had. If the damages sustained by the plaintiff are of the same kind as those sustained by the public at large, differing only in degree, and not in kind, or if the damages sustained by the plaintiff are of the same kind sustained by the general public, the only difference being in the excess of damages sustained by plaintiff, then, under the well-settled rules of law which control cases of this character, she could not recover. *Chicago* v. *Union Bldg. Asso.* 102 Ill. 379, 40 Am. Rep. 598; *East St. Louis* v. *O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795; *Parker* v. *Catholic Bishop of Chicago*, 146 Ill. 158.

Where damages are sustained by the public at large, but in different degrees, the law does not confer a remedy. Thus, in *Davis* v. *Hampshire County Comrs.*, 153 Mass. 218, 11 L. R. A. 750, it is said: "The general doctrine is familiar that ordinarily one cannot maintain a private action for loss or damage which he suffers in common with the rest of the community,—even though his loss may be greater in degree." The reason of the rule is that a contrary doctrine would encourage many trivial suits.

In *Shaw* v. *Boston & A. R. Co.*, 159 Mass. 597, the court says: "The only right of the plaintiff to use the highway is that of the public generally. 'Where one suffers in common with all the public, although, from his proximity to the obstructed way, or otherwise from his more frequent occasion to use it, he may suffer in a greater degree than others, still he cannot have an action, because it would cause such a multiplicity of suits as to be of itself an intolerable evil.'"

In *Smith* v. *Boston*, 7 Cush. 254, in passing on the question, the court held that a land owner could not recover unless he suffered a special damage not common to the public.

In *Heller* v. *Atchison, T. & S. F. R. Co.*, 28 Kan. 625, in the discussion of the question, the court said: "Where a party owns a lot which abuts on that portion of the street vacated so that access to the lot is shut off, it is clear that the lot owner is directly

injured, and may properly challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public; but in the case at bar access to plaintiff's lots is in no manner interfered with. The full width of the street in front and on the side is free and undisturbed, and the only real complaint is that by the vacating of the street away from her lots the course of travel is changed. But this is only an indirect result."

In the discussion of the question in *Chicago* v. *Union Bldg. Asso.*, 102 Ill. 379, 40 Am. Rep. 598, it is said (p. 393): "In the American Law Register, New Series, for October, 1880, one of the learned editors of that periodical, Mr. Edmund H. Bennett, in a *note* to *Frits* v. *Hobson* [L. R. 14 Ch. Div. 542], after a very elaborate review of the principal cases bearing upon the question now before us, comes, as we think very correctly to the conclusion: 'First, for any act obstructing a public and common right no private action will lie for damages of the same kind as those sustained by the general public, although in a much greater degree than any other person; second, an action will lie for peculiar damages of a different kind, though even in the smallest degree; third, the damages, if really peculiar, need not always be direct and immediate, like the loss of a horse, but may be as remote and consequential as in other cases of tort; fourth, the fact that many others sustain an injury of exactly like kind is not a bar to individual actions of many cases of a public nuisance.'"

Other cases holding a like doctrine might be cited, but we have referred to enough to show the current of authority bearing on the question. There is less difficulty in determining what the law is, than in making a proper application of the law to the different cases that may arise. In this case we think it plain that plaintiff was entitled to recover. Her property fronted on Sixty-first street. It extended west to and cornered with that part of the street which was vacated. By the vacation of the street and the erection of the viaduct her property, extending from the railroad tracks east to State street, was shut in, and all access from the south and the west was shut off. What was originally a thoroughfare along the entire line of plaintiff's property fronting on Sixty-first street was by the action of the town turned into a blind court. No other property was damaged or affected in the same way, except the small tract lying between Wentworth avenue and the railroad tracks. The property of the general public was not affected like plaintiff's, nor was the damage sustained by the public of the same kind. Before the action taken by the town, plaintiff's property fronting on Sixty-first street was so situated that it was available as lots for business purposes, but after the action of the town it was rendered useless for that purpose.

It is also claimed that by making the subdivision and opening Butterfield street, which separates plaintiff's property from the vacated portion of Sixty-first street, plaintiff has barred herself of the right to recover. When the street was closed up and the viaduct constructed, the town became liable to pay such damages as the plaintiff had sustained. The rights of the parties, so far as the question of damages was concerned, were fixed, and any future subdivision which the plaintiff might make of her property could not deprive her of a right to recover such damages as she had sustained.

From what has been said, if we are correct, the instruction did not announce a correct rule for the determination of the case, and it was properly refused.

The judgment of the Appellate Court will be affirmed.

Sarah BELL *et al.*, *Plffs. in Err.*,
v.
Nels O. CASSEM.

(158 Ill. 45.)

1. The interest of a prior mortgagee cannot be displaced by the lien of a judgment for damages in consequence of the sale of intoxicating liquors, under the Dramshop Act, § 10, providing that if any person shall rent or lease to another any building to be used for the sale of such liquors, or knowingly permit it to be so used or occupied, it may be sold to pay any such judgment against any occupant.

2. The provision of the Dramshop Act, § 10, making the building and premises where intoxicating liquors are sold with permission of the owner liable to sale under a judgment against the occupant for damages from the sale of such liquors, applies only to owners or those having a rentable interest in the property, and not to a contingent interest, such as that of a mortgagee.

(October 11, 1895.)

ERROR to the Appellate Court, Second District, to review a judgment affirming a judgment of the Circuit Court for Kendall County refusing to give a judgment recovered under the Civil Damage Law priority over an antecedent mortgage on the property of the dealer who sold the liquor. *Affirmed.*

Statement by **Phillips**, *J.*:

At the October term, 1892, of the circuit court of Kendall county, a bill was filed by defendant to foreclose a certain mortgage dated December 21, 1889, executed by Albertina Helmuth and Jacob, her husband, on certain real estate in Yorkville, Illinois, given to secure a note for $2,000. To this bill plaintiffs in error, consisting of Sarah Bell and her five children, were made parties defendant, for the reason, as it appears, that on December 22, 1891, they had recovered a judgment against Jacob Helmuth and Albertina Helmuth for damages suffered by reason of the death of the husband of Sarah Bell, caused by the sale to him of intoxicating liquors by Jacob Helmuth, who occupied

NOTE.—The question involved in the above case as to a priority between a judgment establishing a lien under the law regulating the business of dramshops and a pre-existing mortgage on the premises seems to be here decided for the first time. As to the priority between mortgages and mechanics' liens, see *note* to Wimberley v. Mayberry (Ala.) 14 L. R. A. 305.

and used the mortgaged premises as a saloon. Plaintiffs in error filed their answer to the bill in foreclosure, and also their cross-bill, by which they sought to subject the mortgaged premises to the lien of their judgment, rendered in 1891, and declared superior to the mortgage of Cassem, given in 1889.

The answer and cross-bill in substance set forth that the premises in question, known as the "City Hotel," in Yorkville, were owned and occupied by Albertina and Jacob Helmuth, who were engaged in the business of selling intoxicating liquors, and that at the time of taking the mortgage in question, and at all times thereafter, the defendant in error, Cassem, had knowledge of this fact, and knowingly permitted the same to be so used; that by reason of the sale by the Helmuths to the husband of plaintiff in error, Sarah Bell, he became intoxicated and lost his life by drowning, on account of which plaintiffs in error had recovered judgment for $5,000, as above stated; that execution had been issued thereon March 4, 1892, and a levy made on the mortgaged premises, and ask that the mortgage be declared subordinate to the judgment.

Exceptions were filed in the trial court to the answer and to the answer of the guardian *ad litem*, which were in substance the same, and demurrer to the cross-bill, which were sustained by the court and the cross-bill dismissed for want of equity. Decree of foreclosure was entered on the original bill, finding the amount due defendant in error, ordering sale of the premises, and finding that the interest of the plaintiffs in error accrued since the mortgage lien of Cassem. On appeal to the appellate court for the second district this decree was affirmed, and from that judgment this writ of error is prosecuted to this court.

Mr. **Benjamin F. Herrington,** for plaintiffs in error:

It would be contrary to public policy to place his mortgage ahead of this judgment.

McClure v. *Braniff*, 75 Iowa, 88; *O'Brien* v. *Putney*, 55 Iowa, 292; *Wing* v. *Benham*, 76 Iowa, 17; *Cordes* v. *State*, 37 Kan. 48.

Nels O. Cassem is the owner of the freehold.

Moore v. *Titman*, 44 Ill. 370; *Vallett* v. *Bennett*, 69 Ill. 635; *Carroll* v. *Ballance*, 26 Ill. 16, 79 Am. Dec. 354; *Nelson* v. *Pinegar*, 30 Ill. 481; *Oldham* v. *Pfleger*, 84 Ill. 108; *Johnson* v. *Watson*, 87 Ill. 541; *Barrett* v. *Hinckley*, 124 Ill. 42; *Ducker* v. *Wear & Boogher Dry Goods Co.* 145 Ill. 657; *Gage* v. *Scales*, 100 Ill. 221, 8 Am. & Eng. Encyclop. Law, p. 898, *note* 6.

Every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall be so regulated that it shall not be injurious to the rights of the community.

Com. v. *Alger*, 7 Cush. 84.

Messrs. **Randall Cassem** and **McDougall & Chapman,** for defendant in error:

The statutes will not be construed to make liable those having only reversionary and contingent interests, and who do not control the letting.

3 Lawson, Rights, Rem. & Pr. § 1131; *Castle* v. *Fogerty*, 19 Ill. App. 442.

Until the commencement of the suit against him for that purpose, the judgment creditor acquires no interest in the property; and if, before the suit is brought, it has been sold and conveyed, it cannot be subjected to the payment of such judgment.

3 Lawson, Rights, Rem. & Pr. § 1132; *Bellinger* v. *Griffith*, 23 Ohio St. 619.

Phillips, *J.*, delivered the opinion of the court:

The question presented in this court requires a construction of section 10 of the Dramshop Act, which is as follows: "For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable, and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for, and may be sold to pay, any such judgment against any person occupying such building or premises." 1 Starr & C. p. 978.

It is contended, from the fact that this act makes the building and premises liable where the owner permits their use for the sale of intoxicating liquors, and provides that the judgment thus recovered shall be a lien, and the premises shall be held liable for and may be sold to pay such judgment, that therefore a judgment recovered under this act is a paramount lien to a mortgage upon the building where the liquors were sold, notwithstanding the mortgage bears a prior date of execution and recording to the rendition of the judgment. This statute will not bear the construction attempted to be deduced from it, that if one loans or advances money on property which is or afterwards may be used and occupied for dealing in intoxicating liquors, his mortgage lien shall be subordinated to that of a judgment which may at some later date be recovered against the owner of such property. There can be no doubt, from a consideration of this section, that it was the evident intention of the legislature to make only owners of property, and those having rentable interests, amenable to the provisions of the act. A mortgagee, by virtue of his mortgage only, and before any condition broken, has no legal right to rent or lease the incumbered premises to any person or for any purpose. Having no such control over it, he cannot be said to permit the premises to be occupied for any purpose. If premises on which money had been loaned and a mortgage executed should at some time thereafter be leased or rented by the mortgagor for dealing in intoxicating liquors, the law does not recognize the right of the mortgagee to compel the vacation of such premises without some clause in the mortgage giving such power. Until some condition of the mort-

gage is broken, the control of the mortgagor is as absolute, except in the permitting or committing of waste, as if no mortgage lien existed. At the time the mortgage in this case was executed the cause of action of plaintiffs in error had not accrued, and it could not be anticipated that it ever would. To hold that a judgment recovered on such a subsequently accrued cause of action should precede a former mortgage lien would have the effect, in many cases, as in this, to absolutely nullify the mortgage, as the premises would be absorbed in the satisfaction of a large judgment. The large commercial transactions and interests of the country and the interchange of capital demand the borrowing of money and the securing of the same by real estate mortgage, and a mortgagee is compelled to rely upon the condition of the title as shown by the records at the time of the advancement. It would be entirely against public policy to hold that a judgment on a subsequently accrued cause of action should defeat a lien otherwise valid. No investor could safely advance capital if such were the law. Until the commencement of a suit in some cases, and the rendition of a judgment in most others, the judgment creditor acquires no interest in the property, and if, before the suit is brought, it has been sold and conveyed, it cannot be subjected to the payment of such judgment. *Bellinger* v. *Griffith*, 23 Ohio St. 619.

In the case last cited a judgment was recovered, under a statute similar to our own, against a tenant who occupied the premises and used them for the purpose of selling intoxicating liquors. After the recovery of the judgment a suit was instituted against the owners of the property at the time of the unlawful sale of the liquor, to subject the real estate to the payment of the judgment. Meanwhile, after the recovery of the judgment against the tenant, but before this proceeding was instituted, the premises had been sold, in apparent good faith, to a third party, and it was held by the court that the title passed free from any lien of the judgment. It was contended by the plaintiff that the judgment against the tenant who unlawfully sold the liquor became a lien on the property from the time the cause of action accrued. The court said: "It is true the statute declares that the property shall be held liable for the damages assessed against the occupier. But this liability is not spoken of in the sense of creating a lien. . . . To give the statute the construction contended for would go far towards rendering titles insecure. No one could safely purchase real estate on the faith of its appearing from the public records to be clear of liens and incumbrances. A purchaser would be compelled to take the risk of ascertaining who had been the previous occupiers of the premises, and whether any judgments or causes of action existed against them for the unlawful use of the property while in possession. Surely no such innovation upon the policy of the state in regard to requiring liens upon real property to appear of record could have been intended, without an explicit legislative declaration to that effect."

If it should be held that one holding a judgment rendered on a cause of action similar to that of plaintiffs in error was entitled to a superior lien to that of a prior mortgage on the premises in which the liquor was sold, then by the same reasoning it must be held that such judgment would be a valid lien as against a purchaser of the same property, although the conveyance was made before the rendition of the judgment. The adoption of such a rule would not be the legitimate result of the construction of the statute under consideration, but would be judicial legislation by which a priority of liens would be declared and determined without legislative action on which to base the same, and would permit conspiring and fraudulent owners of property to defeat a mortgage lien or valid conveyance of their property by collusion with other parties claiming a cause of action under this statute.

We hold, therefore, that the true construction of this section of the statute is, that it applies only to owners or those having a rentable interest in the property, and not a contingent interest, such as is that of a mortgagee. It was not error, therefore, for the Appellate Court to affirm the decree of the Circuit Court, and *the judgment of the Appellate Court for the Second District is affirmed.*

VERMONT SUPREME COURT.

STATE of Vermont
v.
William SPEYER.

(67 Vt. 502.)

A resolution of the state board of health, without limitation or restriction, that no pigpen shall be built or maintained within 100 feet of any street or inhabited house, is not a reasonable and legitimate exercise of statutory power to promulgate and enforce regulations for the better preservation of the public health in contagious and epidemic diseases, and regarding the causes which tend to their development and spread, as they shall judge necessary.

(July 13, 1895.)

EXCEPTIONS by defendant to rulings of the Addison County Court made during the trial of a prosecution against him for violating regulations of the state board of health against maintaining a pigstye within 100 feet of an inhabited building. *Judgment reversed.*

NOTE.—For police power as to quarantine regulations, see *note* to Hurst v. Warner (Mich.) 26 L. R. A. 484.

For recent illustrations of other police regulations to preserve health, see Health Department of New York City v. Trinity Church (N. Y.) 27 L. R. A. 710, and People v. Warden of the City Prison (N. Y.) 27 L. R. A. 718.

The facts sufficiently appear in the opinion.

Messrs. **Button & Button**, for defendant:

A rule that no person shall build or maintain a pigpen within one hundred feet of an inhabited dwelling, street, or well or spring of water used for drinking purposes, in the state of Vermont, is an unwarranted and unreasonable exercise of the police power of the state.

Prentice, Pol. Powers, p. 7; Tiedeman, Pol. Powers, pp. 297, 484–5; Parker & Worthington, Public Health & Safety, § 45, pp. 272, 292; *Greensboro* v. *Ehrenreich*, 80 Ala. 583, 60 Am. Rep. 130; *Kosciusko* v. *Slomberg*, 12 L. R. A. 528, 68 Miss. 469; *Ex parte O'Leary*, 65 Miss. 80; *Miller* v. *Horton*, 10 L. R. A. 116, 152 Mass. 548; *Coe* v. *Schultz*, 47 Barb. 69; *Weil* v. *Ricord*, 24 N. J. Eq. 175; *Poyer* v. *Des Plaines*, 18 Ill. App. 229; *Re Sam Kee*, 31 Fed. Rep. 680; *State* v. *Fisher*, 52 Mo. 178.

Subject to this control arising from necessity, every one has a right to use his property as he pleases.

Hutton v. *Camden*, 39 N. J. L. 180, 28 Am. Rep. 203.

Although it is competent to regulate a business which is not *per se* a nuisance, but which may become one by the manner in which it is conducted, yet such regulation can be imposed only when such business is being so conducted or there is immediate danger from it, and then the regulation can go no further than the necessity which calls it forth.

Chicago, R. I. & P. R. Co. v. *Joliet*, 79 Ill. 44; Parker & Worthington, Public Health & Safety, § 251; Tiedeman, Pol. Powers, 197; *Austin* v. *Murray*, 16 Pick. 125; *Weil* v. *Ricord*, 24 N. J. Eq. 169; *Beebe* v. *State*, 6 Ind. 501, 63 Am. Dec. 391; *Ex parte O'Leary*, *supra*.

With those pens which are simply private nuisances the police power of the state has no concern.

Whitcomb v. *Springfield*, 3 Ohio C. Ct. Rep. 244.

Whether a police regulation is reasonable is always open to the inquiry of the court.

Tiedeman, Pol. Powers, pp. 18–197; Parker & Worthington, Public Health & Safety, p. 68; *Forster* v. *Scott*, 136 N. Y. 577, 18 L. R. A. 548; *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 195, 22 Am. Rep. 71.

The legislative power cannot be delegated.

Cooley, Const. Lim. p. 141 *et seq.*; *Ex parte Cox*, 63 Cal. 21; *Houghton* v. *Austin*, 47 Cal. 646; *State* v. *Simons*, 32 Minn. 540; *State* v. *Young*, 29 Minn. 550; *People* v. *Bennett*, 29 Mich. 462, 18 Am. Rep. 107; *People* v. *Acton*, 48 Barb. 529; *Thorne* v. *Cramer*, 15 Barb. 112; *Willis* v. *Owen*, 43 Tex. 59; *Barto* v. *Himrod*, 8 N. Y. 490, 59 Am. Dec. 506; *Rice* v. *Foster*, 4 Harr. (Del.) 479; *Johnson* v. *Rich*, 9 Barb. 680; *State* v. *Copeland*, 8 R. I. 33; *Cincinnati, W. & Z. R. Co.* v. *Clinton County Comrs.* 1 Ohio St. 77; *Opinion of the Justices*, 1 Met. 580; *Hoffman* v. *Schultz*, 31 How. Pr. 385; *Parker* v. *Com.* 6 Pa. 507, 47 Am. Dec. 480; *Meshmeier* v. *State*, 11 Ind. 482; *Maise* v. *State*, 4 Ind. 342; *State* v. *Swisher*, 17 Tex. 441; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425; *Brewer Brick Co.* v. *Brewer*, 62 Md. 69, 16 Am. Rep. 395; *The Auditor* v. *Holland*, 14 Bush, 147; *Atty. Gen.* v. *Old Colony R. Co.* 23 L. R. A. 112, 160 Mass. 93; *Salem* v. *Eastern R. Co.* 98 Mass. 443; *Baker* v. *Boston*, 12 Pick. 193, 22 Am. Dec. 421; *State* v. *Parker*, 26 Vt. 362; *Bancroft* v. *Dumas*, 21 Vt. 463.

The exercise of the police power of a state is a legislative function, and the making of general rules and regulations in the exercise of that power is a legislative function.

Tiedeman, Pol. Powers, pp. 5, 197, 425; Parker & Worthington, Public Health & Safety, p. 178; *State* v. *Cadwalader*, 36 N. J. L. 288; *People* v. *New York City Board of Health*, 38 Barb. 345; *Ex parte Tuttle*, 91 Cal. 591; *Ex parte Whitwell*, 19 L. R. A. 727, 98 Cal. 78; *Com.* v. *Alger*, 7 Cush. 96; *Train* v. *Boston Disinfecting Co.* 144 Mass. 530, 59 Am. Rep. 118.

Unless some provision for notice to parties interested of the time and place of hearing and a right to be heard according to the usual modes of procedure is made, said statute is an attempt to deprive a person of his property without due process of law.

Chicago, M. & St. P. R. Co. v. *Minnesota*, 134 U. S. 460, 33 L. ed. 982, 3 Inters. Com. Rep. 209; *Miller* v. *Horton*, 10 L. R. A. 116, 152 Mass. 548; *Sawyer* v. *State Board of Health*, 125 Mass. 183; *Salem* v. *Eastern R. Co.* 98 Mass. 443; *Belcher* v. *Farrar*, 90 Mass. 327; *Van Wormer* v. *Albany*, 15 Wend. 263; *People* v. *Bennett*, 29 Mich. 462, 18 Am. Rep. 107; *Newark & S. O. Horse Car R. Co.* v. *Hunt*, 50 N. J. L. 314; *State* v. *Cadwalader*, 36 N. J. L. 288; *Hutton* v. *Camden*, 39 N. J. L. 127, 23 Am. Rep. 203; *Weil* v. *Ricord*, 24 N. J. Eq. 169; *People* v. *New York City Board of Health*, *supra*.

Mr. **F. L. Fish**, *State's Atty.*, for plaintiff:

The power to enact sanitary regulations which shall have the force of law, and for which a criminal prosecution will lie, may be conferred on a board by the legislature.

People v. *Justices of Court of Special Sessions*, 7 Hun, 214; 2 Am. & Eng. Encyclop. Law, p. 435; *Polinsky* v. *People*, 73 N. Y. 65, 11 Hun, 390; Field, Boards of Health, 24 Am. L. Rev. p. 559; *Lake Erie & W. R. Co.* v. *James* (Ind.) 35 N. E. Rep. 395.

By the provisions of the act giving the state board of health authority to make rules and regulations, they are made the judges of what regulations are necessary for the better preservation of the public health in contagious and epidemic diseases, and also regarding the causes which tend to their development and spread.

This regulation was of a valid and conclusive character, and all persons in the state are bound to abide by it.

Kennedy v. *Philadelphia Board of Health*, 2 Pa. 366; *Green* v. *Savannah*, 6 Ga. 1; *Raymond* v. *Fish*, 51 Conn. 80, 50 Am. Rep. 3; Dill. Mun. Corp. 3d ed. § 328; *Van Wormer* v. *Albany*, 15 Wend. 262, 18 Wend. 169.

To declare that a pigpen shall not be maintained within 100 feet of an inhabited house is a most wholesome and reasonable exercise of police power.

State v. *Holcomb*, 68 Iowa, 107, 56 Am. Rep. 853; *Com.* v. *Young*, 135 Mass. 526; *Quincy* v. *Kennard*, 151 Mass. 563; *Com.* v. *Patch*, 97 Mass. 221.

The state board of health was given discretionary powers over the subject delegated to them, involving matters of judgment, and having acted upon that matter, unless such act is

void because of its unconstitutionality, the same is not revisable.

State v. *Gregory*, 88 Mo. 123, 58 Am. Rep. 565; *People* v. *Nelson*, 133 Ill. 565; *State* v. *Holcomb*, *supra*; *Cushing* v. *Board of Health of Buffalo*, 18 N. Y. S. R. 783; Parker & Worthington, Public Health & Safety, § 86, *note* 2.

To constitute a nuisance it is not necessary that a noxious trade or business should endanger the health of the neighborhood. It is sufficient if it produces what is offensive to the senses, and which renders the enjoyment of life and property uncomfortable.

Catlin v. *Valentine*, 9 Paige, 575, 4 L. ed. 821, 38 Am. Dec. 567; *Brady* v. *Weeks*, 3 Barb. 157.

Start, J., delivered the opinion of the court:

The information charges that the respondent kept and maintained a pigpen within 100 feet of an inhabited dwelling house, in violation of a regulation made by the state board of health. To this information the respondent demurred. The demurrer was overruled, information adjudged sufficient, and the respondent ordered to plead over; to which the respondent excepted.

No. 98, section 6, of the Acts of 1886, as amended by No. 82, section 11, of the Acts of 1892, provides that the state board of health shall have authority to promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic diseases, and regarding the causes which tend to their development and spread, as they shall judge necessary; and any person or persons or corporation neglecting or refusing, after having been duly notified in writing, to comply with the requirements of such regulations, shall, upon conviction thereof, pay to the treasurer of the state a fine of not less than $25 nor more than $100. Acting under the authority conferred by these enactments, the board of health promulgated a regulation that no pigpen should be built or maintained within 100 feet of any well or spring of water used for drinking purposes, nor within 100 feet of any street or inhabited house.

The power of the legislature to prevent the introduction and spread of infectious and contagious diseases cannot be questioned. All property in the state is undoubtedly held subject to the reasonable supervision of legislative authority, to an extent necessary to the reasonable preservation of the public health. While the necessity and propriety of particular regulations are primarily of legislative determination, their character, whether reasonable, impartial, and consistent with the state policy, is a question for the court. Tiedeman, Pol. Powers, 197; Parker & Worthington, Public Health & Safety, 68; Dill. Mun. Corp. §§ 319, 325, 329; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 8 Inters. Com. Rep. 185.

By the enactment in question, the legislature attempted to confer upon the state board of health power to promulgate and enforce reasonable regulations in respect to contagious and epidemic diseases and causes which tend to their development and spread. If the board of health, in promulgating the regulation in question, were in the reasonable exercise of the power attempted to be conferred upon them, all pigpens built or maintained within 100 feet of any well or spring of water used for drinking purposes, or within 100 feet of any street or inhabited house, must be regarded as infected with contagious or epidemic diseases or causes which tend to their development and spread; or, under such circumstances, it must be inferred that there are reasonable grounds for apprehending that they are thus infected or are such causes. A regulation so general and far-reaching, affecting business and the use of property, cannot be held to be reasonable or justifiable, unless there are reasonable grounds for a belief that the necessary protection of the public health requires it. The regulation in question cannot be held to be reasonable or justifiable because some few individuals in the state maintain pigpens in such a manner as to endanger public health. To justify promulgating such a regulation, there must be reasonable grounds for apprehending that all pigpens affected by it are, or may be, a menace to public health. It cannot be said that all pigpens situated within 100 feet of a well or spring of water used for drinking purposes, or within 100 feet of a street or inhabited house, endanger public health, or that there are reasonable grounds for apprehending that they do. They may or may not thus endanger the public health. Very much depends upon the manner of construction, the way they are kept and occupied, the means for keeping them clean, the location and surroundings, the character and slope of the land, their nearness to or remoteness from thickly settled communities, and the existence or nonexistence of diseases and causes of diseases. A pigpen may be a menace to public health when situated in a city or village and perfectly harmless when situated upon a farm; and the fact that a pigpen situated in a city or village is a nuisance, and endangers public health, and ought to be abated, furnishes no reasonable ground for abating a pigpen upon a farm, which is not a nuisance, and in no way affects the public health. The regulation, if valid, had the effect to abate and cause to be removed every pigpen within the prohibited limit. It deprived every owner of land within the limit of its use for purposes that, under proper conditions, are harmless and legitimate. By it, the citizen living miles from neighbors, and from epidemic diseases and causes which tend to their development and spread, and whose possessions do not extend beyond the prohibited limit, is unreasonably and unjustly deprived of his right to build and maintain a pigpen and engage in a business which has ever been regarded, when conducted under proper conditions, as legitimate. The regulation is intended to have force and effect throughout the entire state. It affects alike those pigpens which are, as a matter of fact, maintained in such a manner as to be offensive, and those which are maintained with every possible degree

of cleanliness; it affects alike those situated upon farms and those situated in thickly settled communities; and it affects all pigpens within the prohibited limit, without reference to the existence or nonexistence of epidemic or contagious diseases and the causes which tend to their development and spread, in any particular locality. It is intended to affect alike a business which is so conducted as not to be a nuisance, or in any way endangering public health, or furnish reasonable grounds to apprehend that it will do so, and business which is so conducted as to be a nuisance, and furnish reasonable grounds for a belief that it will endanger public health if continued. It reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful business and use of property. It is founded on fear and apprehension of a remote possible danger to the public health, and not upon its existence, or upon reasonable grounds to apprehend that any considerable portion of the pigpens affected by it endanger or will endanger public health. It is an unreasonable and unjust interference with a legitimate and recognized business pursuit and use of property, without reference to its location or the manner in which it is conducted, or the existence or nonexistence of epidemic or contagious diseases or causes which tend to their development and spread, in any particular locality. It is too broad and sweeping to be upheld by any necessity of protecting the public health, and we cannot regard it as a reasonable and legitimate exercise of the power attempted to be conferred by the enactments in question.

Judgment reversed; demurrer sustained; information adjudged insufficient and quashed; respondent discharged.

Taft, J., concurs in the result:

The keeping of pigs, not pigpens, is the evil. The board had no authority to prohibit the building of a pigpen.

MICHIGAN SUPREME COURT.

ALPINE TOWNSHIP SCHOOL DISTRICT NO. 11, *Plff. in Err.*,
v.
Aloys BATSCHE.

(.....Mich.....)

1. **The occupancy of a part of a schoolhouse as a residence,** by a teacher, for the purpose of enabling him the better to perform his contract to teach, does not make him a tenant of the school district employing him, but his occupation is that of the district.

2. **A teacher lawfully in possession of the schoolhouse, who holds over without right,** becomes a tenant at sufferance if the owner permits him to remain a sufficient length of time to imply an intentional acquiescence in the occupancy, although his previous holding was not that of a tenant, and a consent to the occupancy, either express or presumed from lapse of time, is not essential to create that relation.

(September 26, 1895.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of defendant in an action brought to recover possession of a portion of a school building. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **Wolcott & Ward,** for plaintiff in error:

There was an implied agreement that defendant should vacate at the close of his school term, and it was contrary to the terms of that agreement for him to continue in possession and refuse to vacate.

Wilkinson v. *Williams*, 51 Mich. 155.

There are many things to distinguish the holding of this defendant from that of a person whose occupancy of a building is incident to, and for the better performance of, his duties in the service of his master.

Every case where a man has been held to be a mere servant supports the doctrine that he may be forcibly ejected, and it would be held clearly contrary to the spirit of our law to permit the plaintiff, under the circumstances here stated, to put an end, with a strong hand and without due process of law, to an occupancy, of seven years' duration, of rooms which had been continuously the home and residence of the defendant and his family.

The defendant should not be heard to complain that the more peaceable and orderly method was adopted.

Bristor v. *Burr*, 8 L. R. A. 710, 120 N. Y. 427.

If Batsche was a tenant his refusal to go unless expelled by force or legal process was not forcible detainer.

Appleton v. *Buskirk*, 67 Mich. 407; *Kerrains* v. *People*, 60 N. Y. 221, 14 Am. Rep. 158.

Under ordinary circumstances an occupancy of three months' duration, without special circumstances to rebut the presumption of a tenancy, would raise that presumption.

People v. *Annis*, 45 Barb. 307.

The defendant is estopped from objecting that the school district cannot be a landlord.

7 Am. & Eng. Encyclop. Law, p. 29; *Tone* v. *Columbus*, 39 Ohio St. 281, 48 Am. Rep. 438; *Helena* v. *Turner*, 36 Ark. 577.

One who executes a lease to a body claiming to be a corporation is estopped to deny the existence of the corporation to defeat the lease.

Whitney v. *Robinson*, 53 Wis. 309; *Motz* v. *Detroit*, 18 Mich. 495; *Imboden* v. *Etowah & B. B. Hydraulic Hose Min. Co.* 70 Ga. 86; *Frank* v. *Toogood*, 18 Iowa, 515; *Haselman* v. *United States Mortg. Co.* 97 Ind. 365; *St. Joseph Fire & Marine Ins. Co.* v. *Hauck*, 71 Mo. 465; *French* v. *Donohue*, 29 Minn. 111; *Cochran* v. *Arnold*, 58 Pa. 399; *Congregational Soc. in Troy* v. *Perry*, 6 N. H. 164, 25 Am. Dec. 455; *Lehman* v. *Warner*, 61 Ala. 455.

NOTE.—On the subject of occupancy by employé as distinguished from tenancy, see also Bowman v. Bradley (Pa.) 17 L. R. A. 213.

Messrs. Carroll, Turner & Kirwin, with *Mr. F. A. Stacey*, for defendant in error:

A tenant at sufferance is one who enters into premises by lawful lease, and holds over by wrong.

Wood, Land. & T. § 14.

In order to create a tenancy of any nature, the two following elements must concur:

1. The person going into possession must occupy the premises in subordination of the other's title;

2. An express demise of the premises, or an occupancy under such circumstances that a contract of letting can fairly be implied therefrom.

Wood, Land. & T. p. 26; *Finlay* v. *Bristol & E. R. Co.* 7 Exch. 410; *Cole* v. *Gill*, 14 Iowa, 587; *Chatard* v. *O'Donovan*, 80 Ind. 20, 41 Am. Rep. 782; *Hilsendegen* v. *Scheich*, 55 Mich. 468.

The mere fact that defendant remained under a naked possession for six or seven months after the right of occupancy under the contract of hiring was at an end, and of which both parties were well aware, does not create a tenancy of any kind.

Wood, Land. & T. §§ 9, 10; *King* v. *Cheshunt*, 1 Barn. & Ald. 478; *King* v. *Stock*, 2 Leach, C. C. 1015, Russ. & R. C. C. 185; *Watson* v. *McEachin*, 47 N. C. 207; *State* v. *Pridgen*, 80 N. C. 84; *State* v. *Curtis*, 20 N. C. 222.

If a tenancy of any kind sprang up after the termination of the contract of hiring between the parties as claimed by the plaintiff, then it follows from the law of landlord and tenant that certain reciprocal rights and duties must consequently exist and accompany such relation.

Morrill v. *Mackman*, 24 Mich. 286, 9 Am. Rep. 124.

Under such circumstances as exist in this case, the plaintiff cannot maintain against the defendant assumpsit for use and occupation.

Marquette, H. & O. R. Co. v. *Harlow*, 37 Mich. 554, 26 Am. Rep. 538; *Boston* v. *Binney*, 11 Pick. 1, 22 Am. Dec. 358; *Merrill* v. *Bullock*, 105 Mass. 486; *Wilmarth* v. *Palmer*, 34 Mich. 347; *Lockwood* v. *Thunder Bay River Boom Co.* 42 Mich. 538; *Bancroft* v. *Wardell*, 13 Johns. 489, 7 Am. Dec. 396; *Wyman* v. *Hook*, 2 Me. 337; *Central Mills Co.* v. *Hart*, 124 Mass. 126.

Hence all the incidents of tenancy are wanting.

There was absolutely no privity of estate or contract between the parties after the determination of the defendant's employment.

Lockwood v. *Thunder Bay River Boom Co.* 42 Mich. 536; *Ward* v. *Warner*, 8 Mich. 508; *Watson* v. *Steer*, 25 Mich. 386; *Kennebeck Purchase Propr.* v. *Springer*, 4 Mass. 416, 3 Am. Dec. 277; *Township No. 6 Propr.* v. *McFarland*, 12 Mass. 325; Wood, Land. & T. § 14.

A school district cannot become a landlord.

Dill. Mun. Corp. § 24; *Harris* v. *School Dist. No. 10 in Canaan*, 28 N. H. 58; *Wilson* v. *School Dist. No. 4 in Chester*, 32 N. H. 118; *Giles* v. *School Dist. No. 4 in Sanbornton*, 31 N. H. 304.

Montgomery, J., delivered the opinion of the court:

This proceeding was instituted before a circuit court commissioner to recover possession of the lower floor of a school building, the complaint alleging that the said school district is landlord of said premises, and that said Aloys Batsche is the tenant of said school district, and that said Aloys Batsche holds said premises unlawfully and against the will of said school district, and that said school district is entitled to possession of the same. The building in question is a two-story building; the schoolroom being on the second floor, and the rooms beneath being occupied, in connection with the school room, by the teacher. In 1895, the defendant contracted with the district board to teach school for seven months, and, in pursuance of the contract, took possession of the building the same as any teacher does. He had possession of the keys of the building, and continued to teach the school throughout the term, and remained there afterwards, and has always, from that time until the commencement of this suit, been in possession of the building. Every year the district has contracted with him, and he has continued to teach the school. The school term ended in June, 1892, and August 31, 1892, notice to quit was served. The case turned in the court below upon the question of whether the relation of landlord and tenant existed. The circuit judge, being of the opinion that it did not, directed a verdict, and plaintiff brings error. Numerous questions are discussed in the brief of the complainant's counsel but we think it cannot be fairly said that the circuit judge was called upon to pass upon anything more than the simple question of whether the relation of landlord and tenant existed. Not only was this the question presented by complainant's and defendant's counsel as the sole question in the case, but the complaint upon which this suit was founded was based upon this relationship. This question, however, resolves itself into two branches: First, Was the occupancy in the first instance as a tenant? and, second, Was complainant entitled to treat defendant's subsequent holding as that of a tenant at sufferance?

It is fairly inferable from the statement made by plaintiff's counsel below that the occupation of the premises was incident to, and deemed essential for, the performance of the duties of the defendant as teacher. It was not proposed to show that there was a distinct letting of these premises occupied by defendant, or that any rent was received. It has been held that under such circumstances the occupant's possession is that of the employer, and that the relation of landlord and tenant does not exist. *King* v. *Cheshunt*, 1 Barn. & Ald. 473; *State* v. *Curtis*, 20 N. C. 222; *Stock's Case*, 2 Leach, 1015; *Haywood* v. *Miller*, 3 Hill, 90; *Kerrains* v. *People*, 60 N. Y. 221. The case last cited is well reasoned, and, we think, notes the proper distinctions. It states the case of *Hughes* v. *Chatham Overseers*, 5 Mann. & G. 54, in which it was said: "There is no inconsistency in the relation of master and serv-

ant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee for years, at will, . . . and if he do so the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration." But in the main case the court held that, where the occupancy of the house was for the purpose of enabling the servant the better to perform the service, the occupancy was that of the master, and not of the servant. We think that this is the rule in a case where, as in the present, there was no letting in terms, no rent reserved, and where it is clear that the purpose of the occupancy was to enable the employé to perform the service of his employer. The case of *Bristor* v. *Burr*, 120 N. Y. 427, 8 L. R. A. 710, cited by counsel, does not overrule *Kerrains* v. *People*, but is entirely consistent with it, the court placing its conclusion in that case upon the ground that the relation of master and servant did not exist between the defendants and the plaintiff. But we think that, upon the statement of counsel (upon which the case was decided below), defendant became a tenant at sufferance. That such a relation may grow out of an occupancy by a servant is recognized in *Kerrains* v. *People*. In that case it was said, it is true that, in order to have the effect to create a tenancy by sufferance, the occupancy must be sufficiently long to warrant an inference of consent to a different holding, but we are aware of no case which fixes the precise time within which such consent may be inferred. In *People* v. *Annis*, 45 Barb. 304, it was held that on the termination of the tenancy the continued occupancy of the servant must be deemed that of a tenant by sufferance. The court says: "The contract for the service having been terminated, and an end put to it, in this way the right of occupancy under it went also, and was ended. The relator, after that, was in possession, not as a trespasser, but as one holding after his right of occupancy had been extinguished; and, of course, he became a tenant at will or sufferance."

It is contended by defendant's counsel that, in order to have a tenancy grow into one by sufference, it must originally have been created by an agreement for one by the parties, and that, as no agreement for a tenancy ever existed, the relation cannot arise. We do not so understand the law. We think the rule is that a person in possession of land lawfully, who holds over without right, becomes a tenant at sufferance, if the owner suffers him to remain in possession a sufficient length of time to imply an intentional acquiescence in the occupancy, and it is not necessary that the previous holding be that of a tenant. It is stated in defendant's brief that the lapse of time was not sufficient to raise a presumption of consent. But a consent to occupancy is not necessary to create a tenancy by sufferance. It is said in Wood on Landlord and Tenant (sec. 7): "The tenancy is of such a nature as necessarily implies an absence of any agreement between the owner and the tenant, and if express assent is given by the owner to such possession the tenancy is thereby, *instanter*, converted into a tenancy at will, or from year to year, according to the circumstances." A contract to pay rent is not essential to create the relation of landlord and tenant. Wood, Land. & T. § 1.

It is suggested that, on the showing of plaintiff, the title to land came in question. But we think not. If the possession was received from plaintiff, he is not in position to raise a question of title. If it was not, clearly the relation of landlord and tenant never existed.

Judgment will be reversed, and a new trial ordered.

The other Justices concur.

VIRGINIA SUPREME COURT OF APPEALS.

SPENCE & NEFF, *Plffs. in Err.*,
v.
NORFOLK & WESTERN R. CO

(.....Va.....)

A shipper of goods may maintain an action on the case against the carrier for their negligent injury, where they were sold and shipped subject to the payment of a draft against the bill of lading, the shipper guaranteeing payment of freight, although, when notified of the injury, he refused to give directions as to their disposition on the ground that he no longer had title, if the carrier did not act upon such claim to his prejudice.

(August 8, 1895.)

NOTE.—For effect of delivering property to a carrier as a transfer of title, including the question, Who should sue for breach of the carrier's contract? see *note* to Ramsey & Gore Mfg. Co. v. Kelsea (N. J.) 22 L. R. A. 415.

ERROR to the Circuit Court for Wythe County to review a judgment in favor of defendant in an action to recover damages for the failure to deliver to the consignee property delivered to defendant for transportation. *Reversed.*

The facts are stated in the opinion.

Mr. **Waller S. Poage,** for plaintiffs in error:

The consignor who has made a special contract with the carrier may always maintain an action upon it for the loss of or damage to the goods, regardless of the question of his interest or property in them.

Hutchinson, Carr. §§ 728, 730, 736; 4 Lawson, Rights, Rem. & Pr. § 1838; 2 Am. & Eng. Encyclop. Law, p. 902; Dicey, Parties to Actions, p. 105; 2 Whart. Cont. § 792; Hawes, Parties to Action, § 87; Deering, Neg. § 120; 3 Wood, Railway Law, § 435; *Sanford* v. *Housatonic R. Co.* 11 Cush. 155; *Blanchard* v. *Page*, 8 Gray, 281; *Finn* v. *Western R. Corp.* 112

Mass. 524, 17 Am. Rep. 128; *Thompson* v. *Fargo*, 63 N. Y. 480; *Southern Exp. Co.* v. *Craft*, 49 Miss. 480, 19 Am. Rep. 4; *Hooper* v. *Chicago & N. W. R. Co.* 27 Wis. 81, 9 Am. Rep. 439; *Turney* v. *Wilson*, 7 Yerg. 340, 27 Am. Dec. 515; *Hand* v. *Baynes*, 4 Whart. 204, 33 Am. Dec. 54; *Elkins* v. *Boston & M. Railroad*, 19 N. H. 337, 51 Am. Dec. 184; *Weyand* v. *Atchison, T. & S. F. R. Co.* 1 L. R. A. 650, 75 Iowa, 573; *Snider* v. *Adams Exp. Co.* 77 Mo. 523; *Denver, S. P. & P. R. Co.* v. *Frame*, 6 Colo. 382.

Messrs. **James A. Walker** and **Bolling & Stanley**, for defendant in error:

The consignee is the proper party to sue.

Prima facie the party to whom the goods are consigned is the owner.

2 Rorer, Railroads, § 5, p. 1330; Angell, Carr. § 497; *Angle* v. *Mississippi & M. R. R. Co.* 9 Iowa, 487; *Webb* v. *Winter*, 1 Cal. 417; *Decan* v. *Shipper*, 35 Pa. 239, 78 Am. Dec. 334; *Green* v. *Clarke*, 12 N. Y. 343; *Dows* v. *Greene*, 24 N. Y. 638; *Merchants Nat. Bank of Cincinnati* v. *Bangs*, 102 Mass. 291; *Foster* v. *Ropes*, 111 Mass. 10; *Miner* v. *Norwich & W. R. Co.* 32 Conn. 91; *Pennsylvania Co.* v. *Holderman*, 69 Ind. 18.

The party to maintain the action must be he in whom the title to the property is vested.

2 Rorer, Railroads, p. 1262; *Green* v. *Clarke*, 12 N. Y. 347; *Pennsylvania Co.* v. *Holderman*, *supra*; *Krulder* v. *Ellison*, 47 N. Y. 36, 7 Am. Rep. 402; *Higgins* v. *Murray*, 73 N. Y. 252; *Dawes* v. *Peck*, 8 T. R. 330; *Newsom* v. *Thornton*, 6 East, 23; *Com.* v. *Fleming*, 5 L. R. A. 470, 130 Pa. 138; *Potter* v. *Lansing*, 1 Johns. 215, 3 Am. Dec. 310.

An order by a consignee to deliver goods to a common carrier, to be shipped to him at a given point, when the directions are complied with, and the goods are delivered to the carrier, passes the title from the consignor to the consignee, and the consignee is the only party that can maintain an action against the carrier for damages to the goods.

Hutchinson, Carr. §§ 733, 736; *Langdon* v. *Robertson*, 18 Ont. Rep. 497; *Higgins* v. *Murray*, *supra*; *Wigton* v. *Bowley*, 130 Mass. 252; *Terry* v. *Wheeler*, 25 N. Y. 520; *Krulder* v. *Ellison*, and *Potter* v. *Lansing*, *supra*; *Wait* v. *Baker*, 2 Exch. 1; *London & N. W. R. Co.* v. *Bartlett*, 7 Hurlst. & N. 400; *Johnson* v. *Stoddard*, 100 Mass. 306; *Magruder* v. *Gage*, 33 Md. 344, 3 Am. Rep. 177; *Waldron* v. *Romaine*, 22 N. Y. 368; *Rodgers* v. *Phillips*, 40 N. Y. 519; *Garland* v. *Lane*, 46 N. H. 245; *Watkins* v. *Paine*, 57 Ga. 50; *Southwestern Freight & Cotton Press Co.* v. *Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Bradley* v. *Wheeler*, 44 N. Y. 495; *Dyer* v. *Libby*, 61 Me. 45; *Ober* v. *Smith*, 78 N. C. 313; *Lake Ontario, A. & N. Y. R. Co.* v. *Mason*, 16 N. Y. 451; *Green* v. *Clarke*, 12 N. Y. 343; *Schmertz* v. *Dwyer*, 53 Pa. 335; *Hurd* v. *Cook*, 75 N. Y. 454.

The proper party plaintiff to a suit is he at whose risk the goods were shipped.

Hutchinson, Carr. §§ 733, 736; *Potter* v. *Lansing*, 1 Johns. 215, 3 Am. Dec. 310; *Com.* v. *Fleming*, 5 L. R. A. 470, 130 Pa. 138; 2 Rorer, Railroads, p. 1330; *Wigton* v. *Bowley* 130 Mass. 252; *Dows* v. *Greene*, 24 N. Y. 638.

The question as to whether or not freight was paid by the consignors or guaranteed by them is no argument in favor of the plaintiffs in error, and is no guide to determine who is the proper party to sue.

2 Redfield, Railways, p. 171; *Green* v. *Clarke*, 18 Barb. 57; *Krulder* v. *Ellison*, 47 N. Y. 40, 7 Am. Rep. 402.

The action brought by the plaintiffs in error in the court below is an action *ex delicto*, and not upon the contract, and therefore they cannot recover.

Finn v. *Western R. Corp.* 112 Mass. 524, 17 Am. Rep. 128; Hutchinson, Carr. § 730.

Buchanan, *J.*, delivered the opinion of the court:

The plaintiff in error brought an action on the case, against the defendant in error, for damages for failing, as a common carrier, to deliver at their destination, within a reasonable time, two car loads of vegetables and fruit.

The verdict of the jury and the judgment of the trial court were in favor of the defendant, and to that judgment this writ of error was allowed.

The principal error complained of was the refusal of the court to give instruction No. 5 asked for by the plaintiffs, and the giving of an instruction of its own in lieu thereof. The instruction asked for, and which was refused, was as follows:

"The court further instructs the jury that, when the risk of the safe transportation of the goods is upon the consignor, he will be considered as the owner, for the purpose of maintaining an action against the carrier for their loss or injury.

"Therefore if the jury shall believe from the evidence in this case that the risk of the transportation of the goods and produce set out in the plaintiffs' declaration was upon them [plaintiffs], they are entitled to maintain this action for said loss or injury."

The instruction the court gave in lieu of it is in these words: "If the jury believe from the evidence that the plaintiffs contracted to sell to De Witt & Co. and Bayer & Son certain produce; and if the jury believe that, according to the true intent and meaning of the said contracts between the said plaintiffs and the said De Witt & Co. and Bayer & Son, the plaintiffs sold the said produce to the said De Witt & Co. and Bayer & Son at an agreed price, free on board the defendant's cars at Rural Retreat, and that the plaintiffs did deliver said produce on the defendant's cars at Rural Retreat, and consigned the same to said De Witt & Co. and the said Bayer & Son at Columbus, Ohio, and Charleston, S. C., to be delivered to the said consignees at their destinations by the defendant, and that plaintiffs charged the said De Witt & Co. and Bayer & Son, on the books of the plaintiffs, with the price of said goods so shipped to them,—then the plaintiffs cannot maintain this action, and the jury should find for the defendant."

On the trial of the cause, the defendant does not seem to have controverted its liability for failure to perform its duty in carrying the goods shipped, but relied entirely upon the defense that the plaintiffs had no interest in the goods shipped after they were

delivered to the defendant, and therefore had no right of action against it for such failure of duty, or, if they had any right of action at all, it was an action of assumpsit on the contract, and not an action on the case in tort.

The question has been very much discussed in this country whether the shipper or consignor can maintain any action against a common carrier for damages done to goods after they have been received by such carrier for the purpose of carriage, and before they have been delivered to and received by the consignees, when the shipper or consignor had no right of property, general or special, in the goods, and no right or interest in their safe carriage, except that arising from the bill of lading.

One line of cases holds that, since the shipper or consignor has parted with all interest in the property, he cannot be injured by the failure of the common carrier to perform its duty, or to keep its contract, and the consignee or owner alone can maintain the action.

Another line of cases holds that, inasmuch as the contract for shipment was made by the shipper or consignor, he has the right to maintain such action, because the carrier agreed with him to carry the goods safely, and within a reasonable time, and the action is for the breach of that agreement.

This subject was discussed at length, and with great learning and ability, by *Chief Justice* Shaw, in the case of *Blanchard* v. *Page*, 8 Gray, 281. The facts of that case showed that the plaintiffs in the action against the carrier had sold goods to another party, who had paid for them, and they afterwards delivered the goods to the common carrier, to be forwarded for them. When they delivered them to the carrier, they took from it a bill of lading purporting to be a contract with the shippers to carry and deliver the goods to the purchaser. The goods were lost, and an action was brought by the shippers against the carrier for their value, upon the contract in the bill of lading. It was admitted that the shippers had no interest or property in the goods at the time of the shipment, and it was for that reason contended that they could not maintain the action; but the court held, notwithstanding the fact that they had no interest in the goods shipped, that an action could be maintained upon the contract. And this position was sustained by an argument, both upon general principles and upon authority, which, as Mr. Hutchinson says in his work on Carriers, seems unanswerable. In a later case decided by the same court, it was held that, where there was no bill of lading, nor other writing evidencing the contract, an action could be maintained by the consignor, who had no interest in the property shipped, nor an express contract with the carrier. *Finn* v. *Western R. Corp.* 112 Mass. 524, 17 Am. Rep. 128.

Mr. Hutchinson, in his work on Carriers, after discussing this question at length, reaches the conclusion that the consignor, who has made a special contract with the carrier, may always maintain an action upon it for the loss of or damage to the goods, regardless of the question of interest or property in them. Nor would it appear to be material whether the freight upon them has been paid by him or another. If not paid, he is the party to whom the carrier may look for its payment, in case the consignee should refuse to accept the goods, or to pay the carrier's charge upon them. And if paid, no matter by whom, the payment would be a sufficient consideration for the contract with the consignor. Section 728.

Angell on Carriers, § 499, says that the rule upon this subject is properly stated by Park, *J.*, in *Freeman* v. *Birch*, 1 Nev. & M. 420, in which it was held "that the person employing the carrier must bring the action, but that the circumstance of the legal right, being in one person, may be evidence of employment by that person. Hence it follows that, in order to decide who is the proper party to be made plaintiff in an action of this nature, the first inquiry must be whether any special agreement for the carriage of the goods in question exists. If there is none, it then becomes necessary to ascertain in whom the right of property is vested. In the former case, the remedy for any breach of contract belongs to the party with whom such agreement is made. Therefore, where the consignor agrees with the carrier for the conveyance of the goods, and is to pay him, the action is well brought."

The plaintiffs in this case, according to their evidence, not only made a special contract with the defendant, by which they guaranteed the payment of the freight, but the consignees were not entitled to the possession of the goods until they accepted the drafts attached to the bills of lading. The sales in this case were made by telegram. The Columbus purchasers or consignees, De Witt & Co., wired the plaintiffs for prices, who replied that they would sell them the produce shipped, at a certain price, "f. o. b. the cars [free on board the cars] at Rural Retreat, shipment subject to draft with bill of lading attached." De Witt & Co. then wired the plaintiffs not to send draft, and they would remit. The plaintiffs answered, refusing to ship unless they would agree to their terms. De Witt & Co. then wired them to ship according to their first proposition. The same kind of a contract, it seems, was made with Bayer & Son, the Charleston purchasers or consignees. It is very clear from their contracts that the plaintiffs did not intend to part with all interest in the goods when they delivered them to the defendant for shipment. The evidence shows that when the consignees refused to receive the goods, on the ground that they were damaged, the plaintiffs, upon being notified of the fact, refused to give directions as to the disposition of the goods, on the ground that they had sold them to the consignees, and the goods were shipped at their risk. This action of the plaintiffs could not change the original contract between them and the consignees. The most that can be said of it is that their conduct at that time is inconsistent with their claim now. It is also equally true that the conduct of the defendant at that time was inconsistent with its present claim. Then it treated the plaintiffs as the owners of the goods, and

insisted upon paying, and did pay them, the balance of the amount received upon the sales of the goods shipped to Charleston, after paying the freight. Now it insists that the plaintiffs had no interest in the goods shipped after they were delivered to it for shipment. While the conduct of both parties has been inconsistent with their present claims, such conduct cannot affect their legal rights in this case, as neither acted upon the other's conduct to his prejudice.

The evidence shows, or, at least, tends to show, that the consignees had no right to the possession of the goods shipped until they paid the drafts which were attached to the bills of lading. In such a case, Mr. Benjamin says, in section 899 of his work on Sales (2d Am. ed.), "that where a bill of exchange for the price of goods is inclosed to the buyer for acceptance, together with the bill of lading, the buyer cannot retain the bill of lading unless he accepts the bill of exchange; and, if he refuses acceptance, he acquires no right to the bill of lading, or the goods of which it is the symbol."

Mr. Angell says: "Where the direction is not to deliver the goods in case of the existence of certain circumstances, nor until payment should be made by the consignee in cash, the property in the goods continues in the consignor." Section 511.

Hutchinson on Carriers, in discussing this subject, says: "But, after all, the question whether the property in the goods has passed to the consignee by a delivery to the carrier, will depend upon the intention of the transaction, and this may always be shown. And goods may be shipped to the order, and on account of the consignee as purchaser, and yet his right to the possession of them may be incomplete, as where the direction to the carrier is not to deliver the goods until payment of the price or a compliance with some other condition by the consignee. In such cases, of course, the title to the goods remains in the consignor until the conditions upon which delivery is to be made have been complied with." Section 734.

There are cases which hold, where goods are sold and shipped C. O. D. the title passes; but in those cases it is admitted that the seller has a special property in the goods sold. In the case of *Pilgreen* v. *State*, 71 Ala. 368, which was a case where a liquor dealer received an order requesting him to send whiskey by express, C. O. D., to the party ordering it, it was said: "The general property, however, passed to the buyer by the delivery to the express company at Calera [the place from which the whiskey was shipped]. The risk of loss then passed to him, though there may have remained in the seller a special property, and though the buyer could not, without payment of the price, entitle himself to the absolute property, and to the actual possession. . . . The seller has a lien upon the property for the price, and the right of possession until it is paid."

Whether the contracts in this case vested the title to the goods sold in the consignees, when delivered to the defendant company for shipment, subject to the lien for the purchase price, and the right to the possession until the drafts were accepted, or whether the title did not vest in them until the drafts were accepted, is not material, for, in either case, the plaintiffs had such interest and rights in the property as would entitle them to maintain an action; for it is well settled that where both the consignor and the consignee have an interest in the goods, one having a general and the other a special property, either may sue; but a recovery by one constitutes a bar to an action by the other. *Freeman* v. *Birch*, 1 Nev. & M. 420; *Mayall* v. *Boston & M. Railroad*, 19 N. H. 122, 49 Am. Dec. 149; 3 Am. & Eng. Encyclop. Law, pp. 902, 903. The plaintiffs having such interest in the goods shipped (if any interest be necessary where they have made a special contract with the carrier for their shipment, and guaranteed the payment of freight) as gives them the right to maintain an action against the defendant, the question arises, Can they maintain an action of tort, or must they bring assumpsit?

That they can maintain an action on the case, as well as an action of assumpsit, we think is well settled.

In the case of *Boorman* v. *Brown*, 3 Q. B. 511, *Chief Justice* Tindal, in delivering the opinion of the court, said: "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or nonperformance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render; actions against common carriers, against ship owners on bills of lading, against bailees of different descriptions, and numerous other instances occur in which the action is brought in tort or contract at the election of the plaintiff." The principle in all these cases would seem to be that the contract creates a duty, and the neglect to perform the duty, or the nonfeasance, is a ground of action upon a tort.

Angell on Carriers, § 422, says, in discussing this question: "But, in respect to the proper form of action at common law against all common carriers, there was for a long time a question, and one much agitated among pleaders; and it was natural that the question should arise out of the innovation upon the common-law duties of carriers. As long as their occupation was considered only as a public duty, the breach was tort, for which they were liable to an action on the case, founded upon the custom of the realm; or, in other words, upon the common law. In time, however, they succeeded in establishing the existence of a contract, and then they at once became liable to an action of assumpsit on their undertaking; and a very long-established, continued, and uniform usage has sanctioned the principle and adopted the advantages of both forms of action; so that the case may be considered either way, as arising *ex contractu* or *ex delicto*, according as the neglect of duty, or breach of promise, is intended to be relied on as the cause of in-

jury. The practice of declaring against common carriers on the custom of the realm was as ancient as the law itself, and was uniformly adopted until the case of *Dale* v. *Hall* (decided in 1750) [1 Wils. 281], when the practice of declaring in assumpsit succeeded; but for four hundred years before that time the declaration was in tort on the custom."

It is said by Hutchinson on Carriers "that, since this recognition [in the case of *Dale* v. *Hall*] of the right of the bailor of the goods to sue upon his contract with the carrier, the two forms of action, the one in assumpsit for breach of contract, and the other in tort for the breach of duty, have been adopted indifferently, or as best suited the purposes of the pleader." Sections 738–740; 2 Am. & Eng. Encyclop. Law, p. 903; 8 Rob. Pr. (New) 437–441.

This court, in the case of *Southern Exp. Co.* v. *McVeigh*, reported in 20 Gratt. 264, 284, held that where there is a public employment, from which arises a common-law duty, an action may be brought in tort, although the breach of duty assigned is the doing or not doing of something contrary to an agreement made, in the course of such employment, by the party upon whom such general duty is imposed. In that case, as in this, there was a special agreement, and this court held that the plaintiff had the right to bring, as he did, an action of tort. In *Ferrill* v. *Brewis*, 25 Gratt. 765, 768, *Judge* Staples said: "There is a class of cases [among them that of bailment] in which the foundation of the action springs out of the privity of contract between the parties, but in which, nevertheless, the remedy for the breach or non-performance is indifferently in assumpsit or in case upon tort."

The plaintiffs made the contract with defendant for the shipment of the goods, and guaranteed the payment of the freight. They are therefore parties to the contract, and had an interest in the safe delivery of the goods; and it is not for the defendant, who made the contract with them, to say, upon a breach of that contract, that the plaintiffs are not entitled to recover damages which are the direct and natural consequence of such breach of contract. *Blanchard* v. *Page*, 8 Gray, 281, 301.

Even if the defendant had not required the plaintiffs to guarantee the payment of the freight, we do not think its right to recover the same, if it had performed its duty, and the proceeds of the goods shipped were insufficient to pay its freight, could be made to depend upon what may prove to be the legal effect of the dealings between the consignors and consignees upon the title to the property which was the subject of transportation. It had the right to look for its compensation to the plaintiffs, who required it to perform the service by delivering the goods to it for transportation. And the plaintiffs, unless they were the mere agents of the consignees, have the right to enforce the contract made with the defendant, and to sue for its breach; and their right to do so cannot be made to depend upon the question whether or not the title to the goods shipped passed by their dealings with the consignees. There can be but one recovery against the defendant for its breach of contract, or its failure to perform its duty, whether the action be brought by the plaintiffs, with whom the contract was made, or by the consignees, if they were the owners of the goods. *Finn* v. *Western R. Corp.* 112 Mass. 524, 533, 534, 17 Am. Rep. 128.

The consignees in this case, if they had the right to do so, have brought no action, and there is not only no suggestion that they have ever made any objection to the plaintiffs' maintaining this action, but they, or members of their firms, are introduced as witnesses by the plaintiffs in proving their case.

We think that an action on the case in tort may be brought against the carrier, by the party who makes the special contract with it, for its breach of the contract, unless there be in the contract some undertaking by the carrier which it would not be its duty to perform under the common law. In such case damages for a breach of such additional undertaking could, perhaps, only be recovered in an action *ex contractu*.

The plaintiffs, we think, had the right to maintain this action against the defendant, if they proved either that they had made a special contract with it for the transportation of the goods, or that they had any interest or property in the goods, either general or special, and that the defendant had committed a breach of its contract, or failed in the performance of its duty; and that the jury should have been so instructed.

It follows from what has been said that the circuit court erred in the instruction complained of; and for such error its *judgment must be reversed*, and a new trial awarded, to be had in accordance with the views expressed in this opinion.

CONNECTICUT SUPREME COURT OF ERRORS.

John A. ROBINSON
v.
John W. CLAPP.

(65 Conn. 365.)

1. A land owner may cut from a tree, the trunk of which stands on his boundary line, all the roots and branches on his side up to the trunk.

2. Evidence that a grantor of a part of a tract of land told the grantee that a well nearly on the boundary line, but on the land not conveyed, "belonged to" and "would be sold" with the land conveyed, is inadmissible to show the legal effect of the deed as against a subsequent purchaser of the remaining land.

3. The releasee in a quitclaim deed,

NOTE.—As to property rights in trees on boundary line, see *note* to Hickey v. Michigan C. R. Co. (Mich.) 21 L. R. A. 729.

As to easements of light, see *note* to Case v. Minot (Mass.) 22 L. R. A. 536.

See also 40 L. R. A. 626.

who purchases in good faith and for full consideration, will be protected from secret unrecorded incumbrances on the property.

4. **A grantee of a part of a tract of land, who is told by the grantor that a well on the boundary line** partially on the land unconveyed will go with the part sold, is not entitled to an injunction against covering such well with a building, where he has never used it since his purchase, and it has been covered with a flagstone all that time, and pipes connecting it with his buildings are entirely on his land.

5. **A purchaser of a tract of land 40 feet wide,** and on which is a building 11 feet from land retained by the grantor, with a bay window 5 feet from such line, does not obtain, by implied grant, the right to the light which the building will receive from the unconveyed portion, as against a subsequent purchaser for value of the remaining land.

6. **A decree enjoining the erection of any building** on defendant's property "so near as to exclude the light" from plaintiff's dwelling house is bad for indefiniteness.

(January 8, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas for New Haven County in favor of plaintiff in a suit brought to enjoin defendant from erecting a house in such a manner as to shut off the light and air from certain windows in plaintiff's house. *Reversed.*

The facts are stated in the opinion.

Messrs. **Henry G. Newton** and **J. Birney Tuttle,** for appellant:

Plaintiff, under his quitclaim deed, stands in the same position as if he had received a warranty.

Sherwood v. *Barlow*, 19 Conn. 471; *Ely* v. *Stannard*, 44 Conn. 528; *Dart* v. *Dart*, 7 Conn. 250; *Rogers* v. *Hillhouse*, 3 Conn. 398; *Potter* v. *Tuttle*, 22 Conn. 512; *Dodd* v. *Seymour*, 21 Conn. 476.

If the trunk of this tree rested wholly on plaintiff's land, and any amount of trunk and branches projected over defendant's land, defendant might cut off everything which overhung his land, and erect his house.

5 Thompson, Rem. & Rem. Rights, 2291; Wood, Nuisances, 113; *Lyman* v. *Hale*, 11 Conn. 177, 27 Am. Dec. 728; 1 Washb. Real Prop. 3d ed. 139; Cooley, Torts, 672.

A tenant in common may sever the joint property, where it is advisable, and take his share of it.

Dubois v. *Beaver*, 25 N. Y. 123, 82 Am. Dec. 326; *Griffin* v. *Bixby*, 12 N. H. 454, 37 Am. Dec. 225.

No grant of any right of light and air from adjoining lands is to be implied from the conveyance of a house.

Keats v. *Hugo*, 115 Mass. 205, 15 Am. Rep. 80; *Shipman* v. *Beers*, 2 Abb. N. C. 435; *Mullen* v. *Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Keiper* v. *Klein*, 51 Ind. 316; *Morrison* v. *Marquardt*, 24 Iowa, 35.

The ancient doctrine of implied grant of light and air is a twin of the doctrine of a prescriptive right to light and air, which has been condemned in nearly or quite every state in the Union.

Gen. Stat. 1888, § 2970; 6 Am. & Eng. Encyclop. Law, p. 152, *note* 3; Washb. Easements, p. 583; *Parker* v. *Foote*, 19 Wend. 309; *Carrig* v. *Dee*, 14 Gray, 583.

Messrs. **E. P. Arvine** and **T. H. Russell,** for appellee:

When a person, having erected a building upon a part of his land, and having placed therein windows opening upon the other part of his land, sells the building with the land on which it stands, the right to the continued enjoyment of light and air through these windows passes to the grantee by implication.

Shoemaker v. *Shoemaker*, 11 Abb. N. C. 84; *Simmons* v. *Cloonan*, 81 N. Y. 557; *New-Ipswich W. L. Factory* v. *Batchelder*, 3 N. H. 190, 14 Am. Dec. 346; *Kenyon* v. *Nichols*, 1 R. I. 411; *Cooledge* v. *Hager*, 43 Vt. 9, 5 Am. Rep. 256; *Morrison* v. *King*, 62 Ill. 35.

This easement has been upheld since.

Palmer v. *Fletcher*, 1 Lev. 122; *Ewart* v. *Cochrane*, 7 Jur. N. S. 925; *Compton* v. *Richards*, 1 Price, 27; *Robinson* v. *Grave*, 29 L. T. N. S. 7; *Wheeldon* v. *Burrows*, 48 L. J. Ch. 853; *Myers* v. *Catterson*, L. R. 43 Ch. Div. 481.

This implied easement of light and air over other land of the grantor is a part of the common law of the state.

1 Swift, Dig. 165; *Card* v. *Grinman*, 5 Conn. 168; *Clawson* v. *Primrose*, 4 Del. Ch. 666; *McCready* v. *Thomson*, 1 Dud. L. 181; *Gerber* v. *Grabel*, 16 Ill. 217; *Hughes* v. *Kelly*, 40 Conn. 154.

The English common law relative to implied grants was distinctly recognized as being a part of the common law of this state.

Bushnell v. *Proprietors of Ore Bed*, 31 Conn. 158; *Rosewell* v. *Pryor*, 6 Mod. 116; *Story* v. *Odin*, 12 Mass. 157.

Massachusetts has always upheld the doctrine of implied easements of necessary light and air over other land of the grantor.

Fifty Associates v. *Tudor*, 6 Gray, 255; *Collier* v. *Pierce*, 7 Gray, 18, 66 Am. Dec. 453; *Randall* v. *Sanderson*, 111 Mass. 116; *Salisbury* v. *Andrews*, 128 Mass. 336; *Case* v. *Minot*, 158 Mass. 584.

The adjudications in this country may be said to have occurred in three periods of eras.

The first period contains the cases of *Story* v. *Odin*, 12 Mass. 157 (1818) and *United States* v. *Appleton*, 1 Sumn. 492 (1833). Both these cases strictly followed the English rule.

A few years later several cases involving this question were decided apparently contrary to the English rule.

Myers v. *Gemmel*, 10 Barb. 537, and *Palmer* v. *Wetmore*, 2 Sandf. 316, and some others in New York, which were overruled by *Lampman* v. *Milks*, 21 N. Y. 512, and *Mullen* v. *Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379, which have been overruled by *Rennyson's App.* 94 Pa. 153 (1880). *Mullen* v. *Stricker* was practically overruled by *National Exch. Bank* v. *Cunningham*, 46 Ohio St. 587.

This line of authority culminates in the case of *Keats* v. *Hugo*, 115 Mass. 204, 15 Am. Rep. 80.

The later decisions show that the English rule, with slight modifications, has now been established as the only fair and equitable rule in this country.

Rennyson's App. supra; Buss v. *Dyer*, 125

Mass. 291; *Henry* v. *Koch*, 80 Ky. 391, 44 Am. Rep. 484; *Dunkles* v. *Wilton R. Co.* 24 N. H. 495; *Ingals* v. *Plamondon*, 75 Ill. 123; *Burns* v. *Gallagher*, 62 Md. 473; *Morrison* v. *Marquardt*, 24 Iowa, 63, 92 Am. Dec. 444; *Turner* v. *Thompson*, 58 Ga. 273, 24 Am. Rep. 497; *Morrison* v. *King*, 62 Ill. 35; *Case* v. *Minot*, 158 Mass. 584, 22 L. R. A. 536; *Bierkeley* v. *Smith*, 27 Gratt. 896; *Sutphen* v. *Therkleson*, 38 N. J. Eq. 318; *Havens* v. *Klein*, 51 How. Pr. 82; *Janes* v. *Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Warren* v. *Blake*, 54 Me. 286, 89 Am. Dec. 748; *Dillman* v. *Hoffman*, 38 Wis. 572; *White* v. *Bradley*, 66 Me. 263; *Ogden* v. *Jennings*, 62 N. Y. 531.

The defendant, as grantee of William Waite, is bound by the implied grant of the easement to the plaintiff.

Deming v. *Carrington*, 12 Conn. 1, 30 Am. Dec. 591; *Ramsbottom* v. *Phelps*, 18 Conn. 285; *Columbia College Trustees* v. *Lynch*, 70 N. Y. 449, 26 Am. Rep. 615.

The well is appurtenant to the plaintiff's dwelling house, and is necessary thereto.

French v. *Morris*, 101 Mass. 68; *Paine* v. *Chandler*, 134 N. Y. 385, 19 L. R. A. 99.

An easement is never lost by non-user.

Washb. Easem. 639; *King* v. *Murphy*, 140 Mass. 254; *Curran* v. *Louisville*, 83 Ky. 632.

The declarations of the actual vendor at the time of the sale, in reference to the well, were admissible.

Norton v. *Pettibone*, 7 Conn. 323, 18 Am. Dec. 116; *Deming* v. *Carrington*, 12 Conn. 5, 30 Am. Dec. 591; *Smith* v. *Martin*, 17 Conn. 400; *Ramsbottom* v. *Phelps*, *supra*; 1 Greenl. Ev. § 287; *Cleverly* v. *Cleverly*, 124 Mass. 316.

The plaintiff had a right to have the tree continue undisturbed.

Griffin v. *Bixby*, 12 N. H. 453, 37 Am. Dec. 225; 1 Washb. Real Prop. 7, 8.

The attempt of one cotenant to make partition without the consent of the other is void.

Griswold v. *Johnson*, 5 Conn. 365; *Kennedy* v. *Scovil*, 12 Conn. 327.

The cutting down or injury of shade or ornamental trees is an irreparable injury, which the courts will prevent by injunction.

Baltimore & O. R. Co. v. *Boyd*, 67 Md. 32; *Wilson* v. *Mineral Point*, 39 Wis. 160; *Musch* v. *Burkhart*, 83 Iowa, 301, 12 L. R. A. 484; High, Inj. § 344.

Fenn, J., delivered the opinion of the court:

Upon the complaint of the plaintiff, claiming an injunction to restrain the defendant from doing certain acts on the defendant's own land, adjacent to land of the plaintiff, the court of common pleas for New Haven county found the following facts:

On September 21, 1883, one William Waite was, and for a long time had been, the owner in fee of certain premises on the northerly side of Bradley street in the city of New Haven, 61 feet front on said street, and 98 feet deep. A dwelling house stood on the westerly part of said lot. On said day said William Waite, through a third person, conveyed to his wife, Elizabeth, the westerly part of said lot, 40 feet front, on which said dwelling house stood. On August 23, 1888, the said 40-foot lot was, by warranty deed, conveyed to the plaintiff by an agent of Mr. and Mrs. Waite, to whom it had been previously conveyed for that purpose. On October 6, 1888, William Waite quitclaimed his right, title, and interest in the remaining 21 feet of the original lot to the defendant. On the boundary line between the premises of the plaintiff and the defendant there stands a maple tree of about forty years' growth, about 16 inches in diameter, and with a branch extension of from 40 to 50 feet. This tree is a valuable one to the plaintiff as a shade tree and ornament, and shades a part of the plaintiff's premises. The boundary line runs substantially through the middle of the trunk of said tree. At the time that said William Waite erected said dwelling house,—which was more than twenty years previous to the plaintiff's purchase,—he dug and connected with said dwelling house, by pipes, a well, and used said well of water as appurtenant to said house during the period of his ownership, up to and within a short time previous to said purchase. For some five years previous to the plaintiff's purchase, and up to the time when said Waite ceased to use said well, such use was by means of a curb and bucket. The plaintiff has never used said well, which has been covered up ever since he has owned the premises. The defendant does not intend to destroy the well. At the time of the plaintiff's purchase the well was connected with the house by means of pipes, and there was a concrete walk leading from the house to the well, across said boundary line, and continuing into that part of the premises owned by the defendant, along the extent of the flagstone that crowns the well. This stone, which is about 5½ feet in length, extends some 3½ feet upon the defendant's land. The well is 2½ feet in diameter, and adjoins the line, but is practically all of it upon the land of the defendant. On the trial the plaintiff and said William Waite both testified that a few days previous to the plaintiff's purchase, and while negotiations were pending, said Waite told the plaintiff that said well went with the house, and would be sold to him; and this statement was a substantial inducement to the plaintiff in making said purchase. To the admission of this evidence the defendant objected, but the court overruled the objection, and admitted the evidence, the defendant duly excepting, and the court found the facts to be as testified. The plaintiff's principal sitting room and the room over it, the dressing room, are on the east side of the house, and derive their light solely from a bay window, having its windows on the easterly, northeasterly, and southeasterly sides thereof. Said rooms are so inclosed on all sides by other parts of the structure that no other means of light than from the east side is possible, without a substantial reconstruction of that part of the building. The east face of said bay window is between 5 and 6 feet beyond the line of the side wall of the house from which such window projects, and is 5 feet from said boundary line. The stairway and hall of the dwelling house is lighted by a stained-glass window in the easterly side of the house,

and has also a glass in the south door. The defendant threatens and intends to build, and has made a contract for the building of, a dwelling house to extend down along the boundary line for a distance of 58 feet from a point about 6 feet from said Bradley street, the wall of which is to be about 20 feet high, and threatens to remove so much of the tree as is on his side of said boundary line. The construction of a dwelling house on the line, as the defendant intends to construct it, would cover the well, and that portion of the premises on his side of the line on which said tree stands; and the removal of that portion of the tree which the defendant threatens to remove would destroy the life of the whole tree. Such construction would also deprive the plaintiff of the supply of light which has come across said 21 feet now owned by the defendant, and would make it necessary for the plaintiff to light his sitting room and dressing room with gas, or some other light, in the daytime, in order to obtain sufficient light for the reasonable use of the rooms. At the time of purchase by the plaintiff, and at the time of the purchase by the defendant, there was no fence or other visible sign of demarcation marking said boundary line. And said original tract of land owned by William Waite was, at the time of the erection of said dwelling house thereon, and ever afterwards until the execution of the deeds above mentioned, an undivided tract of land. The defendant, previous to his purchase, had lived within 100 feet of the premises, and was fully acquainted with the same. Upon these facts the court, overruling the claims of the defendant, rendered judgment for the plaintiff, enjoining and restraining the defendant "from such interference with the tree mentioned in the complaint as will destroy or injure the same, and such interference with the well mentioned in the complaint as will deprive the plaintiff of the use of the same; also from erecting any building upon the premises described as the property of the defendant, so near as to exclude the light from the plaintiff's dwelling house." The defendant's appeal assigns eleven reasons, some of which are not important. Taken as a whole, however, they present, in substance, four alleged grounds of error which we deem it necessary to consider. First, in restraining the defendant from interference with the tree; second, with the well, including the admission of evidence; third, from excluding the light; fourth, that the judgment rendered is uncertain. We will examine each of these, and in the order above indicated.

First, in reference to the tree. Upon the subject of the rights of the parties in a tree situated as this is, it is said in 1 Washburn on Real Property, § 7*a*: "The law as to growing trees may be regarded so far peculiar as to call for a more extended statement of its rules as laid down by different courts. . . . In the first place, trees which stand wholly within the boundary line of one's land belong to him, although their roots and branches may extend into the adjacent owner's land. . . . But the adjacent owner may lop off the branches or roots of such trees up to the line of his land. If the tree stand so nearly upon the dividing line between the lands that portions of its body extend into each, the same is the property in common of the land owners. And neither of them is at liberty to cut the tree without the consent of the other, nor to cut away the part which extends into his land, if he thereby injures the common property in the tree." This is the doctrine of our own court in *Lyman* v. *Hale*, 11 Conn. 177, 27 Am. Dec. 728, cited by Washburn. See also, 26 Am. & Eng. Encyclop. Law, p. 558. We may therefore limit our investigation to the inquiry as to the logical application of the principles of that case to the present one. In that case the tree stood upon the plaintiff's land, but its branches extended some distance across the line, and some of its roots ran into the defendant's ground. The action was trespass *quare clausum fregit* for entering upon the plaintiff's land and picking up pears, the fruit of the tree. The defendant claimed to be either tenant in common or joint owner with the plaintiff, or exclusive owner of the pears gathered, which fell on his own land from overhanging branches. The claim of joint ownership urged rested on the fact that the roots extended into the defendant's ground, and that the tree derived a part of its nourishment from his soil. In reviewing and disapproving the authorities cited in support of such claim, this court said: "Is it the doctrine of these cases that whenever a tree growing upon the land of one man, whatever may be its distance from the line, extends any portion of its roots into the land of another, they therefore become tenants in common of the tree? We think not; and, if it were, we cannot assent to it. Because, in the first place, there would be insurmountable difficulties in reducing the principle to practice; and, in the next place, we think the weight of authorities is clearly the other way. How, it may be asked, is the principle to be reduced to practice? And here it should be remembered that nothing depends upon the question whether the branches do or do not overhang the lands of the adjoining proprietor. All is made to depend solely upon the inquiry whether any portion of the roots extend into his land. It is this fact alone which creates the tenancy in common. And how is the fact to be ascertained? Again, if such tenancy in common exist, it is diffused over the whole tree. Each owns a certain proportion of the whole. In what proportions do the respective parties hold? And how are these proportions to be determined? How is it to be ascertained what part of its nourishment the tree derives from the soil of the adjoining proprietor? If one joint owner appropriates all the products, on what principle is the account to be settled between the parties? Again, suppose the line between adjoining proprietors to run through a forest or grove. Is a new rule of property to be introduced in regard to those trees growing so near the line as to extend some portions of their roots across it? How is a man to know whether he is the exclusive owner of trees growing, indeed, on his own land, but near the line; and whether he can

safely cut them without subjecting himself to an action? And again, on the principle claimed, a man may be the exclusive owner of a tree one year, and the next a tenant in common with another; and the proportion in which he owns may be varying from year to year, as the tree progresses in its growth. It is not seen how these consequences are to be obviated, if the principle contended for be once admitted. We think they are such as to furnish the most conclusive objections against the adoption of the principle." We have quoted so much at length because it must be obvious that by far the greater part of this most cogent reasoning applies with equal force against the doctrine of a tenancy in common of a tree standing upon the dividing line between two properties, and extending its body no matter in what proportion, into each. It is true, the opinion appears to concede that in such a case the tenancy would exist, and such is the familiar statement of the treatises and opinions. The expression is probably well enough and sufficiently accurate for practical purposes, but it is not entirely correct, as appears to us to be clearly shown in an article in the Albany Law Journal (vol. 10, p. 226), which points out that where a tree stands partly on the lands of each of two adjoining proprietors, the possession of each must be always confined to that portion of the tree which is on his side of the boundary line, in view of the greater dignity and permanence of real-estate tenure, as compared with the temporary and changing nature of growing timber.

In addition to what we have said, it must be apparent that the very nature of things differentiates such a so-called common interest from an ordinary tenancy in common, either of real or of personal property. In the case of a tree like the one in question, yielding no fruit, of trifling value for wood, if cut, of no value while standing, except for ornament or shade, what relief by any remedy, legal or equitable, provided for ordinary tenants in common, can a part owner of such tree, to whom its continued existence is of no advantage but an injury, obtain? Can he call upon the other part owner to account for the benefit which he has derived from such ornament or shade? Could he, in this state, procure a partition of the growing tree as real estate, under Gen. Stat., § 1304? And if he did, would not the lines of his own and the adjacent land divide the tree as they did before, leaving the rights of the parties identical in effect with what they were before? Could he obtain a sale of the tree under section 1307, either as real estate or personal property, that would carry the right to have it destroyed or removed? If it be conceded, as it must be, that he could do none of these, it will be evident, we think, that the tenancy in common in a tree is of a peculiar nature, if there be such a tenancy at all. It would really seem to come to this: that each of the land owners upon whose land any part of a trunk of a tree stands has an interest in that tree, a property in it, equal, in the first instance, to, or perhaps rather identical with, the part which is upon his land; and, in the next place, embracing the right to demand that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole. There may, it is true, be a difficulty in applying such a principle as this, and such difficulty appears to exist in the present case. It might perhaps fairly be urged that to prevent the defendant from removing that portion of the trunk of the tree upon his own land—thereby depriving him of the opportunity to build upon it as desired—would be likely to produce a greater irreparable injury to the defendant than such removal and the consequent destruction of the life of the tree would cause the plaintiff, and that, therefore, the equitable remedy of injunction (which is not adapted finally to adjust the rights of the parties) should have been refused, and the contestants left to settle such rights in methods pertaining to the legal, and not the chancery, jurisdiction. We are inclined to think such elements of discretion enter into this matter that we ought not to disturb the conclusion of the trial court upon it. But we think the law is already well settled in this state, as well as elsewhere, and, as before stated, that where the branches of a tree extend over an adjacent owner's land, he may lop them off up to the line, even though that were practically to the trunk of the tree. In this case a portion of the trunk is on the defendant's land, and the branch extension of 40 to 50 feet, as found, presumably reaches across it. That he should have less right to lop these branches because he owns a portion of the tree than if he owned none of it, appears to us to be unreasonable. The injunction should not extend further than to restrain the defendant from cutting any portion of the trunk and any further cutting of the branches or of the roots than he might lawfully have done had the trunk stood wholly upon the plaintiff's land, but reaching to the defendant's line. If in fact the trunk divides itself, as the tree extends upwards, into two or more parts, of similar size, with more of a perpendicular than horizontal extension, each of those parts should be regarded as a portion of the trunk.

In respect to the well, there was, we think, error in the action of the court, both in reference to the admission of evidence and in granting the injunction, whether the latter action be or be not regarded as influenced by such evidence. Concerning the testimony, the plaintiff seeks to justify its reception as being a declaration of the actual vendor at the time of the sale, and cites *Norton* v. *Pettibone*, 7 Conn. 323, 18 Am. Dec. 116; *Deming* v. *Carrington*, 12 Conn. 5, 30 Am. Dec. 591; *Smith* v. *Martin*, 17 Conn. 400; *Ramsbottom* v. *Phelps*, 18 Conn. 285. None of these cases, however, support his contention. For, waiving the point that the title to the premises now owned by the plaintiff was not at the time of such conversation in the declarant, William Waite, it is evident that the statement to the plaintiff "that the well went with the house, and would be sold to him," was not in its nature a declaration adverse to the declarant's title. It was not an assertion as to his title at all. There was no question then, nor is there now, that the declarant then

had title to the land now belonging to the defendant on which the well is situated. It was therefore simply a statement of what interest or easement in land not to be conveyed "belonged to" and "would be sold" with the land to be conveyed. Whether, by the legal effect of the deed to the plaintiff, the well, or any right in it, was conveyed to him as an appurtenance or otherwise, is an inquiry to which the evidence under consideration is not relevant. If not so conveyed, whether the plaintiff has, or ever had before waiting so long, a cause of action for the reformation of the instrument, so as to include the well as a part of the grant, is another and distinct question. In this case, however, to which William Waite is not a party, in which no claim for reformation is made, but only the title of the plaintiff as derived from the deed as it stands is counted upon, such inquiry cannot be entered into. Nor would any conceivable answer to it affect the decision of the point as to the admission, in this case, of the evidence now under consideration. There is no claim that the defendant had any notice of this conversation, and its use to impair the title of a bona fide purchaser, for full consideration, without notice, actual or constructive, of an adjoining piece of land, is clearly improper. The fact that the defendant derived his title from a quitclaim deed is entirely immaterial. "In this state a quitclaim deed is a primary conveyance, vesting in the releasee all the interest, even in fee, which the releasor has so conveyed. As a conveyance, it is of as much force as a warranty deed, differing from it chiefly in the superadded covenants, which may operate by way of estoppel upon a future-acquired interest, or may secure the covenantee against a bad or defective title." *Sherwood* v. *Barlow*, 19 Conn. 476. It might even be said that there is more reason why a releasee in a quitclaim deed should be protected from the operation of secret, unrecorded incumbrances on the property, where he purchased in good faith, and for full consideration, than such a purchaser whose title comes to him accompanied with covenants for his protection. But, further, in reference to the injunction, there was error. The plaintiff claims the record shows that the well, at the time of his purchase, was appurtenant to the dwelling house, and necessary thereto. We do not so understand the finding. At the time the dwelling was erected the well was dug, and connected with it by pipes. It was used as appurtenant to the house, either by pipes or by curb and bucket, up to and within a short time previous to the plaintiff's purchase. It was not so used at the time of the purchase. For the last five years of its actual use the curb and bucket had been employed. At the time of the purchase that also had been abandoned, and the well was covered by a flagstone. The pipes at that time connected the well with the house. Whether they do so still is not found. The plaintiff has never used the well. The defendant does not intend to destroy it, but the construction of his dwelling house would cover it. Why should he not so cover it, if he desired? It had already been covered when he bought, and it so remains. It is not found that the well has ever been, or ever is likely to be, necessary, or even useful, to the plaintiff. If it ever has been, why has he never used it? If he objects to its being covered, why did he receive his deed while it was in that condition? Why has he suffered it to remain so ever since? But he wishes, or he may, perhaps, wish hereafter, to revive the use of the pipe. It is entirely upon his own land, and reaches a well which the defendant has no intention to destroy. How, so far as the record discloses, will the proposed act of the defendant affect him in such use?

We come now to the question most extensively considered on both sides in the argument,—that in relation to light. The great practical importance of the subject presented will be our justification for a somewhat extended examination. By the common law, in England, the right to light and air over the land of another could be claimed in certain cases by prescription, and in certain others by implication, or what was called "implied grant." If the common law, as to the prescription, ever existed in Connecticut, it does so no longer. Gen. Stat. § 2970. But the plaintiff claims that the law as to implied grants of light and air does exist, and should be recognized in this state. That doctrine the plaintiff states as follows: "When a person, having erected a building upon a part of his land, and having placed therein windows opening upon the other part of his land, sells the building, with the land on which it stands, the right to the continual use and enjoyment of light and air through these windows passes to the grantee by implication." This asserted rule is a particular instance of the application of the doctrine of the creation of easements of various kinds,—the principal of which are perhaps ways and rights of passage by implication,—which doctrine is said to rest upon the application of the maxims: "A grantor cannot be allowed to derogate from his own grant," and "A grantor is presumed to convey, so far as it is in his possession, whatever is necessary for the reasonable enjoyment of the thing conveyed." Again, it is said to be based upon the supposed intention of the parties, as deduced from the surrounding circumstances; the essential element of which is the situation, relation, and condition of the granted and retained portions of the land. If we assume this doctrine, generally speaking, to be correct, the inquiry arises as to its proper limitations; and to what would be such in any given case, provided the question of its application arose between the grantee and his grantor, who still retained the other portion of the land, there must be added an additional consideration, provided, as in the present instance, such original grantor does not so retain, but has afterwards parted with, such remaining portion to another person, who is a bona fide purchaser for value. The policy upon which our registration laws as to conveyances of real estate is based, would seem to make it essential that, in order to claim such easement against such purchaser, it must be of a character so

evidently necessary to the reasonable enjoyment of the granted premises, so continuous in its nature, so plain, visible, and open, so manifest from the situation and relation of the two tracts, as to fairly and clearly indicate to a prospective purchaser of the reserved portion the intention of the parties to the previous sale that it should remain, and to make such purchaser chargeable with knowledge that the law, based on justice, that equity, founded on good conscience, would forbid him, in case of his purchase, so to occupy the lot as to interfere with such easement.

The general doctrine of easements by implied grants, and the ground upon which it is based, are well stated by this court in *Collins* v. *Prentice*, 15 Conn. 39, 48, 38 Am. Dec. 61, in reference to private ways. In speaking of such ways, the court, by Waite, *J.*, said: "It is well settled, as a part of the common law of England, that, if a man having a close, to which he has no access, except over his other lands, sell that close, the grantee shall have a way to it, as incident to the grant. . . . And although doubts have formerly been expressed upon the subject, it seems now to be as well settled that, if the grantor had reserved that close to himself, and sold his other lands, a right of way would have been reserved. . . . The way, in the one case, in contemplation of law, is granted by the deed; and in the other case, reserved. And although it is called a way of necessity, yet in strictness, the necessity does not create the way, but merely furnishes evidence as to the real intention of the parties. For the law will not presume that it was the intention of the parties that one should convey land to the other in such manner that the grantee could derive no benefit from the conveyance, nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties. A way of this kind is limited by the necessity which creates it." These principles in reference to private ways—especially the limitation of such easements to cases of actual existing necessity—are further stated in *Pierce* v. *Selleck*, 18 Conn. 321; *Seeley* v. *Bishop*, 19 Conn. 128; *Woodworth* v. *Raymond*, 51 Conn. 70. In Massachusetts, in reference to such ways, it was said in *Buss* v. *Dyer*, 125 Mass. 291: "It is a well-established and familiar rule that deeds are to be construed as meaning what the language employed in them imports, and that extrinsic evidence may not be adduced to contradict or affect them. And it would seem that nothing could be clearer in its meaning than a deed of a lot of land, described by metes and bounds, with covenants of warranty against incumbrances. The great exception to the application of this rule to the construction of deeds is in the case of ways of necessity, where, by a fiction of law, there is an implied reservation or grant to meet a special emergency, on grounds of public policy, as it has been said, in order that no land should be left inaccessible for purposes of cultivation. This fiction has been extended to cases of easements of a different character, where the fact has been established that the easement was necessary to the enjoyment of the estate in favor of which it was claimed. In this commonwealth, grants by implication are limited to cases of strict necessity." Coming now directly to the subject of the application of this doctrine or "fiction" to light and air, it was said by Gould, *J.*, in *Ingraham* v. *Hutchinson*, 2 Conn. 598, in speaking of what are called "ancient lights:" "Besides, to what extent does this privilege or protection go, where it actually exists? Does the adjoining proprietor lose all right to erect a building upon his own land, whenever it would, in the least degree, diminish the light of a privileged window? Is he precluded from building at the distance of three rods, or one rod, or even at a less distance, from his neighbor's windows? I am not aware that the rule was ever claimed to extend so far. It goes no further, as I understand it, than to protect windows, which have been long used, from being obstructed, or, as it is often expressed in the books, 'stopped up.'" But the plaintiff claims that a much broader extension of the rule, in case of an implied grant, was distinctly recognized in this state in *Bushnell* v. *Proprietors of Ore Bed*, 31 Conn. 150, a case upon which the plaintiff much relied. In that case it appeared that the plaintiff had formerly conveyed to the defendant, an ore-bed company, the right, in washing their ore upon a small stream that ran through his land, to discharge dirt upon his "meadow lot," lying below upon the stream. A great quantity of dirt accumulated on the meadow lot, filling the bed of the stream, and raising the lot above the adjoining land, so that the dirt washed upon the lot, spread, and was carried upon the plaintiff's pasture lot adjoining. The plaintiff had owned this lot at the time the deed was given. In holding that the defendant was not liable for any damage to the pasture lot resulting naturally from the discharge of dirt upon the meadow lot, this court (Dutton, *J.*) said: "A grantor is presumed to intend to convey, so far as it is in his possession, whatever is necessary to the reasonable enjoyment of the thing conveyed. It is well-settled law that if the owner of a lot conveys it to another person while there is upon it a dwelling house with windows opening upon another lot of the grantor, neither he nor his heirs nor assigns can erect a building upon the second lot so near as to exclude the light from the dwelling house." Now, it is evident, as the opinion itself states (page 157), that the question for discussion in *Bushnell* v. *Proprietors of Ore Bed* was, What rights were in fact conveyed by the deed? This was a question solely of interpretation, in which the principles of the doctrine of implied grants, which do not, and have never been claimed to, rest upon interpretation of language used, were in no sense involved. The entire discussion of the doctrine, as well as the illustration cited, was, therefore, wholly *obiter*. Nevertheless, both the principle and the illustration, although vouching as authority two cases, both of

which have been distinctly overruled in almost every American jurisdiction where the question has since arisen, may, we think, fairly be adopted as a correct statement of the law, provided proper care is exercised in construing the terms used, bearing in mind that the presumption against the grantor that it was not his intention "to convey land in such manner that the grantee could derive no benefit from the conveyance" must be fairly weighed and applied with due regard to the counter presumption that it could not have been his intention "to so convey a portion as to deprive himself of the enjoyment of the remainder." From this consideration—manifestly just where the effort is to extend by pure implication the language used, and to thus supply what might so easily have been procured to be expressed, if it were intended—it will follow that the word "necessity" and the term "reasonable enjoyment" can have no fixed arbitrary and unyielding meaning, but must find their explanation in view of the situation of the parties, of the nature, character, and adaptability of the property, and in the light of surrounding circumstances. They should also receive a strict construction, for the reason that such implied easement is an impairment of "the exclusive dominion of every man over his own soil and freehold, now held sacred by our constitution and laws." *Pierce* v. *Selleck*, 18 Conn. 330. It may be true, as stated in *Bushnell* v. *Proprietors of Ore Bed*, and the true ground of that decision, that the construction of a deed, if it is doubtful, must be taken most strongly against the grantor." But in the case before us there is no question concerning the construction of language used, no claim that this is doubtful, but the imputation of language never used; and surely caution and moderation should be exercised in that.

It further must follow, we think, as a corollary from what has already been said, that the doctrine of easements by implied grant—a doubtful exercise of power by the courts in all cases—should, when applied to easements of light, be most cautiously used; and, briefly stated, that in the above quotation the words "exclude the light" should not be regarded as equivalent to "exclude any light;" in other words, that "exclude" is not to be held synonymous with "impair." To borrow the emphatic language of Dillon, *Ch. J.*, in *Morrison* v. *Marquardt*, 24 Iowa, 64, 92 Am. Dec. 444: "Surely such an easement, uncertain in its extent and duration, without any written or record evidence of its existence fettering estates, and laying an embargo upon the hand of improvement which carries the trowel and the plane, and, as applied to a subsequent purchaser, against the spirit of our recording acts, and not demanded by any consideration of public policy,—surely such an easement should not be held to exist by mere implication, when such implication originates in no reasonable necessity." A careful examination of the cases in the United States upon the subject, both those cited in the very able and exhaustive brief in behalf of the plaintiff and others, justifies the statement that in what we have said we have been in harmony with the views held in the principal American jurisdictions. Wherever the doctrine of easements by implied grants of light and air has been recognized at all, it has been carefully restricted; and no well-considered case in this country, at least in recent years, can be found that has gone to the extent, in the application of such doctrine to the facts, to which it would be necessary to go in the present case in order to justify the judgment of the court below.

In *Keats* v. *Hugo*, 115 Mass. 204, 15 Am. Rep. 80, which is a well-considered, and may be regarded as a leading, case, three actions were tried together. In the principal one the defendants conveyed to the plaintiff, by warranty deed in the usual form, a certain lot of land with a dwelling house thereon, situated on the line between the parties, created by said conveyence; the lot so conveyed being a part of a larger lot then, and the remainder of which was at the date of the action, owned by the defendants. The dwelling house had windows and a door in that part of the house adjoining the line. After said conveyance, the defendants placed a structure and woodshed on their own land, against said house, within about 8 inches of the same. The question was "Whether a person, who sells a house having windows overlooking land retained by him, thereby deprives himself of the right to build on that land so as to obstruct the passage of light and air to the windows." The court (Gray, *Ch. J.*), in the opinion, said: "The question being of great practical importance to owners of real estate, and having heretofore been the subject of some variety and conflict of judicial opinion, we have thought this a suitable occasion to review the cases in this commonwealth, and to refer to the principal ones in other states." The court then proceeds to do this in an exhaustive manner, and concludes by saying: "By nature, air and light do not flow in definite channels, but are universally diffused. The supposed necessity for their passage in a particular line or direction to any lot of land is created, not by the relative situation of that lot to the surrounding lands, but by the manner in which that lot has been built upon. The actual enjoyment of the air and light by the owner of the house is upon his own land only. He makes no tangible or visible use of the adjoining lands, nor, indeed, any use of them which can be made the subject of an action by their owner, or which in any way interferes with the latter's enjoyment of the light and air upon his own lands, or with any use of those lands in their existing condition. In short, the owner of adjoining lands has submitted to nothing which actually encroached upon his rights, and cannot therefore be presumed to have assented to any such encroachment. The use and enjoyment of the adjoining lands are certainly no more subordinate to those of the house where both are owned by one man, than where the owners are different. The reasons upon which it has been held that no grant of a right to air and light can be implied from any length of continuous enjoyment, are equally strong

against implying a grant of such a right from the mere conveyance of a house with windows overlooking the land of the grantor. To imply the grant of such a right in either case, without express words, would greatly embarrass the improvement of estates, and, by reason of the very indefinite character of the right asserted, promote litigation. The simplest rule, and that best suited to a country like ours, in which changes are continually taking place in the ownership and the use of lands, is that no right of this character can be acquired without express grant of an interest in, or covenant relating to, the lands over which the right is claimed. In accordance with these views, the English doctrine of implied grants of rights of light and air has been wholly rejected in several well-considered cases. *Palmer* v. *Wetmore*, 2 Sandf. 316; *Myers* v. *Gemmel*, 10 Barb. 537; *Haverstick* v. *Sipe*, 33 Pa. 368; *Mullen* v. *Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Morrison* v. *Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444. And with the single exception of *Janes* v. *Jenkins*, 34 Md. 1, 6 Am. Rep. 300, all the opinions of American judges, with which the learning and research of counsel have supplied us, in favor of the acquirement of such a right by mere implication from the conveyance of a house, have been either, as in *Lampman* v. *Milks*, 21 N. Y. 505, 512, *obiter dicta*, or, as in *Robeson* v. *Pittenger*, 2 N. J. Eq. 57, 32 Am. Dec. 412, in those states in which a like right is held to exist by prescription, and therefore of no weight as authority in this commonwealth. Considering, therefore, that by the preponderance of reason and of authority no grant of any right of light or air over adjoining lands is to be implied from the conveyance of a house, we have only to apply this rule to the facts of the cases pending before us." Judgment was ordered for the defendants.

The case of *Keats* v. *Hugo* has been quoted with approval, and recognized as authority in other states. *Doyle* v. *Lord*, 64 N. Y. 432, 21 Am. Rep. 629, was a case where the facts were that the plaintiffs leased the first floor of a building in the city of New York for a store. In the rear was a yard attached to and exclusively appropriated for the use of the building, to which all the occupants had access through a hall running from the front to the rear of the building, and, as the building was occupied when the plaintiff leased, no tenant could dispense with it. The rear of the store received light necessary for the transaction of business therein from windows opening into the yard. In holding that the lessor could, upon the facts found, be restrained from building in the yard so as to obstruct the light, the court (Earle, *J.*) said: "This conclusion is reached without any departure from what may be called the American doctrine as to light and air, as distinguished from the English common-law doctrine, and the law as laid down in the following authorities is fully recognized: *Parker* v. *Foote*, 19 Wend. 315; *Palmer* v. *Wetmore*, 2 Sandf. 316; *Myers* v. *Gemmel*, 10 Barb. 537; *Mullen* v. *Stricker*, 19 Ohio St. 135, 2 Am. Rep. 379; *Haverstick* v. *Sipe*, 33 Pa. 368; *Keats* v. *Hugo*, 115 Mass. 204, 15 Am. Rep. 80. . . . Under these authorities, if the lessor had sold the store and lot upon which it stood 25 feet by 51, the grantee would have taken no right to light and air from the balance of the lot. In that case the grantor could have built upon the balance of the lot, and thus have darkened the windows in the store without violating any rights of the grantee. In this case, if the yard had not been part of the lot upon which the building was standing, and if it had not been appropriated to use with the building so as to pass as appurtenant thereto, so far as to give easements therein to the tenants of the building, the plaintiffs could not have complained of the acts of the defendants alleged in the complaint."

In *Turner* v. *Thompson*, 58 Ga. 268, 24 Am. Rep. 497, an executrix sold a half lot of land, with a tenement thereon, opening upon the other half lot; and bought the other half herself at the same sale. It was held that she "will be estopped from obstructing the passage of light and air through such windows, if those windows were necessary to the admission of sufficient light and air for the reasonable enjoyment of the tenement which she sold; *aliter*, if sufficient light and air could be derived from other windows opened, or which might conveniently be opened, elsewhere in the tenement, to make the rooms reasonably useful and enjoyable." The court (Jackson, *J.*) cites with approval *Keats* v. *Hugo*, *supra*, adding: "The principle applied by the supreme court of West Virginia, in a recent case there, seems to us sound and sensible, and we shall adopt it in this case. . . . That principle is, that 'an implied grant of an easement of light will be sustained only in cases of real necessity, and will be denied or rejected in cases when it appears that the owner claiming the easement can, at a reasonable cost, have, or substitute, other lights to his building.'" The court adds: "We apply this principle the more readily because it appears to be the conclusion of Washburn (Easem. p. 618), drawn from a consideration of all the English and American authorities, and because, as before stated, it strikes us as reasonable and right. . . . So Tyler approves the same principle, Tyler, Boundaries, 550; and *Judge* Story is authority to the same point. *United States* v. *Appleton*, 1 Sumn. 492–502, Fed. Cas. No. 14,468." In this case the injunction granted was dissolved, because the "decree, as it stands, might be held to enjoin her from building, if these lights were at all impaired; and we think such action ought not to be had except in case of necessity as before explained."

In *Rennyson's App.*, 94 Pa. 147, 152, both *Keats* v. *Hugo* and *Turner* v. *Thompson* are cited and approved, the opinion saying of the latter: "It is worthy of remark, however, that this case limits the general application of *Keats* v. *Hugo* as between dominant and servient tenement in one important respect. I think the limitation is wise and right. It is that an implied easement of light and air will be sustained in case of real necessity." The opinion then proceeds to

lay down the following rules: "(1) No implication of a grant of the right to light and air arises upon a sale of one of two adjacent lots having a house upon it, with windows overlooking the land of the grantor. (2) The grantor, by such sale, is not estopped from improving his retained lot by building upon it, though his erection darkens the windows of his vendee, and excludes the access of light and air from such windows. (3) That the limitation of these two propositions depends upon the fact as to whether such windows are a real necessity for the enjoyment of the grantee's property. If they be, then the implication of the grant of an easement of light and air will be sustained; if they be not, or can be substituted at a reasonable cost, with a view to the purposes of the dominant tenement, then such implication will be denied and rejected. (4) The American doctrine as to light and air requires an express grant or agreement, unless a real and actual necessity exists, to vest a dominant tenement with such light. (5) The doctrine of ancient lights is not recognized."

A somewhat earlier case than those just cited is that of *Morrison* v. *Marquardt*, 24 Iowa, 35, 92 Am. Dec. 444, to which reference has already been made, and in which a very elaborate opinion was written by Dillon, *Ch. J.*, and strong ground is taken against the implication of an easement of light and air, except in cases of strictest necessity. See also, *Sutphen* v. *Therkelson*, 38 N. J. Eq. 318; *White* v. *Bradley*, 66 Me. 254; *Brande* v. *Grace*, 154 Mass. 210, 212,—where, in case of a plaintiff lessee, held entitled to a remedy, the court said: "We do not regard this view of the rights of the parties as at all inconsistent with the decision in *Keats* v. *Hugo*, 115 Mass. 204, 15 Am. Rep. 80, and other cases, which hold or intimate that the necessity must be pretty plain in order to warrant the implication of a grant." See, also, *Case* v. *Minot*, 158 Mass. 577, 22 L. R. A. 536,—a case similar to *Doyle* v. *Lord*, *supra*, to which it refers.

Applying these principles to the case before us, what result is fairly reached? Here was a lot located on Bradley street, about six blocks from the center of the city of New Haven, with a frontage of 61 feet, and a depth of 98 feet. A dwelling house stood upon the westerly part of said lot. The plaintiff purchased said westerly part, 40 feet frontage, with said dwelling house thereon. That left the grantor a lot 21 feet front, which shortly afterwards was sold to the defendant. If we are to go into the business of raising presumptions,—as we must, to support implied grants,—it is fair to suppose the plaintiff did not pay the price and value of the 61-foot lot, for his 40-foot lot. But it would have been just for him to have done so, provided he intended to avail himself of the only beneficial use of it,—keeping it open and unoccupied, in order to have no obstruction to the light of his sitting and dressing room derived from his bay window. It is also fair to presume that his grantor would not have sold a portion for a less price than the whole, provided the remainder was thereby to become practically useless to him; and, if he had charged the price of the whole for a portion, would not the plaintiff have insisted upon taking the whole instead of a portion only? But the grantor would not have sold a portion only, unless the part retained was beneficial to him. But in what could any substantial benefit from such a lot consist unless it could be built upon? And if building was contemplated, there could be little question, apparently, in view of the narrowness of the lot, that such building would require to extend substantially to both sides of the ground. The fact that the plaintiff purchased land extending 5 feet beyond the east face of his bay windows, and from 10 to 11 beyond that of his house, is significant. Such additional width of 5 feet would evidently have been useful to a 21-foot lot. But the plaintiff purchased it, thereby giving himself in fact, whatever his purpose may have been, a strip of that width, upon which no structure could be constructed without his act, to either exclude or impair his light. When the defendant, who lived near, and was fully acquainted with the property, bought, what was the evident situation? He found a narrow, vacant lot, adapted to the purposes of building; presumably to no other use. The plaintiff's house, itself upon a lot so narrow that it extended nearer to the opposite side of the lot than to the side in question, on which there were 5 feet clear beyond the uttermost extension in a bay window, which projected 5 or 6 feet from the side of the house. Could any one purchasing property under such circumstances have supposed that it was the intention of the parties, in making and accepting the grant of the portion of the original premises which had been conveyed to the plaintiff, that there should go with such premises, by implication—by implied grant—a right in the remaining portion of such premises, paramount to and preventative of their beneficial use and enjoyment? We think not. Should the defendant, then, have been enjoined from the acts proposed. His intention was to build a dwelling house to extend down along the boundary line, for a distance of 58 feet from a point about 6 feet from Bradley street, the wall of which was to be about 20 feet high. It is found by the court that "the erection of said dwelling house would deprive the plaintiff of the supply of light which has come across said 21 feet, now owned by the defendant, and would make it necessary for the defendant to light his sitting room and dressing room with gas or some other light in the daytime, in order to obtain sufficient light for the reasonable use of the rooms." This is a finding of fact which we are not at liberty to review. But we have the right, and it is our clear duty, to interpret the language, so far as the same, by reason of indefiniteness, requires interpretation, by the aid of those facts which pertain to that common and general fund of knowledge and information which belongs to the domain of things of which all courts are bound to take judicial notice. By this assistance it becomes evident that the depreciation of light which would ensue from the intended act of the defendant is far from total. The plaintiff would not only be left with so

much light as would come from the unobstructed space between the buildings, including the additional space covered by the northeastern and southeastern sides of his bay window, to which he could add by putting in windows elsewhere, or differently constructed; he would also have the light from overhead, beyond the top of a wall 20 feet high; and as to his dressing room on the second story of his house, which does not extend so far eastward into several feet as the sitting room bay window projection, the angle in which the light would be admitted would seem to be such as to make the obstruction comparatively small. It seems to us, therefore, that the proposed act of the defendant would be, in view of all the circumstances, an interruption of light to the plaintiff to the extent of that which is convenient only, not to that which is necessary for the reasonable enjoyment of his dwelling. Indeed, that enjoyment is not reasonable which deprives the defendant of any use of his property, in order merely that the plaintiff may, by reason of such deprivation, have a more comfortable, convenient, and better use of his own. In view of the facts found, as we interpret the finding, we conclude that an injunction could not have been granted had not the trial court adopted what we hold to be the wrong standard, substituting convenience for necessity as the test by which to determine the existence of the right claimed. In this respect also the court erred.

The court also erred in granting an injunction in so indefinite terms. It is impossible to lay down any precise rule of universal application upon the subject. But the person enjoined is entitled to know with reasonable certainty what acts he may and may not do without making himself liable as in contempt of an order. In reference to light, it was the claim of the defendant throughout—a claim which we are not at liberty to say was not made in good faith—that the erection intended to be made by him would not be of such a character or "so near as to exclude the light from the plaintiff's dwelling house." This claim the court overruled. But there is nothing in the injunction to indicate whether any erection, or, if so, how near, or of what a character, would be permissible. Without endeavoring to state what degree of certainty would have been reasonably practicable under the circumstances, which is unnecessary in view of what we have held upon the other questions in the case, it is sufficient to say that it seems to us the language employed falls short of the degree of definiteness which could without inconvenience be attained, and should be required.

There is error, and a new trial is granted.

The other Judges concur.

ILLINOIS SUPREME COURT.

alexander BELFORD, *Plff. in Err.*,
v.
Melinde WOODWARD.

(158 Ill. 122.)

1. **A provision in a judgment for a specific sum of money,** with interest, that it be paid in United States gold coin, does not constitute it a variance from a declaration describing the judgment as for a certain number of dollars or for money simply,—especially where the complaint upon which it was rendered describes the notes upon which the suit was brought as notes for the payment of so many dollars, and not so many dollars in United States gold coin, and the judgment was one by default.

2. **A default judgment ordering payment of the amount adjudged in gold coin** is void as to such provision, where the complaint showed no promise to pay in coin, but is not invalid as a whole.

3. **A judgment of another state adjudicating a matter not presented** by the pleading or within the issues may be held invalid as to such adjudication, but valid as to other matters which the judgment record shows upon its face to be easily and naturally separable and within the issues.

4. **Variance in a suit upon a judgment** alleged to be simply for a sum of money, in that the judgment proved is payable in gold coin, does not constitute cause for reversal, where the judgment recovered thereon contains no direction for payment in any particular kind of money.

5. **A judgment payable in United States gold coin** is not within the rule that debt will not lie on any obligation except for the payment of a sum specifically certain, as calling for the payment of an unliquidated amount to be determined by the fluctuations of the gold market, but is an obligation to pay in money, or an agreement to deliver a certain weight of standard gold ascertainable by count of coins made legal tender by statute.

6. **Any clerical mistake in the amount for which a judgment is entered** in the Illinois appellate court may be corrected in the supreme court, where there is sufficient in the record and on the face of the judgment itself to show the correct amount.

(October 11, 1895.)

ERROR to the Appellate Court, First District, to review a judgment affirming a judgment of the Circuit Court of Cook County in favor of plaintiff in an action upon a foreign judgment. *Affirmed.*

Statement by **Magruder, J.:**

This is an action of debt begun on June 6, 1893, by defendant in error against plaintiff in error upon a foreign judgment rendered on April 29, 1893, in favor of defendant in error and against plaintiff in error in the superior

NOTE.—*Form of judgment and procedure in case of liability to make payment in coin.*

I. *Form of judgment.*
- a. *On contracts to pay coin.*
- b. *On contracts for coin or equivalent.*
- c. *For coin converted or misapplied.*
- d. *For damages in other cases.*
- e. *For obligations created by law.*
- f. *For costs.*

II. *Pleadings and procedure.*

I. *Form of judgment.*

In the note to Skinner v. Santa Rosa (Cal.) *ante*, 512 (1895), it is shown that valid obligations may be created for payment in gold or silver. The present note considers the form of judgment and procedure in such cases.

a. *On contracts to pay coin.*

The leading case of Bronson v. Rodes, 74 U. S. 7 Wall. 229, 19 L. ed. 141 (1869), held that judgments in such cases may be entered for coined dollars and parts of dollars. And this has become the established rule, although there has not been entire uniformity in the contracts.

It was said, as to a note payable in specie in Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 (1869): "The damages should have been assessed at the sum agreed to be due, with interest, in gold and silver coin, and judgment should have been entered in coin for that amount, with costs."

That judgment on a contract payable in specie should be entered for payment in coined dollars and parts of dollars is again decided, in Trebilcock v. Wilson, 79 U. S. 12 Wall. 687, 20 L. ed. 460 (1872).

A decree for gold and silver coin of the United States was ordered in Forbes v. Murray, 3 Ben. 498 (1869), on an obligation for payment of a certain sum in pounds sterling of Great Britain. The same was decided in The Surplus of the Edith, 5 Ben. 146 (1871).

In California, where it was provided by statute that judgment for the plaintiff on a contract might be made payable in gold or silver if the contract specifically promised to make payment in such money, this statute was sustained, and judgments in that form were rendered in numerous cases.

Thus it is held that on a contract for payment in United States gold coin judgment should be rendered, under Cal. Code Civ. Proc., § 667, for the same kind of money or currency that is specified therein: Sheehy v. Chalmers (Cal.) 36 Pac. Rep. 514 (1894). Burnett v. Stearns, 33 Cal. 468 (1867); Carpentier v. Atherton, 25 Cal. 564 (1864).

Judgment for gold coin was also rendered under proper complaint on a contract to pay gold, although this was originally an oral contract, where a written contract dated before the commencement of the suit was made pending the suit. Meyer v. Kohn, 29 Cal. 278 (1865).

Under this statute the questions in dispute were generally as to the right to the benefits of the statute, rather than as to the form of the judgment, and many of the cases arising under it are not referred to in this note for that reason, but are found in a note to Skinner v. Santa Rosa (Cal.) *ante*, 512 (1895), as to the validity of contracts or obligations to make payments in coin. Other cases under this statute are found below in division II., as to *Pleadings and procedure.*

Judgment for "gold dollars" was held in Hittson v. Davenport, 4 Colo. 169 (1878), to be properly rendered in an action on a note payable in gold.

So in Chesapeake Bank v. Swain, 29 Md. 483 (1868), it was held that a judgment on an obligation payable in coin should be entered for dollars and parts of dollars payable in gold or silver.

On a policy of insurance payable in gold, it was

court of the city and county of San Francisco, California, for $3,903.46 with interest thereon at the rate of 7 per cent per annum debt, and $13.50 costs. A number of pleas were filed to the declaration, to wit: (1) *Nul tiel record;* (2) *nil debit;* (3) that there was no such court as the one set forth in the declaration; (4) that the superior court of San Francisco had no jurisdiction to render the judgment; (5) that the defendant was never served, etc. Replications were filed to the pleas and rejoinder to the replications. The cause was tried before a jury, who returned a verdict finding "the issues in debt in favor of the plaintiff and against the defendant for the sum of thirty-nine hundred and sixteen and $\frac{96}{100}$ dollars ($3.916.96) and damages in the sum of two hundred and eighty ($280) dollars." After overruling motions for new trial and in arrest of judgment, the court below rendered judgment upon the verdict "that the said Melinde Woodward do have and recover of and from the said Alexander Belford the sum of three thousand nine hundred and sixteen dollars and ninety-six cents ($3,916.96), her debt aforesaid, and two hundred and eighty dollars ($280), her damages aforesaid, and also her costs to be taxed by the clerk of this court, and that said Melinde Woodward have execution against the said Alexander Belford for her said debt, damages and costs." This judgment has been affirmed by the appellate court, and is brought here for review by writ of error.

The judgment roll from the California court, introduced in evidence, showed service upon Belford; that he appeared and filed a demurrer to the complaint; that the demurrer was overruled; that he filed no answer, and that default was entered against him. The judgment roll also sets forth in full the complaint which describes the cause of action. The liability charged in the complaint against Belford was that of indorser upon two notes executed by one Cogan to the plaintiff, Woodward. The complaint avers that Cogan made one of these notes, "whereby he agreed and promised to pay to plaintiff the sum of $1,443.75 in eight months from date" and the other of said notes "whereby he agreed and promised to pay to plaintiff the sum of $1,512.50 in fourteen months from date." The complaint prays for "judgment for the sum of $2,956.25 together with interest thereon from the time the said promissory notes matured and for costs of suit." The judgment rendered by the superior court of San Francisco, as the same is set out in the judgment roll, concludes as follows: "It is hereby ordered, adjudged, and decreed that the plaintiff, M. Woodward, in the above entitled cause, do have and recover of and from the defendant, Alexander Belford, in said cause, the sum of $3,903.46, with interest thereon at the rate of 7 per cent per annum from date hereof until paid, together with plaintiff's costs and disbursements incurred in said action, amounting to the sum of $13.50, and that said sum of $3,916.96 and said interest be paid in United States gold coin."

held, in Warren v. Franklin Ins. Co. 104 Mass. 521 (1870), that judgment must be rendered for gold coin specifically.

The doctrine of Bronson v. Rodes was also followed in Foster v. Atlantic & P. R. Co., 1 Mo. App. 390 (1876), where the decision was that judgment should be for the amount due payable in gold.

Judgment to be paid in coin was also rendered in an action on a draft, calling for payment in gold, in the case of Chrysler v. Renois, 43 N. Y. 209 (1870).

Yet, in Bank of Prince Edward's Island v. Trumbull, 53 Barb. 459 (1868), judgment was rendered on a contract payable in gold for the value thereof in legal tender notes. But here the plaintiff asked for such recovery.

On a promissory note payable in gold or silver, judgment was entered for payment in coin, in Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 69 (1871).

A mortgage to pay "lawful silver money" was enforced in McCalla v. Ely, 64 Pa. 254 (1870), by judgment for the amount due in lawful silver money of the United States following Bronson v. Rodes.

So judgment for gold was held in Smith v. Wood, 37 Tex. 616 (1872), to be properly rendered on a promissory note calling for a certain number of dollars in gold.

It was declared in Buchegger v. Shultz, 13 Mich. 420 (1865), that the courts have no power to render a judgment payable in one species of money only, and this seems to have been a somewhat common doctrine before the case of Bronson v. Rodes, *supra*, which established the contrary.

Before the decision in Bronson v. Rodes it was decided in a considerable number of cases that judgments could not include a specific provision for payment in gold or silver or in any particular kind of money, but that they must be rendered simply for dollars and parts of dollars, and would then be payable in any lawful money. These cases are presented in the note to Skinner v. Santa Rosa (Cal.) *ante*, 512 (1895). But they are not important on the present subject, since they were based on the denial of the validity of the obligation to pay in coin, rather than upon the mode in which the obligation was to be enforced. They are also overruled by the decisions of the United States Supreme Court upholding the validity of such contracts.

b. *On contracts for coin or equivalent.*

That a judgment on a note payable in gold coin or its equivalent should be rendered according to the market value of such gold coin at the time and place of trial in legal tender paper dollars, was decided in Wells, F. & Co. v. Van Sickle, 6 Nev. 45 (1870), and that a judgment simply and solely for gold coin was erroneous.

So, on a note for a certain number of dollars payable "in gold, or its equivalent in the currency of the country," judgment was rendered for the value of the gold estimated in currency, that is, by adding to the nominal amount enough to compensate for the depreciation of the treasury notes. Mitchell v. Henderson, 63 N. C. 643 (1869).

A note made in 1866 payable in "gold or its equivalent" was the subject of adjudication in Atkinson v. Lanier, 69 Ga. 460 (1882), in which case it appeared that although gold was at a premium at the maturity of the note, and subsequently became of par value with the currency, yet recovery in a suit could be only for the amount of gold or its equivalent specified therein at that time with interest, and not for the value in currency at the time of the maturity, as this, when the two kinds of money had become equal, would require payment of more than the note called for.

This case disapproved of Bond v. Greenwald, 4 Heisk. 453 (1871), in which it was held that the relative value of gold coin and legal tender notes should be taken at the time of the breach of the

Messrs. **Newman & Northrup**, for plaintiff in error:

A judgment for United States gold coin is, in contemplation of law, materially different from a judgment for dollars simply.

Bronson v. *Rodes*, 74 U. S. 7 Wall. 240, 19 L. ed. 141; *Dewing* v. *Sears*, 78 U. S. 11 Wall. 379, 20 L. ed. 189; *Butler* v. *Horwitz*, 74 U. S. 7 Wall. 258, 19 L. ed. 149; *Gregory* v. *Morris*, 96 U. S. 626, 24 L. ed. 742; *McGoon* v. *Shirk*, 54 Ill. 408, 5 Am. Rep. 122; *Myers* v. *Kaufman*, 37 Ga. 600, 95 Am. Dec. 367; *Dutton* v. *Pailaret*, 52 Pa. 109, 91 Am. Dec. 135.

The plaintiff having offered no evidence whatever to show the value in "dollars" of the amount of gold coin called for by the judgment, the amount of debt and damages could not be ascertained.

An action of debt will not lie on any obligation except one for the payment of "money," pure and simple, without any additional or qualifying provisions fixing the kind or character of money with which the debt is to be absolved.

Mix v. *Nettleton*, 29 Ill. 245; *Wilson* v. *Hickson*, 1 Blackf. 230; *Deberry* v. *Darnell*, 5 Yerg. 451; *Scott* v. *Conover*, 6 N. J. L. 270; *Campbell* v. *Weister*, 1 Litt. (Ky.) 80; *Mattox* v. *Craig*, 2 Bibb, 584; *Brunner* v. *Kelsoe*, 1 Bibb, 487; *Osborne* v. *Fulton*, 1 Blackf. 234; *Watson* v. *M'Nairy*, 1 Bibb, 359.

The verdict of the jury and the judgment were excessive even on the plaintiff's own theory of the case.

Smith v. *Luse*, 30 Ill. App. 37.

Messrs. **Prentiss, Montgomery & Hall** for defendant in error.

Magruder, J., delivered the opinion of the court:

When the judgment roll was introduced in evidence by the plaintiff below the defendant objected to it upon the alleged ground that there was a variance between the judgment set forth in the declaration and the judgment described in the judgment roll so offered in evidence, in this, that the judgment set forth in the declaration was therein described as a judgment for a certain number of dollars, or for money simply, whereas, as it is insisted, the judgment described in the judgment roll was a judgment for a certain number of dollars to be paid or payable "in United States gold coin." This objection was overruled, and exception was taken.

Counsel for plaintiff in error contend that a judgment calling for a certain amount of dollars payable "in United States gold coin" is in no respect different from a judgment calling for a certain amount of gold bullion; that without evidence showing the mercantile value of the quantity of gold coin called for, it was impossible for the court or jury to determine what, in fact, was the obligation fixed by the judgment in question, as gold coin is constantly fluctuating in value; and that, as the plaintiff offered no such evidence, she failed to make out a case showing the amount of principal debt or interest, if any, due to her from the defendant.

contract sued upon, where this called for payment in gold or its equivalent.

The Tennessee court did not, however, regard its decision as in conflict with Bronson v. Rodes and Butler v. Horwitz, *supra*. It said that as defendant had failed to elect to pay in gold complainant had a right to insist on the terms of the contract, which were that if the payment was not made in gold it should be made in an amount of currency equivalent in value to the gold. But if the time when this value is to be determined is taken, as in the Tennessee case, to be the time of the breach of the contract, it might happen that the depreciation of legal tender notes then existing might be much greater than at the date of judgment, in which case the rule would work an injustice. It is to avoid this that the Georgia case of Atkinson v. Lanier, *supra*, adopts a different rule, as above stated.¶

We do not find that the Supreme Court of the United States had decided any case in which the effect of an alternative provision for coin or its equivalent has been presented.

c. For coin converted or misapplied.

Judgment for the amount of gold coin was allowed a guest whose satchel containing gold coin was stolen from the hotel. Kellogg v. Sweeney, 46 N. Y. 291, 17 Am. Rep. 333 (1871).

Judgment and execution for gold coin were also allowed in Independent Ins. Co. v. Thomas, 104 Mass. 192 (1870), against an insurance agent for premiums which he had collected in gold.

But in Greentree v. Rosenstock, 61 N. Y. 583 (1875), in an action against an agent for the value of gold which he had changed into currency, it was held that judgment might be rendered for the amount in currency which would be equivalent to the value of the gold.

As to a claim that the recovery should have been for gold instead of currency, the court said this view would have been correct had it not been for a stipulation by which various admissions were made. And it said: "The apparent purpose of these admissions was to authorize the referee, in case he found for the plaintiff, to order judgment for the sum named in currency. Besides, it was an admission that the defendant had the plaintiff's money in currency at the time he paid it over to the sheriff. Accordingly the plaintiff can recover it in that form. If an agent takes the gold of the principal and converts it into currency or other property, the principal is not confined to his claim for gold, but may, instead thereof, claim the currency or other property."

In a suit to recover gold coin deposited as security after its return was wrongfully refused it was held, in Gibson v. Groner, 63 N. C. 10 (1868), that the plaintiff could recover judgment for the face amount of the gold, with a sufficient amount added to make good the depreciation of the currency in which the judgment would be payable.

But this case was decided before that of Bronson v. Rodes, and the plaintiff did not ask for a recovery in coin. The court plainly regarded itself unable to order payment in any particular kind of money, and said: "In the present condition of the government and the courts, and as the process of the courts is now controlled, a plaintiff in execution can only collect currency, i. e., United States treasury notes."

d. For damages in other cases.

The validity of a judgment for coined dollars on account of a breach of contract to purchase iron is recognized in Thompson v. Butler, 95 U. S. 694, 24 L. ed. 540 (1878), in which the verdict was for $5,066.17 "in gold," but $66.17 was remitted and judgment entered for $5,000 "in coin." The question in the Supreme Court of the United States was whether or

The simple question involved in the objection is, whether there was such a variance between the declaration and the record of the California judgment as required the trial court to exclude the latter when it was offered in evidence. The declaration alleges that the plaintiff did, by the consideration and judgment of the superior court, etc., of San Francisco, recover against the defendant, in a certain action for the recovery of money, the sum of three thousand nine hundred and three dollars and forty-six cents ($3,903.46) with interest, etc., for her debt, and also the costs taxed at thirteen dollars and fifty cents ($13.50). The judgment, shown by the offered roll is a judgment ordering and adjudging that plaintiff recover against the defendant the same number of dollars with interest for her debt, which are mentioned in the declaration, and the same number of dollars for costs which are mentioned in the declaration. So far, there is an exact correspondence between the allegation and the proof. Does the fact that the judgment set out in the roll contains at the end of it the words: "And that said sum of $3,916.96 and said interest be paid in United States gold coin,"—create a fatal variance? The declaration sets forth the recovery of a judgment for so many dollars; the judgment roll shows a judgment for the recovery of the same number of dollars. The only difference between the two is, that the latter directs that such number of dollars be paid in a specified kind of money. We are inclined to think that there was no variance, and that the direction as to the payment "in United States gold coin" was mere surplusage.

Before the decision in *McGoon* v. *Shirk*, 54 Ill. 408, 5 Am. Rep. 122, this court had held that, under the Acts of Congress of February 25, 1862, and July 11, 1862, known as the "Legal Tender Acts," a note or contract for the payment of a sum of money specifically in gold could be discharged by the payment of the same sum in legal tender notes, and that,

not this judgment for coin, which was worth a premium, was for more than $5,000 so as to come within the jurisdiction, and it was held that it was not, but that the amount, and not the kind, of money determined that question.

In an admiralty case damages for collision causing the loss of goods shipped from a Canadian port was estimated at the value of the goods in that port in the currency of Canada which was equivalent in value to the gold coin of the United States. In the circuit court the decree was changed to give the value of the Canadian currency in legal tender notes. On appeal to the Supreme Court of the United States, it appeared that, by reason of the largely appreciated value of legal tender notes since the decree of the circuit court was made, the libellant, if that decree was affirmed, would receive much more than the estimated value of the property. But the court held that the decree, being right when rendered, could not be disturbed, and therefore it was affirmed. The Telegraph v. Gordon, 81 U. S. 14 Wall. 258, 20 L. ed. 807 (1872). *Mr. Chief Justice* Chase and *Justices* Clifford and Field dissented from this decision on the ground that the decree should have been made payable in coin, and that exact justice would have been secured thereby.

A person entitled to damages payable in gold may, if he chooses, with the approbation of the court take a judgment to be discharged in currency for the amount which would be the equivalent in currency of the specified amount of coin as bullion. Gregory v. Morris, 96 U. S. 619, 24 L. ed. 740 (1878).

But judgment for coin cannot be rendered in suits for unliquidated damages, where there is no contract expressly stipulating for coin. Calhoun v. Pace, 37 Tex. 454 (1872).

So judgment payable in gold coin cannot be supported in an action of tort. Livingston v. Morgan, 53 Cal. 23 (1878). This was an action for trespass on property.

The same was held in an action of slander, in Chamberlain v. Vance, 51 Cal. 75 (1875), where the words "gold coin" in a verdict were disregarded in entering judgment.

e. For obligations created by law.

In United States v. Erie R. Co., 107 U. S. 1, 27 L. ed. 385 (1883), which was an action for a tax of 5 per cent on interest paid in coin by the railroad company to foreign bond holders, it was held that as the payments were all made in pounds sterling, the computations must necessarily be on that basis, and that if there were any difference in value between coin and currency it would be proper to render the judgment for the coin or its equivalent in currency, but, as there was then no such difference, a general judgment for the amount due was all that was necessary.

A judgment for duties on imports was held in Sun Cheong-Kee v. United States, 70 U. S. 3 Wall. 320, 18 L. ed. 72 (1866), to be properly amended during the term to make it "payable in gold and silver coin for duties." It was said that this merely declared the legal effect of the judgment, as only gold and silver would be received for duties, and, although the amendment was unnecessary, it did not make the judgment invalid.

So judgment for taxes, which, by state statute, were payable only in gold and silver coin, was rendered to be payable in such, in Lane County v. Oregon, 74 U. S. 7 Wall. 71, 19 L. ed. 101 (1869).

f. For costs.

Upon entry of judgment on a promissory note payable in gold or silver, it was ordered in Phillips v. Dugan, 21 Ohio St. 466, 8 Am. Rep. 69 (1871), to be made for payment in coin, and not for currency equivalent in value, but the judgment for costs was ordered separately without any provision for payment in coin.

Judgment on a draft payable in gold, entered in Chrysler v. Renois, 43 N. Y. 209 (1870), was made payable in coin with the costs payable in currency.

The same form of judgment was adopted in Kellogg v. Sweeney, 46 N. Y. 291, 17 Am. Rep. 433 (1871), in case of a loss of coin by theft from a hotel.

In Hittson v. Davenport, 4 Colo. 169 (1878), a judgment on a note stipulating for payment in gold was amended so as to make the recovery payable in "gold dollars" and costs "in lawful money."

It was held, in Carpentier v. Atherton, 25 Cal. 564 (1864), that the judgment for costs in such a case might also be made payable in the kind of money stipulated in the contract sued upon.

That judgment "should have been entered in coin for that amount with costs" is the decision in Butler v. Horwitz, 74 U. S. 7 Wall. 258, 19 L. ed. 149 (1869), in case of a contract to pay in gold and silver. Nothing more definite is said as to the medium in which payment of costs is to be made, or to distinguish the costs from the other part of the judgment in this particular.

So in Sun Cheong-Kee v. United States, 70 U. S. 3 Wall. 320, 18 L. ed. 73 (1866), judgment for a specified

in a suit upon such a note or contract, judgment could be entered up for the amount due upon the face of the instrument, and that the value of gold over legal tender notes was not a subject for consideration in an action brought on such a note or contract. But these prior decisions were overruled in *McGoon* v. *Shirk*, *supra*, because, after their rendition, the Supreme Court of the United States decided the cases of *Bronson* v. *Rodes*, 74 U. S. 7 Wall. 229, 19 L. ed. 141, and *Butler* v. *Horwitz*, 74 U. S. 7 Wall. 258, 19 L. ed. 149, taking a contrary view; and the construction given by that court to an act of congress was, of course, binding upon this court. Accordingly, the *Bronson Case* and the *Butler Case* were followed in the *McGoon Case*. In the latter the question was, whether a note payable in terms, in American gold, and executed after the passage of the Legal Tender Act of February 25, 1862, could be discharged by a tender of United States treasury notes; and the *Bronson Case* was there construed as holding that an express contract to pay coined dollars could only be satisfied by the payment of coined dollars; and the *Butler Case* was construed as holding that, when it appears to be the clear intent of a contract that payment or satisfaction shall be made in gold and silver, damages should be assessed and judgment rendered accordingly; and, after thus construing the two federal decisions, we said in the *McGoon Case:* "The note was payable in American gold, and in that medium alone, without the consent of the payee, could it be paid and satisfied. The court erred in holding the tender of treasury notes sufficient, and a compliance with the contract, and for this error the decree must be reversed."

In *Hepburn* v. *Griswold*, 75 U. S. 8 Wall. 603, 19 L. ed. 513, the Supreme Court of the United States held that the Legal Tender Acts of 1862 and 1863, making United States notes a legal tender in payment of all debts, public and private, were unconstitutional so far as they applied to debts contracted before the passage of those acts; that, before February 25 1862, all contracts not expressly stipulating

sum "payable in gold coin for duties, with costs," was rendered without any further specification as to the costs.

These cases leave the subject of costs somewhat unsettled in respect to the kind of money in which they shall be ordered to be paid. None of the other cases have anything to say on this point.

II. *Pleadings and procedure.*

Like the case of BELFORD v. WOODWARD, nearly all the other cases on the subject have held it to be necessary to ask for gold or silver in the complaint in order to be entitled to a judgment therefor.

Thus, on a default judgment an entry for gold coin is invalid where the complaint did not pray for it and the summons did not say that such judgment would be taken. Lamping v. Hyatt, 27 Cal. 99 (1864).

That the complaint must make a case under the specific contract act, which permits a judgment in gold coin, was also decided in McComb v. Reed, 28 Cal. 281, 87 Am. Dec. 115 (1865), and an allegation of the conversion of gold into "cash" and "money" is insufficient to support such judgment.

But the mere fact that a judgment is entered by default is not sufficient to prevent making it payable in gold coin when other requisites exist. Harding v. Cowing, 28 Cal. 212 (1865).

Where no issue was raised by the pleadings in an action of contract, as to whether plaintiff's demand was payable in gold coin, and the plaintiff made no averment on that point, the words "gold coin" in a verdict are mere surplusage to be disregarded in entering judgment. Watson v. San Francisco & H. B. R. Co. 50 Cal. 523 (1875).

In case of Smith v. Peabody, it was held by *Judge* Daniels, at special term in Buffalo in 1870, that judgment for coined dollars on foreclosure of a mortgage payable only in coin would not be rendered, unless a demand for coined dollars was made in the complaint, and that to order judgment for coined dollars would exceed the relief demanded.

So in Lillie v. Sherman, 39 How. Pr. 287 (1870), it was decided by *Judge* Dwight at a special term that a motion to amend a judgment of foreclosure and sale upon a mortgage directing payment in gold would be denied, because there was no ambiguity in the terms of the decree, and the term "dollars" there used meant only dollars in legal tender money.

These two cases last named are cited and disapproved in Ransford v. Marvin, 8 Abb. Pr. N. S. 432 (1870), in which Masten, *J.*, at a special term of the Buffalo superior court, decided that a judgment for a specified number of "dollars," without specifying the kind of money in which it should be paid, could not be discharged by a tender of the specified amount in legal tender notes, where the record showed that the complaint was based upon a contract which was payable only in coin, and that the word "dollars" in the judgment meant coined dollars, and that the contract was not merged in the judgment for the purpose of determining what kind of money should be paid.

The verdict need not make a specification as to the kind of money to be paid in order to permit a judgment for gold coin in an action on a contract specifically calling for such payment, the right to which also is shown by the pleadings. Winans v. Hassey, 48 Cal. 664 (1874).

An injunction is not the proper remedy for error, if error exists, in a judgment for gold and silver coin. Windisch v. Gussett, 30 Tex. 744 (1868).

In Miller v. Tyler, 58 N. Y. 477 (1874), it does not appear that any express provision was made for payment in coin by the mortgage which was there foreclosed. But it was declared that the reconsideration of the legal tender question by the Supreme Court of the United States with a result adverse to its first judgment did not affect existing judgments of state courts. Therefore, one who had paid in coin the amount called for by a judgment of foreclosure while the first legal tender decision was in force was denied the right to recover back the amount of the premium on gold after that decision was overruled by the Supreme Court of the United States. The question arose, however, on a motion to vacate the order by which the foreclosure decree was amended, to include a provision for payment in coin, and the court held that the decision of such motion was not reviewable on appeal.

It appears from the review of the decisions that they fully support all that is said in the above case of BELFORD v. WOODWARD in respect to judgments payable in coin. The result of the authorities clearly is, that a plaintiff may have his judgment specifically provide for payment in coin if his contract or other cause of action expressly calls for such money, and he demands it in his complaint.

B. A. R.

otherwise, were in legal effect contracts for the payment of coin, and that under the constitution the parties thereto were respectively entitled to demand and bound to pay the sums due, according to their terms, in coin, notwithstanding the provision in the Legal Tender Acts making United States notes a legal tender in payment of such debts. Following the *Hepburn Case*, this court held in *Morrow* v. *Rainey*, 58 Ill. 357, and *Chamblin* v. *Blair*, Id. 385, that contracts for the payment of money, made before the passage of the Legal Tender Acts, had reference to coined money "and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin."

Subsequently the *Legal Tender Cases* (*Knox* v. *Lee* and *Parker* v. *Davis*) 79 U. S. 12 Wall. 457, 20 L. ed. 287, overruled the case of *Hepburn* v. *Griswold*, *supra*, so far as it held the legal tender acts to be unconstitutional as applied to contracts made before the passage of those acts; and, by consequence, the decisions in 58 Ill., also so holding, were rendered nugatory as authorities upon that point. The *Legal Tender Cases*, 79 U. S. 12 Wall. 457, 20 L. ed. 287, held that the legal tender acts were constitutional as applied to contracts made before, as well as to contracts made after, the passage of those acts; but we do not understand that the decision of the *Legal Tender Cases*, so called, overruled the cases of *Bronson* v. *Rodes* and *Butler* v. *Horwitz*. The *Legal Tender Cases* decided that contracts payable in money, whether made before or after the passage of the legal tender acts, could be discharged by the tender of United States treasury notes, popularly known as "greenbacks;" but they did not decide that contracts specifically payable in gold and silver coin could not be enforced as such. It was only contracts payable in money generally, without specifying gold and silver coin, which were therein referred to. The decision in those cases recognizes two kinds of money as legal tender in the payment of debts, first, gold and silver coin, second, treasury notes made legal tender by act of congress. It was therein held that all debts, which the contract of the parties did not make payable in coin, could be discharged in legal tender notes, but the right to make and enforce contracts for payment in coin was not denied. *Mr. Justice* Strong, who wrote the opinion in the *Legal Tender Cases*, expressly says: "We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money."

The case of *Bronson* v. *Rodes*, *supra*, is recognized as authority in *Trebilcock* v. *Wilson*, 79 U. S. 12 Wall. 687, 20 L. ed. 460, decided a year after the *Legal Tender Cases* were decided. In *Trebilcock* v. *Wilson*, the question arose, whether a note payable by its terms in specie could be satisfied, against the will of the holder, by the tender of notes of the United States declared by the Act of February 25, 1862, to be a legal tender in payment of debts, and it was there held that the use of the term "in specie" did not assimilate the note to a note payable in chattels, but that those words were descriptive of the kind of dollars in which the note was payable, "there being different kinds in circulation, recognized by law;" and, after stating the meaning of the words, "in specie," to be "that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States," the court says: "This being the meaning of the term 'in specie,' the case is brought directly within the decision of *Bronson* v. *Rodes*, where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts. The several coinage acts of congress make the gold and silver coins of the United States a legal tender in all payments, according to their nominal or declared values. . . . As the Act of 1862 . . . has been sustained by the recent decision of this court (79 U. S. 12 Wall. 457, 20 L. ed. 287), as valid and constitutional, we have, according to that decision, two kinds of money, essentially different in their nature, but equally lawful. It follows, from that decision, that contracts payable in either or for the possession of either, must be equally lawful and, if lawful, must be equally capable of enforcement. . . . We shall find little difficulty in holding that it (the Act of 1862) was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie; and that when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally. . . . The 20th section of the Act of 1792 . . . has reference to the coins prescribed by the act, and when, by the creation of a paper currency, another kind of money, expressed by similar designations, was sanctioned by law and made a tender in payment of debts, it was necessary, as stated in *Bronson* v. *Rodes*, to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought." Accordingly, in the *Trebilcock Case*, the judgment of the supreme court of Iowa, holding that a tender of greenbacks or United States legal tender notes in payment of the note payable in specie was legal and sufficient, was reversed.

Still later, in *Gregory* v. *Morris*, 96 U. S. 619, 24 L. ed. 740, the Supreme Court of the United States again recognized the case of *Bronson* v. *Rodes*, and referred to it as holding that a contract for the payment of gold coin is "an agreement to deliver a certain weight of standard gold, to be ascertained by a count of coins, each of which is certified to contain a definite proportion of that weight," and that judgment may be rendered upon such a contract payable in coined dollars; and it was held in the *Gregory Case* that an instruction, telling the jury that "no agreement or contract to pay a certain number of dollars in gold can be enforced," was properly refused as being in conflict with *Bronson* v. *Rodes*.

Hence, any language used in *Reinback* v. *Crabtree*, 77 Ill. 182, which can be construed as holding that a contract payable in gold may be paid at the option of the debtor, and against the will of the creditor, in any currency which the general government has declared to be a

legal tender in the payment of debts, must be regarded as being in conflict with the federal decisions, and is not binding as authority. Such language was used inadvertently, and was in conflict with the case of *McGoon* v. *Shirk*, *supra*, which was evidently overlooked.

We conclude that "express contracts to pay coined dollars," where creditors insist upon their enforcement, "can be satisfied only by the tender of payment of coined dollars, and judgments in suits brought on such contracts may be entered for coined dollars and parts of coined dollars, such contracts not being within the Legal Tender Acts." 15 Am. & Eng. Encyclop. Law, p. 705, and cases in *notes;* 1 Freem. Judgm. 4th ed. § 8, and cases in *notes.*

But it is only where the contract calls for the payment of the debt in gold coin that the judgment should be rendered for coined dollars. In the case at bar, it appears, from a reference to the judgment roll of the California court, where the complaint in the action is set out in full, that the notes, upon which the suit was brought in the California court, are described as notes for the payment of so many dollars, and not as notes for the payment of so many dollars in "United States gold coin." The judgment, by the use of the words, "and that said sum of $3,916.98 and said interest be paid in United States gold coin," goes beyond, and is not authorized by, the allegations of the complaint in regard to the terms of the note. The judgment is complete in itself without the added words as to the mode of payment; because it is therein adjudged that plaintiff do have and recover of and from the defendant the sum of $3,903.46 with interest, etc., together with costs, etc., amounting to the sum of $13.50, before the added words are reached. Their omission would detract nothing from the sufficiency of the judgment.

In *Watson* v. *San Francisco & H. B. R. Co.*, 50 Cal. 523, the verdict and judgment were for gold coin; there was no allegation in the complaint warranting a recovery in gold coin; the Code of Civil Procedure in California requires the judgment to conform to the verdict; and the supreme court of California there held that, "if the verdict goes beyond the issues raised by the pleadings, and passes upon an extraneous fact not embraced therein, it is void *pro tanto*, and the surplus matter may be disregarded in entering the judgment." The court in that case proceeds to say: "In this case there was no issue as to whether plaintiff's demand was payable in gold coin, and the complaint contains no averment on that point. The words 'gold coin' in the verdict are, therefore, mere surplusage, and should have been disregarded in entering the judgment." To the same effect is *Chamberlin* v. *Vance*, 51 Cal. 75.

This ruling is applicable here, as the judgment sued upon was rendered in California. It is manifest that the judgment sued upon, being a judgment by default, went beyond the issue raised by the complaint in ordering the judgment to be paid in gold coin, and to that extent is void. The defendant below made this very objection to the admission of the judgment roll. The record shows that he objected to its admission upon the following ground, among others: "That the said judgment roll shows a void judgment in this, that the judgment therein shown appears to have been rendered by default in an action where the complaint of the plaintiff showed no promise or undertaking of the defendant to pay any sum in gold coin, but, notwithstanding this fact, judgment was entered therein for a sum of money payable in gold coin." We think that the objection was valid as to that part of the judgment which directs payment to be made in gold coin, but not as to the whole judgment.

A judgment of a court of another state, adjudicating a matter not presented by the pleadings or within the issue, is void even in a collateral proceeding. *Reynolds* v. *Stockton*, 48 N. J. Eq. 211. If the whole judgment is void when all the matters adjudicated by it are outside of the issue, then, when two matters adjudicated upon by a judgment are shown upon the face of the judgment record to be easily and naturally separable, and one of them to be within the jurisdiction of the court, and the other to be beyond its jurisdiction, the judgment may be held to be valid as to the former matter, and void as to the latter. In such case, the judgment will be sustained so far as it adjudges what the court has the power to adjudge as being within the issue, and will be void so far as it attempts to adjudicate upon what is beyond its power as being outside of the issue. This principle was applied in the late case of *People* v. *Seelye*, 146 Ill. 189, where the judgment of a probate court, approving the account of a guardian which appeared in the record to be a part of the judgment itself, was sustained in a collateral proceeding as to a part of the items of the account which the court had the power to pass upon, but was held to be void as to the items which were beyond the jurisdiction of the court.

The judgment sued upon in the present action being void only as to the last clause, which directs the mode of payment, and being valid as to that portion of it which adjudges that the plaintiff should recover the sum of so many dollars generally, it follows that there was no such variance as is insisted upon, because the declaration correctly declares upon the valid portion of the judgment according to its legal effect.

It is difficult to see how the defendant below could have been injured by the action of the court in admitting the judgment roll from California. In this action of debt upon the California judgment, the trial court rendered judgment against defendant for the sum of a certain number of dollars without any direction that it be paid in any particular kind of money. The defendant has not been required to pay the judgment in United States gold coin. The judgment against him being a judgment for the payment of dollars generally, he can discharge it in either one of the two lawful kinds of money, that is to say, either by paying gold and silver coin, or by paying legal tender notes. The plaintiff, by taking a judgment payable in dollars generally, has waived his right to insist upon payment "in United States gold coin."

Counsel for plaintiff in error claim that a judgment is a contract. Some courts have

held that a judgment is a contract, and others have held that it is not a contract. 1 Freem. Judgm. § 4; 1 Black, Judgm. §§ 7–11. The doctrine of this court is that a judgment is not a contract. *Williams* v. *Waldo*, 4 Ill. 264; *Rae* v. *Hulbert*, 17 Ill. 572; 1 Black, Judgm. § 10, and *notes*. But, even if the judgment here sued upon be a contract, we see no reason why the party seeking to enforce it may not waive the provision requiring payment to be made in gold coin, and give the debtor the privilege of paying in any kind of money which is legal tender under the acts of congress. The authorities hold that contracts payable in gold coin must be satisfied in that medium unless another mode of satisfaction meets with the consent of the creditor. With his consent they may be satisfied in legal tender notes. The prohibition against the satisfaction of a contract payable in gold coin by the payment of any other medium than gold coin only applies where the satisfaction in another medium than that of gold coin is against the will of the creditor. If the creditor does not choose to take a judgment payable in coined dollars, the debtor is not injured, as then he may pay in either coined dollars or legal tender notes.

Counsel for plaintiff in error invokes the well-settled rule, that debt will not lie on any obligation except one for the payment of a sum specifically certain, and insists that the clause as to payment in United States gold coin does not call for the payment of money or a sum certain, but for the payment of an unliquidated amount to be determined according to the fluctuations of the gold market. Even if the clause in question be regarded as a valid part of the judgment, we are unable to agree with counsel upon this point. We regard an obligation to pay "in United States gold coin" as an obligation to pay in money, or an agreement to deliver a certain weight of standard gold ascertainable by count of coins made legal tender by statute. A contract for the payment of so many dollars in gold and silver is a contract for the direct payment of money, and the judgment in a suit thereon should be entered for coined dollars and parts of dollars when such is the will of the creditor. *Hart* v. *Flynn*, 8 Dana, 191; *Dewing* v. *Sears*, 78 U. S. 11 Wall. 379, 20 L. ed. 189. We do not regard the case of *Mix* v. *Nettleton*, 29 Ill. 245, where it was held that an action of debt would not lie upon a due bill for so many dollars payable in county orders, as having any application here.

It is claimed that the judgment here is for too large an amount. The judgment in the circuit court was for $3,916.96 debt and $280 damages or interest. In the appellate court the defendant in error remitted $6, and judgment there should have been entered for $3,916.96 debt and $274 damages, but, as matter of fact, the clerk entered up judgment affirming the judgment of the circuit court for $3,916.96 debt and $275 damages, the latter amount being too large by one dollar. There was here what was clearly a clerical mistake in putting the figures $275 instead of $274. As the judgment of the appellate court shows upon its face that the defendant "remitted the sum of $6 from the judgment entered in the lower court," and as the record of the lower court is before us showing that the judgment for damages there was $280, there is that in the record and upon the face of the judgment itself by which the latter can be amended, and the mistake of the clerk rectified. We are inclined to think, therefore, that we have the power to correct the judgment of the appellate court in the respect thus indicated. It is accordingly so ordered.

The judgment of the Appellate Court will be affirmed for $3,916.96 debt and $274 damages, and costs.

PENNSYLVANIA SUPREME COURT.

City of PHILADELPHIA, *Appt.*,
v.
OVERSEERS OF PUBLIC SCHOOLS.

(170 Pa. 257.)

A school is not a purely public charity, so that the property used for it is exempt from taxation, when conducted by a master as a business enterprise, under a contract by which he pays one eighth of the gross receipts from tuition to the corporation owning the property, and receives tuition for all pupils, although the corporation, which was organized to conduct a school for the rich at reasonable rates, and for the poor gratuitously, itself pays the tuition of a small part of the pupils out of income received from endowments and legacies.

(October 7, 1895.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas No. 3 for Philadelphia County in favor of defendant in an action brought to enforce payment of taxes. *Reversed.*

The conclusions of the referee, Mr. J. Levering Jones, were as follows:

The William Penn Charter School is an academy or institution of learning, founded, endowed, and maintained by public or private charity, and is therefore, so far as the buildings situate at Nos. 8 and 12 South Twelfth street, and the land annexed thereto, necessary for the enjoyment of said buildings, exempt from taxation by the city of Philadelphia.

The exemption from taxation of a public educational institution sustained subsequently by charitable gifts, rests upon two grounds:

1. The relief that is afforded the state in the reduction of the burden imposed upon it in the education of its youth;

2. An acknowledgment of that generous spirit of humanity, that, speaking from the heart, gives something for the benefit or good

NOTE.—As to the effect of using property of an educational institution for revenue, upon its right to exemption from taxation, see *note* to Book Agents of Methodist Episcopal Church, South, v. Hinton (Tenn.) 19 L. R. A. 289.

See also 30 L. R. A. 232; 38 L. R. A. 591; 40 L. R. A. 119; 43 L. R. A. 490.

of the public, not contaminated by the expectation of pecuniary returns.

The latter ground, however, is the fundamental one, and upon it the doctrine of exemption really rests.

A private school supported by private means, having no public object in view, but conducted solely for the advantage and convenience of those in control, or those availing themselves of the instruction given, may relieve the local government of some of the expenses incidental to the education of its children, but, the essential quality of charity being absent from their creation and maintenance, they are properly subjects of taxation.

The founder of the William Penn Charter School had as his primary thought the education of those children whose parents were unable to pay for their tuition. An advocate of educating the youth of all classes, it was to the poor that his attention was in this instance particularly directed. The terms of his grant fully indicate this, for he says, "those unable to pay for tuition are to be educated gratis, and the rich at reasonable rates." He wisely provided for the support of the school to be derived from gifts and legacies, and by those possessing wealth whose children should attend it for instruction. The main purpose of his plan has been a permanent and continuing influence in the career of the school. The services rendered by its managers, the endowments it has received, and the manner in which it has been conducted, have all been expressive of the original aim.

Now the William Penn Charter School rests upon a charitable foundation. This is evident from the study of its charter.

It has been endowed by charitable gifts and bequests, and has always been maintained by public or private charity. It is true its imposing corps of teachers, providing a comprehensive course of study, are not directly paid by endowments to the school, interest arising out of trusts or from annual contributions, but the school property used entirely for school and not for residential purposes arose out of the investment of a charitable fund, which has been managed and nursed, and added to by men who have received no compensation, and sought no personal gain.

For over a century this school flourished modestly, the result of its work scarcely noticed because its funds were not large and its field of labor limited. To increase the capacity of the school, draw public attention to it, and widen its scope of action, its overseers adopted a new business policy, determined to construct a new building, and pay the head master practically in proportion to the numerical increase in the number of pupils. The corporation was fortunate in securing the services of a remarkably able organizer, and after a courageous struggle for a few years against many disadvantages, they succeeded in giving the school the highest repute and securing for those taught free of personal charge an education semi-collegiate in character. To attain this result a considerable number of pupils are charged a fee for tuition. Does this circumstance make the property directly in use for school purposes taxable? In our judgment it does not.

With the endowments already enjoyed, the overseers could have purchased an insignificant building, pursued the conservative course that guided the schools for many years, and with two or three teachers taught the primary branches gratis to the number of pupils that are now so liberally educated. This course of conduct would, beyond question, have exempted the specific property under consideration from taxation.

Now, has anything been done to destroy the charitable characteristics of this excellent school? Has not its public work been widened, and is it not governed by a wiser judgment than heretofore? Is its service to humanity not increasing? Does the corporation of its overseers derive any benefit from the tuition fees?

It is true that the charitable funds of the school are somewhat increased through a small surplus which comes from pay scholars, but the sum is insignificant in comparison with the actual amount appropriated by the officers from the trust funds for the education of what are termed "free pupils," and it does not destroy or limit the charity because this sum is used in the enlargement of the charitable work and is of no pecuniary advantage to any one.

The fees received from the stockholders of the Philadelphia library more than pay those employed in its service, but the circumstance that there is a balance annually invested for the use of the library, and the purchase of new publications, does not make the library less an institution relieved from taxation.

Nor does the form of contract which has been made with the head master in any way affect the charitable purpose of the institution. With this private contract made for the advantage of the institution, unproductive to any of the trustees, not limiting the public benefits of the institution, the city has nothing to do; no more than it would have with the salary of the pastor of a church or the terms upon which a professor of the University of Pennsylvania delivered lectures to the students. An express or implied contract generally exists in all charitable institutions between the governing body and those who render services to the institution. The contract which was made between the overseers of the William Penn Charter School and its head master is but an agreed mode of payment for the work he performs, and which, at the end of sixteen years, has given him no more than adequate compensation, while it has resulted fortunately for the school, increasing its usefulness and securing, probably better results than if there had been only a fixed sum paid to him. It is but an increasing scale of compensation, dependent upon what he achieves. Is a church less a charitable organization because it pays its pastor the first year of his pastorate $1,000 and the tenth year $10,000, assuming in advance his ability to build up the congregation and basing the estimate of what he should receive from the expectation of the increased number of communicants?

The contract made with the head master, being valid, and in no way against public policy, or affecting the charitable aim of the

overseers in their management of the school, does not impair or reduce its charitable or public features.

The circumstance that the mere income from the fees of students is much larger than the income which arises from the charitable donations which have been given at various times for the support and maintenance of the school, does not affect the character of the foundation or the object of the institution, for the overseers are uncompensated, and give their time and services, working out directly the charitable aims of the founder.

Nor does the fact that the charitable investment is not a large one change the charitable character of the school. The gift of the widow's mite was as deep an act of charity as the princely endowment of Girard. The meaning of the act of assembly is not to be measured by the amount of the benefaction, but the motive and purpose attached to it, and by the management of the fund arising from it.

As the test of a charity is not the sum involved, so the test is not whether at a particular time there are ten or one hundred beneficiaries. The College of La Fayette with a dozen matriculants taught free of tuition fees is as much a charity as if a thousand thronged its class rooms, taught without compensation. So with the William Penn Charter School. It has not a large body of free students attending it, but it is striving to increase the number. Its facilities for the education of those unable to pay for tuition is increasing. In a few years the corporation will be free of debt, and its entire income can then be applied, not partially to the maintenance of its buildings, but entirely to the education of free pupils.

Nor does the small increase that occasionally comes to its funds from the fees of scholars, paid by the head master, beyond the cost of their tuition, make it an institution conducting business for profit.

If its trustees devoted the income from the property possessed by them to the maintenance exclusively of the school building, where should be annually taught a few students by a single teacher paid for his services from the trust fund, no one would question the charitable nature of the work being performed. When the scope of the school is enlarged, and its facilities are extended to many who pay for tuition, the sole purpose of giving such tuition for fees being to increase its facilities to those unable to give compensation for tuition, the charitable nature of the school is unaffected.

The whole result of the business management of the William Penn Charter School has been the creation by the methods adopted of a splendid equipment for educational work, and the acquisition of that equipment for the direct use of every free scholar in the school.

It is an institution instinct with public spirit, which Sir James MacIntosh says is the highest defensive principle in a state. That is the force governing its overseers. With the charitable capital it has it is achieving much. Its aim to accomplish more in the direction of public good is evident, and if the wisdom and vigor now displayed in its management continue, the result is not uncertain.

It is unnecessary to make a comparison of the numerous decisions which have been rendered in Pennsylvania interpretive of Act of May 14, 1874, relating to educational institutions exempt from taxation. All that we have herein observed is, we think, in accord with the rules which have been laid down by our supreme court in the following cases which will be briefly examined.

In *Donohugh* v. *Library Co. of Philadelphia*, 86 Pa. 307, the library company of Philadelphia was assessed for the purposes of taxation. It appeared that the property of the library company consisted of its buildings and books acquired by gift and bequest, that the corporation was composed of members, and was maintained by their annual contributions, from the income derived from such property as had been given to it, and from fees paid for the use of books by persons not members. No dividends have ever been paid, but the entire income has been dedicated to the expenses and the purchase of books. The court held that such an institution is a purely public charity within the meaning of the constitution, that it was not administered for private gain, that it was not confined to privileged individuals, but was open to the indefinite public. The supreme court in that case substantially adopts the opinion, written in the lower court by Mitchell, *J.*, and it may be well to quote the language that he uses, as illustrative of some of the elements which enter into a charity in a case where it is partly sustained by fees received from its beneficiaries. He says: "The library is a trust, and while it is the property of the corporation, and therefore in a certain sense of the corporate stockholders, yet it is not their property in any full, legal or commercial sense. They cannot sell it and divide the proceeds among themselves as individuals—that would be a violation of the trust, which a court of equity would be bound at once to restrain. Being then a trust, its purpose and scope must be looked for in the grant. It is not a question of how the revenue is derived, but to what purpose and with what intent is it devoted. The purpose of this trust is clearly set forth in the charter; it is 'to erect a library for the advancement of knowledge and literature in the city of Philadelphia,' and we fail to discover in it any taint of private profit."

In *Philadelphia* v. *Women's Christian Asso.*, 125 Pa. 572, it appeared that the Women's Christian Association was chartered by an act of assembly approved May 9, 1871; that its object is the temporal, moral, and religious welfare of women; that it is located in Philadelphia, where it has a boarding department, a home for young women, an employment bureau, a restaurant, a lecture room, and a free library; that the house and lot cost $70,000, a part of which was the proceeds of a sale of the property in which the association was formerly located, which was purchased by money previously given by the public and friends, and that there is a mortgage on the premises of $36,000; that there is no stock in the association, and none of the corporate officers receive any salary or compensation; that food and lodging are furnished to women who are dependent on themselves for support, and who do not receive more than $6 a week wages; that they pay the association a certain amount of board per week, and if unable to

pay, and if there is any vacancy, are taken free of expense, but are required to present themselves at the employment bureau in order to obtain employment. In 1885 the expenses were $2,641.95 in excess of the receipts. The defendant association was assessed for the purposes of taxation by the city of Philadelphia. Paxson, *Ch. J.*, in the opinion of the court, says: "The object of the association is to improve the temporal, moral, and religious welfare of young females who are obliged to earn their own support, and that as a means to this end, it furnishes them with food and lodging, not as paupers, but for a compensation which, while it does not compensate, aids in defraying the expenses, and thus preserves the self-respect of the recipients, while to others who are unable to pay, temporary shelter is furnished free, and aid extended to them in the way of procuring employment. All this and much more is done by a band of devoted women who labor unselfishly, in season and out of season, giving their time and labor freely, and supplying the annual deficit in the treasury by contributions from themselves and their friends. There is no element of gain in the object or operations of this association. It is a public charity, and I regard it as a short-sighted policy in the city of Philadelphia to seek to burden such an institution with taxation."

After reviewing several decisions in this state in which various institutions had been held not to be public charities, he distinguishes them by saying: "Nor was its charitable character, in either of the cases, so stamped upon the institution itself, upon its organic law, that the mode of administering it might not have been changed at any time." And continuing: "In the case in hand the stamp of charity is indelibly fixed upon the association. It appears in its charter, and is developed at every stage of the proceedings. Does the mere fact that it charges a small sum to a portion of those who feed at its table and enjoy the shelter of its roof, destroy its character as a purely public charity? . . . This whole subject was carefully considered in *Donohugh's App.*, 86 Pa. 306. This was the case of the Philadelphia library, an institution maintained by the annual contributions of members, from the income derived from such property as has been given to it, and from fees paid for the use of the books. The test in that case was the object of the corporation. That was found to be the general public good, and not private gain."

The liberal disposition of the court in determining the law is further revealed in *Northampton County* v. *Lafayette College*, 128 Pa. 132, where it was held that buildings owned by an incorporated college located on the college grounds and occupied as residences by persons employed in carrying on the proper work of the institution—such as instructors, the secretary of the president, or the gardener having charge of the property—are embraced in the exemption from taxation granted to the college under the Act of May 14, 1874.

In that case it appeared that $13,000 per annum was paid by students for their expenses and tuition, and helped to sustain the institution, but that there was a considerable number of free pupils; that no person could be refused admission to its faculty or classes, or from participation in any of its privileges and advantages on account of religious belief.

In *Episcopal Academy* v. *Philadelphia*, 150 Pa. 572, the facts of the case were almost analogous to those found in the present instance. In that case the school was incorporated by the Act of March 9, 1787, which act provided that "it is right and proper to afford all due encouragement to the education of youth and to the establishment of useful seminaries of learning within this state," and that there shall be established an academy for the education of youth in useful branches of learning. The school was thereupon subsequently opened, and land appropriated by the state to the trustees for the uses of the school. Its "fundamental laws" provided that there should be a selection of trustees and head master, and, further, "that a convenient number of youths should be taught gratis as soon as the funds shall appear to afford it. In the meantime it shall be kept in view as the object of the institution that all gifts or other bequests for this special purpose shall be kept in a fund to be applied to no other purpose whatever. In 1840 the trustees secured a lot at Locust and Juniper streets, and a large school was subsequently established. The academy is maintained from the income and property given to and purchased by it, and from fees and tuition. No rent is charged. All receipts and income, after defraying the expenses, are applied to increasing the number of free scholars, which has ranged from sixteen to twenty. The premises have never been used for any purpose yielding any income or pecuniary profit to any one. The court in this case seemed to advance distinctly a step beyond any previously taken by them in previous decisions. *Mr. Justice* Williams says: "Whatever is gratuitously done or given in relief of the public burdens, or for the advancement of the public good, is a public charity. In every such case as the public is the beneficiary the charity is a public charity. . . . The property given to the school is so used that, by its use for the purposes contemplated by the givers, the charity is made to support itself. It is not a business organization, conducted for profit, but a charity, conducted with a view to furnish education at its actual cost to a great number of youth who otherwise might be required to pay more for it or forego it altogether. Such was the situation in *Philadelphia* v. *Women's Christian Asso.*, 125 Pa. 572. In that case it was said that the character of the association as a charity was not destroyed if to some extent it received a revenue from the recipients of its bounty. We are now disposed to go further, and say that an institution that is in its nature and purposes a purely public charity does not lose its character as such under the tax laws if it receives a revenue from the recipients of its bounty sufficient to keep it in operation. It must not go beyond self-support. When a charity embarks in business for profit it is liable to taxation like any other business establishment; but so long as the trustees of the school manage it as a charity, giving the benefit of what might otherwise be profit to the reduction of tuition fees or the increase of the

number of free scholars in furtherance of the 'education of youth,' the corpus of the trust, the schoolhouse, is entitled to exemption."

This decision seems conclusive as applicable to the case under consideration. Were it not for the application of the trust funds to the maintenance of the William Penn Charter School it is doubtful if it could exist, and in order to maintain it, and admit the free pupils that therein received instruction, it has been necessary to expend of these trust funds during the last sixteen years an aggregate sum of over $76,000.

The process of the development of the law to the conclusions finally reached has been natural and inevitable, and a test has been laid down in the last-cited case so clearly expressed as to constitute a valuable rule to apply in the future to determine what educational institutions are exempt from taxation.

It may now be said that educational institutions of a distinctly non-sectarian character, conducted solely for the benefit of the public without any element of private gain, relieving the state from taxation and extending knowledge to some who otherwise would not be able to obtain it, are institutions of a purely charitable nature, and exempt from taxation.

An institution of learning like the William Penn Charter School should be encouraged. It is an honor to the state, an example of local philanthropy, and tends to reduce taxation, not to increase it. There a number of meritorious youth are annually taught without compensation. The trust funds of the institution are applied to a beneficent purpose, and the internal organization is maintained by the gratuitous labor of its trustees. No word of adverse criticism can be uttered against its administration by sectarian or layman. Conceived by a large and generous mind,—the founder of our commonwealth,—its aims and its services to the community are entitled to continued municipal recognition and protection. Heretofore relieved of taxation, the exemption should remain as to that portion of its property actually occupied for educational purposes.

I therefore find, under the facts and the law, that the William Penn Charter School, as to the property belonging to it, situate on the west side of Twelfth street, at the distance of 106 feet south of Market street, containing in front 58 feet and extending in depth 132 feet, with the buildings thereon, is exempt from taxation, and so award.

Messrs. **Charles F. Warwick,** *City Solicitor*, and **E. Spencer Miller,** and **Isaac H. Shields,** *Assistant City Solicitors*, for appellant:

Corporate profit excludes the application of the Act of May 14, 1874, as effectually as does individual realization of profit.

Philadelphia v. *Barber*, 160 Pa. 123.

Messrs. **James Wilson Bayard, Frank P. Pritchard,** and **John G. Johnson,** for appellee:

It is not proper to exclude the cost of the real estate and plant in estimating whether an income was produced.

Philadelphia v. *Pennsylvania Hospital for the Insane*, 154 Pa. 9.

But that is not and cannot be the test.

A charity is no less a charity because it makes a charge to the recipients of its bounty.

Donohugh's App. 86 Pa. 306; *Northampton County* v. *Lafayette College*, 128 Pa. 147; *Philadelphia* v. *Women's Christian Asso.* 125 Pa. 572; *Episcopal Academy* v. *Philadelphia*, 150 Pa. 565.

The Act of May 14, 1874, provided that "all hospitals, universities, colleges, seminaries, academies, associations, and institutions of learning, benevolence, or charity, with the grounds thereto annexed and necessary for the occupancy and enjoyment of the same, founded, endowed, and maintained by public charity, . . . be and the same are hereby exempted from all and every county, city, borough, bounty, road, school, and poor tax."

This Act is constitutional.

Donohugh's App. 86 Pa. 306; *Burd Orphan Asylum* v. *School Dist. of Upper Darby*, 90 Pa. 21.

1. This institution was founded as a charity.

2. This institution has been endowed as a charity.

3. This institution is maintained as a charity.

The test of "maintenance by charity" is not the source of the income of the institution nor the proportion which the income from charitable sources bears in its expenditures to the payments received by it from its beneficiaries.

Donohugh's App. supra; Miller's App. 10 W. N. C. 168; *Northampton County* v. *Lafayette College*, 128 Pa. 147; *Philadelphia* v. *Women's Christian Asso.* 125 Pa. 572.

Nor can the purpose for which the funds of the institution are expended at any particular time be the test.

Philadelphia v. *Women's Christian Asso.* and *Miller's App. supra; Thiel College* v. *Mercer County*, 101 Pa. 530.

The fact that the number of those who can at any time enjoy the benefit of the charity is limited, is immaterial.

Burd Orphan Asylum v. *School Dist. of Upper Darby, supra.*

The true test to determine whether an institution "founded and endowed" by charity continues to be "maintained" by it, is whether the governing body of the institution still derives its power from the original charitable foundation and endowment, and is carrying on the institution in pursuance of the original scheme.

Where it does not clearly appear from the charter that the institution is, by its organic law, a charity, its history and practice may be inquired into for the purpose of determining its character, and, in that event, the source of its income becomes, like any other piece of evidence, a matter for consideration.

Hunter's App. 22 W. N. C. 361; *Philadelphia* v. *Women's Christian Asso.* 125 Pa. 572; *Episcopal Academy* v. *Philadelphia*, 150 Pa. 565.

When, however, the institution is, by its organic law, a charity, and when it continues to be carried on by the instrumentality devised by the original donors for the purpose, and by authority of the original charter and without any purpose of private gain, it is impossible to say that it is not maintained by charity.

Dean, J., delivered the opinion of the court:

The city of Philadelphia sought to enforce a lien for registered taxes against lots 8 and 10, on west side of Twelfth street, south of Market, having thereon erected two three-story brick buildings, used for school purposes. The property is owned by the defendant, a very ancient corporation, dating its original grants back to William Penn. These grants, of 1701, 1708, and 1711 defined the object of them to be the establishment and maintenance of a public school, wherein the children of the rich might be educated at reasonable rates, and the poor gratuitously; the school to be under the care and management of a board of overseers. The school was kept up from the date of its foundation until the year 1874, when it had run down to very few pupils. The corporation at this time having an income from investments, these, to a considerable amount, were put into the present property, and additional money borrowed on mortgage. The present lots and buildings represent a total cost of $75,721.12. In 1874 the overseers made a contract with Richard M. Jones, as head master, which stipulated the corporation would furnish the buildings, furniture, school apparatus, fuel, and repairs, while it should receive one eighth of the gross receipts for tuition, including in this estimate the tuition fees of such poor children as were educated gratuitously at the expense of the corporation; the head master to receive seven eighths of all the receipts, and pay thereout the salaries of all subordinate teachers; the teachers selected to be subject to the approval of the overseers. It was further guaranteed, the head master's compensation should not be less than $2,000; if, in any year, there was a deficiency, it should be made up from the funds of the corporation. The overseers receive no compensation for their time or services. Bequests and legacies, since the school was established, have been made to it, from which it derived an annual average income of about $3,800. Under the management of head master Jones, the school has enjoyed almost phenomenal prosperity. Soon after he took charge, in 1876, the number of pupils was fifty-two. Of these, forty-one were paying students, and eleven free. Six years afterwards they numbered 135, of whom twenty were free. In 1892 the number reached 359, of whom sixteen were free. The amount received from pay scholars this year is not given, probably because at the date of the hearing the accounts for that year had not been summarized; but in the year previous (1891), when the whole number was 300, of whom fifteen were free, the receipts from pay scholars, for tuition alone, were $48,606.35. In addition to this there was a moderate profit on books and stationery furnished; also, on refectory charges and diploma fees. Master Jones' portion of the receipts for this year was, net, $12,633.55, and the balance in favor of the overseers was $2,406.24. There having been an increase of forty-three pay scholars and one free scholar the following year, the share of the head master must have been considerably greater.

There is no doubt the institution, in its foundation, was, so far as pupils were taught free, a charity school, and although its operations prior to 1874 and 1875 are not shown, probably, up to that time, it was carried on as originally founded. But at that date, the undisputed testimony is, it was incapable of survival on its ancient foundation and methods of management. It had but seventeen free pupils to be educated from a fund worth probably more than $60,000. Obviously, in a large city like Philadelphia, neither the benevolent intentions of the founder, nor the desires of those who had charge of the school, were being accomplished. The results were in no way commensurate with the scope of the project, nor even with the means provided for carrying it out. This, evidently, was the alternative which then presented itself to the overseers: The school must be put on a paying basis, or must stop. Although this conclusion is not distinctly stated in these words by any witness, a fair consideration of the testimony of head master Jones, overseers Thomas Wister Brown, James Whitall, and clerk Edward Bettle shows that it was practically the one at which they arrived, and doubtless, too, a correct one. They then, instead of persisting in the old way, which at best gave a sickly existence to a small school, wisely resolved to adopt a new plan, which would make it self-supporting, greatly increase the number of pupils, and thereby enlarge its usefulness. A new location for the school was adopted; larger and more commodious buildings erected. A contract was made, as the event showed, with a most capable head master. His energy and efficiency were stimulated by a provision whereby his money receipts, in a large degree, depended on the success of the school. In other words, the school was to be made to pay, and it did pay. But, by the new method, was there any promotion of the charity element, which was one of the two objects of the founder? When master Jones, in 1874, first took charge, there were seventeen boys in the school. There are now 360. But the number of free scholars was, in some years, less than the original seventeen. The highest number in any one year was twenty-six; the last and most prosperous year, only sixteen. As enjoined by the charter, children were to be "admitted, taught, and instructed, the rich at reasonable rates, and the poor to be maintained and schooled for nothing." The rates paid by those able to pay, or the "rich," in 1876, the second year, amounted to $5,410.17. Fifteen years afterwards, in 1891, the same class of patrons paid $54,880.98. As a result of this progress, we look to see the corresponding benefit to the poor, who were to be taught for nothing, and we find, in the first-mentioned year, eleven pupils of this class were taught in the last-named year, fifteen, an increase of but four. The income has increased about 1,000 per cent; the free scholars, not 30 per cent. Success has not been in the line of the charity, but in the building up of a live, efficient school for those able to pay.

It seems to us, this school is a business enterprise. That the benefit from its success is

largely gathered from those whom the founder termed the "rich," and by the head master, Mr. Jones, instead of by the corporation, is significant of its character. He receives seven eighths of the income; the corporation, one eighth,—the latter furnishing the building, fuel, and lights. For tuition of the free scholars it pays, at fixed rates, out of its income raised from the foundation, endowments, and legacies. In substance, the corporation leases its property to master Jones for one eighth of the gross receipts from all the pupils for tuition. If the corporation contracted with a private school for the tuition of ten or fifteen pupils annually, and paid this out of the income from the charity funds, or from the rents of real estate in which the funds were invested, such private school would not, as an institution of purely public charity, be exempt from taxation. When lots are purchased and buildings erected, and these, practically, let as an educational venture, for a rental equal to one eighth of the gross receipts, to an individual, the corporation paying to him, from the charity fund, tuition fees for the instruction of the free pupils, certainly the property is not a purely public charity. The school thus established and carried on has not the elements of a public charity. It is a purely educational enterprise under the control of, and carried on by, an individual in direct competition with other private schools which last are rigorously taxed. The head master does not want pupils who do not pay their rates. He admits none who do not. The small number who do not themselves pay are paid for by the corporation.

We have no word of dissent from the entirely commendable sentiment of the learned referee, approved by the court below, when he says: "It may now be said that educational institutions of a distinctly non-sectarian character, conducted solely for the benefit of the public, without any element of private gain, relieving the state from taxation, and extending knowledge to some who would otherwise not be able to obtain it, are institutions of a purely charitable nature, and exempt from taxation." The trouble in the application of this sentiment to the case in hand is that it does not fit the facts as found by the referee. This institution is not conducted solely for the benefit of the public, any more than is the street passenger railway conducted for the benefit of the public. Those of the public who can pay can ride. Here, those of the public who can pay tuition fees are benefited by an education, just as they might be benefited in many other excellent private schools in Philadelphia, where exemption from taxation is not thought of. Nor is this institution without an element of private gain. We doubt if there be anywhere else in the land, in a school of like grade, an educator in receipt of a salary equal to the $1,000 per month received in 1891 by master Jones as his share of the profits in this enterprise; for this last is clearly what it is, notwithstanding this share is denominated "salary" in the argument. By no stretch of construction can it be so denominated in the instrument, which reads thus: "The corporation to provide the building, furniture, school apparatus, fuel, and repairs, and to receive one eighth the gross receipts, including in the estimate of receipts the tuition fees of such poor children as may be schooled at the expense of the corporation; the head master to receive the remaining seven eighths, and pay thereout the salaries of all his subordinates, and all expenses pertaining to conducting the school, other than are hereinafter mentioned as chargeable to the corporation. The assistant teachers to be selected by him, and appointed, subject to the approval of the overseers; and that he be guaranteed that his net income from the school shall not fall below $2,000 in any school year; the deficiency, if any, to be made up from the educational funds of the corporation." The head master is to have all the profits on seven eighths of the gross receipts, whether $5,000 or $50,000, with a guaranty that these profits shall in no case fall below $2,000. This is a business project, wherein the returns from capital and professional acquirements depend on good fortune and good management, just as in other business ventures.

Nor does the school relieve the state from taxation. Under authority from the state, the municipality of Philadelphia, by taxation, provides for the education of every child within its limits, and this burden is in no appreciable degree lightened by the establishment of private schools. The charity had its foundation when no such complete and beneficient system of education as that created by the commonwealth had an existence, or was dreamed of by William Penn. If such a system had been in operation in the small town on the Delaware in 1708, or if at that time he had had reason to anticipate such an one would be adopted in the future, it is probable his benevolence would have taken some other direction. At this day, when the city raises, by taxation, and expends, sufficient money to educate every child, rich and poor, the private school in no sensible degree relieves the public burden. If it be exempted from taxation, the public burden is increased by imposition of the exempted tax upon others who share not in the gain from the private enterprise. It may be properly said, of the managers and head master of this school, when its methods had fallen behind the times, and, in its struggle alongside the public school, its life had almost ended, they, by wisdom and energy, infused into it a new life; have made it highly prosperous, and not only prosperous, but highly beneficial to all who are able to pay for its privileges; but this does not make it purely charitable. The 848 pay scholars of 1892, who paid nearly $50,000 for their tuition, would hardly take that view. We certainly do not.

None of the cases cited by the referee reach the facts of this case. The rule applied in *Miller's App.*, 10 W. N. C. 168; *Thiel College v. Mercer County*, 101 Pa. 530, and *Hunter's App.* (Pa.) 22 W. N. C. 361,—is the one applicable here. In this last case it is said: "The academy is maintained from the income derived from such property as has

been given to or purchased by it, and from fees for tuition, which are at a much lower rate than institutions of a like grade. . . . It was incumbent on appellees to show that the institution under their care is at least substantially maintained by public or private charity. This has not been done. On the contrary, it may be fairly inferred that its chief source of maintenance is and has been tuition fees. If so, it cannot, in the constitutional sense, be regarded as an institution of purely public charity."

The judgment is reversed, and judgment is now entered for the city of Philadelphia and against defendants, on the facts found by the referee.

Annie O'CONNOR, Admrx., etc., of John O'Connor,

v.

John CLARK, *Appt.*

(170 Pa. 318.)

The owner of a wagon, who permits the name and occupation of another person who is in possession of it to be painted thereon for the purpose of inducing the public to believe that it belongs to and is used by the latter in his business, cannot assert ownership against an innocent purchaser from the person who had it and whose name was on it.

(October 7, 1895.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Philadelphia County in favor of plaintiff in an action brought to recover possession of a certain horse and wagon. *Reversed.*

John O'Connor was engaged in the business of keeping wagons for hire; one of his employés named George Tracy was given one of the wagons to use in doing a cartage business and upon it were placed the words, George Tracy, Piano Mover. Tracy sold the horse and wagon to defendant after defendant had required him to identify himself as the George Tracy whose name was on the vehicle.

Further facts appear in the opinion.

Mr. **John H. Fow,** for appellant:

There are circumstances in this case which take it out of the general rule and estop the representative of the decedent from contesting the right of a bona fide purchaser from Tracy.

It comes under that exception referred to in *Leeky* v. *M'Dermott*, 8 Serg. & R. 500, where it is said: "M'Dermott, who delivered the goods in question to the wagoner, was guilty of no imprudence, nor held out any false colors by which the world might be deceived."

Where one of two innocent parties must suffer a loss, such loss must be borne by the party whose neglect was the occasion of it.

Miller v. *Browarsky*, 180 Pa. 379; *Shaw* v. *Levy*, 17 Serg. & R. 101; *Sinclair* v. *Healy*, 40 Pa. 417, 80 Am. Dec. 589.

While it is the rule that this principle does not apply in the case of a bailor (*Miller Piano Co.* v. *Parker*, 155 Pa. 208), yet it does apply when the bailor, master, consignor, or owner has, by his own imprudence, or holding out in false colors, aided in deceiving the bona fide purchaser.

Miller v. *Browarsky*, *supra*; *Lecky* v. *M'Dermott*, 8 Serg. & R. 500; *Rapp* v. *Palmer*, 3 Watts, 180.

Mr. **J. Edward Carpenter,** for appellee:

The defendant purchased the horse, wagon, and harness from a drunken man at a price so low as to have been ample notice to a purchaser that he was not dealing with the owner.

Tracy was the mere agent of the plaintiff, no property passed by delivery to him, and unless the possession was fraudulent and intended for colorable purposes it was not liable to sale by him.

McMahon v. *Sloan*, 12 Pa. 229, 51 Am. Dec. 601; *Ripley* v. *Gelston*, 9 Johns. 201, 6 Am. Dec. 271; *Saltus* v. *Everett*, 20 Wend. 267, 32 Am. Dec. 541; *Quinn* v. *Davis*, 78 Pa. 15.

Sterrett, *Ch. J.*, delivered the opinion of the court:

If there is nothing more in this case than the facts recited by the learned trial judge in the excerpt from his charge quoted in the first specification of error, the instructions therein given to the jury to find for the plaintiff if they believed the testimony would be substantially correct. The only facts of which this instruction is predicated are, (1) that the wagon in question was the property of John O'Connor, the original plaintiff; and (2) that Tracy, without his permission, took it, and sold it, or attempted to sell it, to the defendant as his own. But these are not the only facts of which there was evidence before the jury. On defendant's behalf, it is contended that the testimony tended to prove, and the jury, if they had been permitted, would have been warranted in finding, that defendant purchased the property in question from Tracy in the honest belief that he was in fact the owner thereof; that the name and occupation of Tracy—viz., "George Tracy, Piano Mover"—were on the wagon when he offered it for sale, and that fact was referred to as indicating his ownership of the property, etc.; that, Tracy being a stranger, defendant was specially careful to inquire and inform himself that the person who was in possession of and offering to sell the wagon was the George Tracy whose name and occupation were painted thereon; that Tracy's name and occupation were put upon the wagon with the knowledge of O'Connor, the original plaintiff, and himself, and by direction of the former, for the purpose of creating the impression and inducing the public to believe that the property belonged to Tracy, and was being used by him in his business as a piano mover, in which he had

NOTE.—For the general rule as to purchasers from one who has no title, to which the present case is an exception, see Baehr v. Clark (Iowa) 13 L. R. A. 717, and *note*.

As to acquiescence by wife in husband's possession of her property, see Brown v. Wright (Ark.) 21 L. R. A. 467.

For some other cases on estoppel to assert title to property, see Dobbin v. Cordiner (Minn.) 4 L. R. A. 333, and *note*.

theretofore been engaged. Without attempting to summarize the testimony relied on by the defendant, it is sufficient to say that it tends to prove substantially the state of facts above outlined, and especially that the original plaintiff, for his own gain and benefit, was a party to the arrangement whereby Tracy's name was put on the wagon for the purpose of misleading the public into the belief that the property was his, and that defendant, acting with due caution and in good faith, was thus misled as to the ownership of the property, and purchased the same from Tracy.

While the soundness of the general rule of law that a vendee of personal property takes only such title or interest as his vendor has and is authorized to transfer cannot for a moment be doubted, it is not without its recognized exceptions. One of these is where the owner has so acted with reference to his property as to invest another with such evidence of ownership, or apparent authority to deal with and dispose of it, as is calculated to mislead, and does mislead, a good-faith purchaser for value. In such cases the principle of estoppel applies, and declares that the apparent title or authority, for the existence of which the actual owner was responsible, shall be regarded as the real title or authority, at least so far as persons acting on the apparent title or authority, and parting with value, are concerned. Strictly speaking, this is merely a special application of the broad equitable rule that, where one of two innocent persons must suffer loss by reason of the fraud or deceit of another, the loss should fall upon him by whose act or omission the wrongdoer has been enabled to commit the fraud. Assuming, in this case, that a jury, under the evidence, should find—as we think they would be warranted in doing—that such marks of ownership were placed on the property by direction of O'Connor, the real owner, as were not only calculated to deceive, but actually intended to deceive, the public, and that by reason thereof, and without any fraud or negligence on his part, the defendant was misled into the belief that Tracy was the real owner, and he accordingly bought and paid him for the property, can there be any doubt, as between the real owner and the innocent purchaser, that the loss should fall upon the former by whose act Tracy was enabled to thus fraudulently sell and receive the price of the property? We think not. In *Barnard* v. *Campbell*, 55 N. Y. 456, 58 N. Y. 73, 17 Am. Rep. 208,—a well-considered case, involving substantially the same principle,—it was held that to create an estoppel by which an owner is prevented from asserting title to and is deprived of his property by the act of a third person without his assent, two things must concur: "(1) The owner must have clothed the person assuming to dispose of the property with the apparent title to or authority to dispose of it. (2) The person alleging the estoppel must have acted and parted with value upon the faith of such apparent ownership or authority, so that he will be the loser if the appearances to which he trusted are not real."

Without further consideration of the questions involved, we think the testimony to which reference has been made tended to prove facts which if found by the jury would have brought the case within the principle of estoppel above stated, and that the learned judge, by the instructions above complained of, virtually withdrew the effect of that testimony from the consideration of the jury. In defendant's second point he was requested to charge: "If the jury find from the evidence that the plaintiff's intestate allowed Tracy to put his name on the wagon, and made no effort to efface it, and thereby allowed the defendant to be misled, their verdict must be for the defendant." This was refused, with the remark that he had already instructed them that their verdict ought to be for the plaintiff in the event of their believing the testimony.

It follows from what has been said that the first and third specifications should be sustained. The second specification is dismissed. As presented, defendant was not entitled to an affirmance of the point therein recited.

Judgment reversed, and a *venire facias de novo* awarded.

COLORADO SUPREME COURT.

DENVER CITY R. CO.
v.
City of DENVER.

(.....Colo.....)

(July 1, 1895.)

1. A city whose charter provides therefor may collect a license imposed by it on street-cars by enforcing a penalty for failure to pay for the license.

2. Taxes imposed as a privilege on a street-car company are not within Const., art. 10, § 3, requiring "all taxes" to be uniform on the same class of subjects.

CROSS writs of error to the Court of Appeals to review a judgment modifying a judgment of the District Court for Arapahoe County in favor of defendant in an action brought to enjoin the enforcement of the collection of a license tax which had been imposed upon plaintiff's cars. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Wolcott & Vaile** and **Henry F. May**, for plaintiff:

A license is issued under the police power, but the exaction of a license fee with a view to revenue would be the exercise of the power of taxation, and the charter must plainly show the intent to confer that power, or the municipal corporation cannot assume it.

NOTE.—On the question of the effect of the constitutional requirement of uniformity in taxation as applied to licenses, see also State v. Moore (N. C.) 22 L. R. A. 472.

See also 40 L. R. A. 611.

Cooley, Const. Lim. p. 244, *201; *New York* v. *Second Ave. R. Co.* 32 N. Y. 261; *State* v. *Hoboken*, 41 N. J. L. 71.

Where doubt exists as to the construction of a charter, that doubt should be resolved against the corporation claiming the power, and this rule applies to municipal corporations.

Horr & Bemis, Mun. Pol. Ord. § 125; Dill. Mun. Corp. § 89; Cooley, Taxn. p. 276; *Lynchburg* v. *Norfolk & W. R. Co.* 80 Va. 250, 56 Am. Rep. 592.

Plaintiff company exists and operates its cars under a territorial charter granted to it before the constitution of the state of Colorado was adopted.

This charter was a contract, and the obligation thereof cannot be impaired by any subsequent legislation, whether by ordinance, statute, or even the adoption of the constitution.

Dartmouth College Trustees v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Gunn* v. *Barry*, 82 U. S. 15 Wall. 610, 21 L. ed. 212.

Having full authority to construct and operate its street horse-car lines, it needed neither permission nor the grant of any privilege from the city of Denver, because that right had been granted to it by the legislature.

New York v. *Second Ave. R. Co.* and *State* v. *Hoboken*, *supra*.

The power to license necessarily implies the power to prohibit, and the city of Denver clearly has no right to prohibit.

Savannah v. *Charlton*, 36 Ga. 460; *Washington* v. *Meigs*, 1 McArth. 53.

A tax cannot be collected by calling it a license and enforcing a penalty for the failure to pay for the license.

44 Alb. L. J. 288; Horr & Bemis, Mun. Pol. Ord. § 257.

Messrs. **F. A. Williams**, *City Atty.*, **Greeley W. Whitford**, and **Allen B. Seaman**, for defendant:

All rights are held subject to the police power.

Boston Beer Co. v. *Massachusetts*, 97 U. S. 32, 24 L. ed. 991; *Southwark R. Co.* v. *Philadelphia*, 47 Pa. 321.

If the grant of power to a municipality is simply to "license and regulate," the license fee exacted under such a grant of power could be no more than an amount sufficient to reimburse the city, and if the sum exacted goes beyond that, and manifestly so, then it is an attempt to raise revenue by means of licenses and is referable to the power of taxation.

Cooley, Taxn. 2d ed. p. 598.

It is impossible to estimate the cost to the city of Denver in regulating the street-cars of the plaintiff in error, and a court of equity cannot and will not inquire into the manner of exercising this discretion granted to the city council, unless it is plainly and manifestly abused.

Re White, 43 Minn. 250; *Mankato* v. *Fowler*, 33 Minn. 364; *Re Bickerstaff*, 70 Cal. 36; *Van Baalen* v. *People*, 40 Mich. 258.

The simple act of requiring a license is an exercise of the police power.

Cooley, Const. Lim. 201; *Re Wan Yin*, 22 Fed. Rep. 701; *Allerton* v. *Chicago*, 9 Biss. 552; *Chicago Pkg. & P. Co.* v. *Chicago*, 88 Ill. 221, 30 Am. Rep. 545.

The right to exact a fee is incident to the power to require a license, and it is entirely within the discretion of the power granting the license, whether or not it shall be demanded.

Thomasson v. *State*, 15 Ind. 451; *State* v. *Herod*, 29 Iowa, 123.

A license fee of $50 has been sustained, under the police power in the following cases:

Allerton v. *Chicago*, *supra*; *Frankford & P. Pass. R. Co.* v. *Philadelphia*, 58 Pa. 119, 98 Am. Dec. 242; *Union Pass. R. Co.* v. *Philadelphia*, 101 U. S. 532, 25 L. ed. 912. See also *New Orleans* v. *New Orleans City & L. R. Co.* 40 La. Ann. 587; *Johnson* v. *Philadelphia*, 60 Pa. 450; *San José* v. *San José & S. C. R. Co.* 58 Cal. 476; *State* v. *Herod*, *supra*; *Louisville City R. Co.* v. *Louisville*, 4 Bush, 478; *Pennsylvania R. Co.* v. *Pennsylvania*, 129 Pa. 200.

But the city of Denver has ample power to exact a license fee for revenue purposes, under subdivision 11, § 20, art. 2, of its charter.

2 Dill. Mun. Corp. 4th ed. §§ 768, 789; *Howland* v. *Chicago*, 108 Ill. 496; *Newton* v. *Atchison*, 31 Kan. 151, 47 Am. Rep. 486; *San José* v. *San José & S. C. R. Co.* 58 Cal. 475; Cooley, Taxn. chaps. 18, 19, also p. 597; *Ex parte Robinson*, 12 Nev. 268, 28 Am. Rep. 794; *Van Hook* v. *Selma*, 70 Ala. 368, 45 Am. Rep. 85; *Ex parte Montgomery*, *Re Knox*, 64 Ala. 466.

Failure to pay taxes in the nature of regulations is as much a violation of an ordinance as any other, and is equally punishable.

Horr & Bemis, Mun. Pol. Ord. § 285.

The Denver City Railway Company accepted its charter from the territorial legislature subject to all police regulations then in force and that might thereafter be adopted, either by the legislature or the city government.

Wiggins Ferry Co. v. *East St. Louis*, 102 Ill. 570; *Frankford & P. Pass. R. Co.* v. *Philadelphia*, 58 Pa. 120, 98 Am. Dec. 242; *State* v. *Herod*, 29 Iowa, 123; *Stone* v. *Mississippi*, 101 U. S. 817, 25 L. ed. 1079; *Union Pass. R. Co.* v. *Philadelphia*, 101 U. S. 528, 25 L. ed. 912.

The alienation of the taxing power must be clear and unquestionable. It is never presumed.

Waller v. *Hughes* (Ariz.) 11 Pac. Rep. 125; *Union Pass. R. Co.* v. *Philadelphia*, *supra*; 2 Dill. Mun. Corp. § 789; Cooley, Taxn. 146; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 29 L. ed. 770; *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514, 7 L. ed. 939; *Philadelphia & W. R. Co.* v. *Maryland*, 51 U. S. 10 How. 376, 13 L. ed. 461.

A tax laid for the double purpose of regulation and revenue must be grounded in both the police and the taxing power.

Cooley, Taxn. 11; *Hirshfield* v. *Dallas*, 29 Tex. App. 242.

There can be no exercise of the police power as a police regulation without some restraint, and "the power to regulate carries with it the power to restrain."

Piqua v. *Zimmerlin*, 35 Ohio St. 507; *Vandine, Petitioner*, 6 Pick. 190, 17 Am. Dec. 351; *State* v. *Freeman*, 38 N. H. 428.

It cannot be urged that no business can be regulated or burthens imposed on its pursuits unless there be power to suppress the business.

Braun v. *Chicago*, 110 Ill. 196; *Howland* v. *Chicago*, 108 Ill. 501.

Goddard, J., delivered the opinion of the court:

On the 3d day of October, 1889, the Denver City Railway Company instituted this action to restrain the city of Denver and its officers from prosecuting cases against it and its employés for operating its horse-cars in violation of a certain ordinance of the city, adopted in 1886 and amended in 1888, which provides, *inter alia*, as follows:

"SECTION 1. It shall be unlawful for any person or persons to hire out, keep or use for hire, or cause to be kept or used for hire, for the carrying or conveying of persons, or run on established lines within the city limits of the city of Denver, any hackney coach, cab, omnibus, express wagon, herdic coach, street-car, vehicle or vehicles, carriage or carriages of any description or name whatsoever, without a license first had and obtained so to do."

"SECTION 14. There shall be charged and paid to the city treasurer for the use of the city of Denver, on issuing the said licenses, by the parties to whom they may be granted, the following sums: . . . Second. For all omnibuses and accommodation coaches, herdic coaches, and street-cars running upon established lines and at stated periods, from place to place within the city, shall be charged for license, each, the sum of $10 per annum."

By section 14 as amended in 1888 the license fee for each car was increased from $10 to $25 per annum. The company averred its willingness to pay a fee of $10, as it had theretofore done, but refused to pay the sum of $25, on the ground that the latter is unreasonable, and in excess of the amount necessary to pay the expenses of police regulation, and is in fact a tax upon its property, and hence unlawful and void. The evidence introduced upon the trial of the cause is not preserved by a bill of exceptions, but the court below made the following findings: "(1) That the license for police regulation does not, under the testimony offered, justify a greater license than $17.50 per car, as heretofore found, but that the wording of the city charter gives the city the right to tax, as well as to license, for police regulation, and that the charter of the plaintiff company, approved January 10, 1867, in no way exempts it from paying such tax. (2) That the city council having the power to assess said tax at the sum of $25 per car, and having elected to do so, that the same is legal. (3) That the temporary injunction heretofore issued in this cause should be dissolved, at the cost of the plaintiff." To the judgment dissolving the temporary injunction and dismissing the action, the company and the city prosecuted writs of error from the court of appeals. That court, in an elaborate opinion, reported in 2 Colo. App. 34, reversed the court below upon its finding that the city was empowered to tax, as well as to license for police regulation, but affirmed its judgment of dismissal upon the ground that the record was devoid of any showing that the sum of $25 was an unreasonable charge for police regulation. Both parties, being dissatisfied with this judgment, bring the case here for review.

The company insists that the finding of the court below that the testimony offered did not justify a charge of $25 for police regulation is conclusive as to its right to maintain the action, under the doctrine announced by the court of appeals,—that the city is not authorized to assess a license tax. The city, on the contrary, contends that the court of appeals erred in holding that the ordinance could not be upheld as a legitimate exercise of its power to tax the business of running street-railway cars.

In the view we take of these respective contentions, it becomes unnecessary to discuss the validity of the ordinance as a police regulation, or to determine whether, upon the record, the finding of the court below is conclusive upon the fact that $25 exceeds the necessary and legitimate expense of issuing the license and providing police supervision. And in this regard, if the court of appeals was correct in holding that the finding of the court below was not an authoritative finding of fact, based upon the evidence, but the result of personal observation only, and hence not conclusive upon this review, we fully concur in the conclusions reached by the learned writer of that opinion,—that "this court cannot interpose its opinion, and guess at a cost of administration, nor take the judgment of the court below, as against the judgment of the city council," and, without sufficient data or evidence, pronounce the ordinance unreasonable as a police regulation.

But upon the more important, and, as we regard it, the decisive, question in the case,—"whether the city, under its charter, has the power to tax, as well as to license and regulate, the business of the railway company,—we are unable to concur with either the reasoning or the conclusion of the court of appeals. That taxation is clearly a legislative prerogative, and may be conferred upon a municipality, by that branch of the government, in such measure and for such purpose as it may deem expedient, so long as it observes the limitations and restraints of the organic law, is not questioned or denied. Nor do we understand that the language of the charter of 1885, which, in express terms, confers upon the city of Denver power, "exclusively, to license, regulate, and tax any or all lawful occupations," etc., is held to be insufficient to authorize the city to impose the tax in question, if such grant of power is not inhibited by our state constitution. But it is asserted that the charter provision, in so far as it attempts to confer the power to tax, is in conflict with section 3, article 10, which provides: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation of all property, real and personal." In this we think the court of appeals is in error. It seems to be almost universally accepted that this and like constitutional provisions refer to the levy of *ad valorem* taxes upon property, and do not apply to taxation imposed on privileges and occupations. Sedgw. Stat. &

Const. L. 2d ed. 504-507, referring to similar provisions contained in the constitutions of various states, says: "In construing these provisions it has been held, in many of the states, that the words 'equal and uniform' apply only to a direct tax on property; and that the clause in regard to uniformity of taxation does not limit the power of the legislature as to the objects of taxation, but is only intended to prevent an arbitrary taxation of property, according to kind or quality, without regard to value. Specific taxes have therefore been sustained as a valid exercise of the legislative power." Burroughs on Taxation, § 54, referring to the same subject, says: "These provisions, as a general rule, are held to apply to property alone, and not to include taxation on privileges or occupations." Among the numerous decisions to the same effect, see *Newton* v. *Atchison*, 31 Kan. 151, 47 Am. Rep. 486; *Ex parte Robinson*, 12 Nev. 263, 28 Am. Rep. 794; *Walcott* v. *People*, 17 Mich. 68; 1 Desty, Taxn. p. 191, § 36; *San José* v. *San José & S. C. R. Co.* 53 Cal. 475; *Ex parte Miranda*, 73 Cal. 365; *Sawyer* v. *Alton*, 4 Ill. 129; *Marmet* v. *State*, 45 Ohio St. 63; *Com.* v. *Moore*, 25 Gratt. 951; *American Union Exp. Co.* v. *St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *St. Louis* v. *Green*, 7 Mo. App. 468; *Davis* v. *Macon*, 64 Ga. 128, 37 Am. Rep. 60. In the latter case the court had under consideration an ordinance enacted by the city of Macon providing that, among others, retail butchers should pay a license of $50 per annum, and that further imposed a tax of $25 upon each wagon used in their business. The contention there was that the ordinance was violative of the constitutional requirement that all taxes shall be uniform, and upon this point *Justice* Bleckley, speaking for the court, says: "It is insisted further that by the tax upon the wagon, the *ad valorem* principle of the constitution is violated. This objection proceeds upon the theory that the wagon is mere property, and subject only to state and county taxes, . . . which taxes have been duly assessed and paid. The complainants contend that having paid all taxes on the value of the wagon as property with which they are chargeable, they cannot be required to pay an additional specific tax to the city upon the same property. But, as already stated, the tax now in question is not a property tax, but a business tax; the wagon is treated as an instrument used in carrying on the business of the complainants within the city, and it has been ruled, and no doubt rightly ruled, that the number and kind of vehicles may be regarded in measuring a tax of this description. . . . That the complainants are in no default to the state and county in respect to taxes upon the value of the wagon as property, is no protection to them against the business tax now demanded." We quote thus fully because of the similarity of that case in principle with the one at bar, and because the language of the learned justice is pertinent to the contention of counsel for the company in this case. In the case of *St. Louis* v. *Green*, *supra*, the court had under consideration the validity of an ordinance imposing a tax upon wagons used in the streets of St. Louis for purposes of traffic and for private purposes. The validity of the ordinance was attacked upon the ground that it was in derogation of a like provision of the constitution of Missouri; and, in an elaborate argument upholding the validity of the ordinance, *Judge* Bakewell, who delivered the opinion of the court, used this language: "The constitutional provision that all property subject to taxation in the state shall be taxed according to its value is undoubtedly binding upon the legislative body when it exercises the taxing power; but this provision is not violated when, as in the case at bar, the tax is not a tax precisely upon the object itself, but rather upon the exercise of the civil right of using that object. . . . And though imposed for revenue, and not for police purposes at all, it is a tax of the nature of a license, because it is a permission to do that which, after the passage of the ordinance, it became unlawful to do without having obtained the permission." The pertinency of this decision to the question we have under consideration is found in the fact that the tax therein upheld was imposed upon vehicles subject also to taxation as property, and in the further fact that the grant of power in the charter of the city of St. Louis was identical with that in the charter of the city of Denver, to wit, "to license, regulate, and tax," etc. This case, on appeal to the supreme court, was affirmed in all particulars, except the holding of the court of appeals to the effect that the ordinance was invalid in so far as it authorized the conviction for a misdemeanor, and punishment by fine. The case of *Palmer* v. *Way*, 6 Colo. 106, is relied on by the learned writer of the opinion of the court of appeals as announcing a different doctrine; and the case of *Wilson* v. *Chilcott*, 12 Colo. 600, accepting the doctrine therein laid down as *stare decisis*, is cited therewith in support of the conclusion reached in that opinion. But since its rendition those cases have been expressly overruled by this court in the case of *Denver* v. *Knowles*, 17 Colo. 204, 17 L. R. A. 135, as being "against the strong current of authority." And the rule announced in the latter case, in so far as it has any application to the question before us, is in conformity with the views herein expressed. It is clear from the foregoing that the imposition of a tax upon occupations is not governed by the rule of uniformity prescribed in article 10, section 3, of the State Constitution, and neither expressly nor by implication is the legislature inhibited thereby from conferring upon the city the power to exact such a tax. And our conclusion is that the legislature having, in express terms, conferred upon the city the power to tax, as well as to license and regulate, the enactment of the ordinance under consideration was a legitimate exercise of that power, and the charge for license therein provided may be enforced as a valid tax.

It is further contended by counsel for plaintiff in error that, if the tax be valid, the ordinance cannot be enforced in the manner provided; that it must be collected

as other taxes, and not by enforcing a penalty for failure to pay for the license. We cannot give our assent to this proposition. Section 21, article 2, of the city charter provides: "The city council shall have power to make all ordinances which shall be necessary and proper for carrying into execution the powers specified in this act, . . . and to enforce the same by appropriate fines, imprisonment, or other penalties." In *St. Louis* v. *Sternberg*, 69 Mo. 289, Norton, *J.*, speaking to this point, said: "Such ordinances have been uniformly upheld when brought to the attention of this court." In support of the power of municipal corporations to recover fines and penalties against persons not complying with similar ordinances, he cites, *Cincinnati* v. *Buckingham*, 10 Ohio, 257; *Shelton* v. *Mobile*, 30 Ala. 540, 68 Am. Dec. 143; *Vandine, Petitioner*, 6 Pick. 187, 17 Am. Dec. 351; *Chilvers* v. *People*, 11 Mich. 43,—and adds: "This is not a proceeding on the part of the city to collect the amount of license required by the ordinance, but it is instituted to recover a fine for breach of it committed by defendant, in practicing law without such license; and, although he may be subjected to the payment of the fine, he would not thereby be entitled to the license."

We are therefore of the opinion that the trial court was correct in holding that the city had the right to exact the sum claimed as a license tax, under the terms of its charter, and upon this ground its judgment should be sustained; and *the judgment of the Court of Appeals affirming the dismissal of the action is affirmed.*

MINNESOTA SUPREME COURT.

John PETERSON *et al.*, *Appts.*,
v.
William RUSSELL, *Respt*

(.....Minn.....)

***1. When one not a party to a negotiable note,** after it has been delivered to and while it is in the hands of the payee, indorses it in blank upon a valid consideration, for the purpose of assuming the liability of guarantor, such act authorizes the payee to write over the signature the contract of guaranty in full; and, that being done, it is a sufficient note or memorandum in writing to take the case out of the statute of frauds.

2. Nicholas & S. Co. v. Dedrick, to the effect that the extension of the time of payment of a past-due note is a sufficient consideration to support a promise to pay it, followed.

(October 15, 1895.)

APPEAL by plaintiffs from an order of the District Court for Marshall County denying a new trial after verdict for defendant in an action brought to enforce the guaranty of a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. **Brown & Carr,** for appellants:

Defendant signed his name in blank on the back of the note (then past due) for the purpose and with the intention of guaranteeing the payment of the same, in consideration of the time of payment being extended to a future date; having placed his name there for that purpose, it authorized plaintiffs to write over it in full the guaranty, or whatever other contract was entered into, and this was a sufficient note or memorandum to take the case out of the statute of frauds, and as soon as the same was written on the guaranty became effectual.

Moor v. *Folsom*, 14 Minn. 340, 100 Am. Dec. 227; *McComb* v. *Thompson*, 2 Minn. 139, 72 Am. Dec. 84; *Pierse* v. *Irvine*, 1 Minn. 369; Tiedeman, Com. Paper, pp. 453, 454; *Beckwith* v. *Angell*, 6 Conn. 315.

Oral evidence is not admissible to vary the terms of a written agreement, but indorsements are a peculiar class of contracts, and that rule does not extend to contracts which are raised from implication by operation of law, such as indorsements in blank.

Dan. Neg. Inst. 4th ed. § 717; *Levering* v. *Washington*, 3 Minn. 323; *Kern* v. *Von Phul*, 7 Minn. 426, 82 Am. Dec. 105; *First Nat. Bank* v. *National Marine Bank*, 20 Minn. 63.

A regular indorsement is an indorsement to which the law attaches a certain and distinct liability.

Levering v. *Washington, supra; Peckham* v. *Gilman*, 7 Minn. 446.

An irregular indorsement is where a name appears on the back of a note in such a position that it is a matter of uncertainty and ambiguity as to what sort of a liability the party who thus placed his name there intended to assume.

In this class of indorsements parol evidence is admissible to explain and bring to light the actual contract that was entered into.

Pierse v. *Irvine*, *McComb* v. *Thompson*, and *Moor* v. *Folsom, supra;* Dan. Neg. Inst. 4th ed. §§ 710, *et seq.;* Tiedeman, Com. Paper, §§ 270 *et seq.; Buck* v. *Hutchins*, 45 Minn. 270.

If courts can ascertain what was the original intention, they will enforce it as between the original parties.

McComb v. *Thompson, supra;* Tiedeman, Com. Paper, § 272.

Persons writing their names on the back of a note may become makers, indorsers, or guarantors by so doing, according to their intentions when they "indorsed."

See Tiedeman, Com. Paper, §§ 270 *et seq.;* Dan. Neg. Inst. 4th ed. §§ 708*a* *et seq.; Buck* v. *Hutchins*, 45 Minn. 271.

The writing may be read by the light of the

*Headnotes by STARR, *Ch. J.*

NOTE.—For liability of stranger who indorses commercial paper before delivery, see also Fullerton v. Hill (Kan.) 18 L. R. A. 33, and *note.*

For oral evidence to show who is liable as the maker of a note, see Keidan v. Winegar (Mich.) 20 L. R. A. 705, and *note.*

surrounding circumstances, in order more perfectly to understand the meaning of the parties.

1 Greenl. Ev. §§ 277, 278, 283.

Parol evidence is admissible to explain recitals of fact.

1 Greenl. Ev. § 285.

Proof of the facts and circumstances which took place at the time of the transaction are admissible to aid in the interpretation of the language employed.

Good v. *Martin*, 95 U. S. 90, 24 L. ed. 341; *De Pauw* v. *Bank of Salem*, 126 Ind. 553, 10 L. R. A. 46.

Russell's promise is supported by a sufficient consideration to make it valid.

Dan. Neg. Inst. § 185, *note 4; Nichols & S. Co.* v. *Dedrick* (Minn.) 63 N. W. Rep. 1110; *Atherton* v. *Marcy*, 59 Iowa, 650; Tiedeman, Com. Paper, § 170, p. 280, *notes 6, 8; Hungerford* v. *O'Brien*, 37 Minn. 306.

Mr. **A. C. Wilkinson,** for respondent:

Under our statute of frauds, the contract is one by which the defendant assumes to pay the debt of another, and must be in writing together with the consideration therefor, plainly expressed, or the same is void and no action can be maintained thereon.

Kelley's Stat. § 4226, p. 96, and Minnesota cases there cited; *Wilson Sewing Mach. Co.* v. *Schnell*, 20 Minn. 40; *Church* v. *Brown*, 21 N. Y. 315; *Houghton* v. *Ely*, 26 Wis 181, 7 Am. Rep. 52; Edwards, Bills & Notes, *231.

In *Nelson* v. *Dubois*, 13 Johns. 175, it was held that such a writing might be made at any time before the trial, but this case was directly overruled in *Hall* v. *Newcomb*, 3 Hill, 233, 7 Hill, 416, 42 Am. Dec. 82.

Campbell v. *Butler*, 14 Johns. 349, was also overruled in *Hall* v. *Newcomb*, *supra*.

Tillman v. *Wheeler*, 17 Johns. 326, was criticised in *Hall* v. *Newcomb*, 7 Hill, 421, 42 Am. Dec. 68, and practically overruled in *Cromwell* v. *Hewitt*, 40 N. Y. 491, 100 Am. Dec. 527.

The practice, then, of writing contracts, even where the indorsement of a name was made upon the note at the time or near about the time of its inception has been discountenanced by the courts.

Houghton v. *Ely*, 26 Wis. 181, 7 Am. Rep. 52; *Richards* v. *Warring*, 39 Barb. 47; *Drake* v. *Markle*, 21 Ind. 434, 83 Am. Dec. 358; *Van Doren* v. *Tjader*, 1 Nev. 380; Dan. Neg. Inst. § 1758; *Crane* v. *Wheeler*, 48 Minn. 207.

Start, *Ch. J.*, delivered the opinion of the court:

Action to charge the defendant as guarantor of the payment of a negotiable promissory note. Upon the trial the plaintiffs offered evidence, and then rested, tending to establish the following state of facts: That on May 4, 1892, Thomas Connors made and delivered to the plaintiffs his note whereby he promised to pay to them or order on November 1, 1892, $145. After the maturity of the note, and on March 31, 1893, the defendant agreed with the payees of the note, the plaintiffs, in consideration of their extending the time of its payment to December 15, 1893, to guarantee the payment of the note, and in execution of his agreement he signed his name on the back of the note in blank, and it was returned to the plaintiffs' agent, and they, by such agent, signed a memorandum on the back of the note in these words: "In consideration of Mr. William Russell indorsing this note, payment of the same is hereby extended until Dec. 15th, 1893." On January 29, 1894, the defendant refusing to pay the balance then due on the note, the plaintiffs, by their attorney, overwrote the defendant's signature with the formal contract of guaranty, in these words: "March 31st, 1893. In consideration of the time of the payment of the within note being extended until Dec. 15th, 1893, I hereby guarantee payment of this note,"—and brought this action on such guaranty. Whether the defendant's agreement was to guarantee the note or to indorse it, in the strict sense of the term, is an open question upon plaintiffs' own evidence, but it was sufficient to warrant a finding by the jury that the contract was to guarantee the payment. The trial court dismissed the action, when the plaintiffs rested, exception by them, and from an order denying their motion for a new trial this appeal was taken.

1. What was the legal liability assumed by the defendant by signing his name in blank upon the back of this note, pursuant to his oral agreement to guarantee its payment? This is practically the only question in this case. It is perfectly manifest that by this irregular indorsement he intended to become responsible to the payees for its payment, in some capacity, as maker, indorser, or guarantor. What liability one who is not a party to a negotiable instrument otherwise than by his indorsement of it, and who is in no manner connected with the title to it or its transfer, assumes by signing his name in blank upon the back thereof, is a question upon which there is much confusion and weighty conflict in the adjudged cases. They cannot be harmonized, and we shall not attempt any analysis of them. In some states, notably in Massachusetts, the question has been put at rest by a statute to the effect that in all such cases, whether his name is placed upon the paper before its delivery to the payee or afterwards, the party shall be charged only as an indorser. This is a certain, practical, and desirable rule; and, if it had been adopted by the courts when the question first arose, it would have saved litigation and some lying. But we cannot now adopt the rule without disregarding well-settled principles and resorting to judicial legislation. The position of the name of such a party upon the paper is in itself one of ambiguity. It is an irregular indorsement, and does not, without parol evidence as to when the indorsement was made and its purpose, indicate the relation of the indorser to the paper or the parties to it. He is not strictly an indorser, for the paper is not negotiated or title made through his indorsement; hence there is a pretty general agreement of the authorities that parol evidence is admissible, as between the original parties, to show the relation of such party to the paper, and to fix his liability as maker, indorser, or guarantor, according to the intention of the parties. *Rey* v. *Simpson*, 1 Minn. 380 (Gil. 282), 63 U. S. 22 How. 341,

16 L. ed. 260; *Kern* v. *Von Phul*, 7 Minn. 430 (Gil. 341), 82 Am. Dec. 105; *Good* v. *Martin*, 95 U. S. 90, 24 L. ed. 341; *Coulter* v. *Richmond*, 59 N. Y. 479; Tiedeman, Com. Paper, § 270; 1 Dan. Neg. Inst. §§ 710, 711. In case of regular indorsements—that is, where the paper is first indorsed by the payee—the law attaches a definite liability to the act, and parol evidence is not admissible to vary it. *Knoblauch* v. *Foglesong*, 38 Minn. 352; *Farwell* v. *St. Paul Trust Co.* 45 Minn. 495. This rule, however, does not apply to an irregular indorsement, except that this court has held that where it is once shown by parol evidence that the name of an apparent stranger to the paper was signed upon the back of it before its delivery to the payee, to induce its acceptance, he will be held as an original maker, and such evidence is not competent to show that he intended to charge himself as indorser only. *Peckham* v. *Gilman*, 7 Minn. 446 (Gil. 355); *Robinson* v. *Bartlett*, 11 Minn. 410 (Gil. 302). We have also held that where such an indorsement is made for a valuable consideration, after the delivery of the paper to the payee, but while it is in his hands and before its maturity, and the payee subsequently indorses it to a bona fide holder, the party making the irregular indorsement will, in favor of such holder, be held as an indorser. *Buck* v. *Hutchins*, 45 Minn. 270. Except as limited in these cases, the general rule that parol evidence is admissible to ascertain the intention of the parties to an irregular indorsement is in force in this state; and such evidence was properly received in this case to show the actual relation the defendant agreed to and did assume with reference to the note in question.

This leaves only the question of the statute of frauds to be considered. The defendant's contract of guaranty was a collateral one to answer for the debt of another, and must, to enable the plaintiffs to enforce it, be evidenced by a note or memorandum in writing expressing the consideration. The signature of the defendant alone on the back of the note is not sufficient. *Moor* v. *Folsom*, 14 Minn. 340 (Gil. 260), 100 Am. Dec. 227. Assuming the facts which the evidence tends to establish, we have a case where the defendant, for a valid consideration, agreed to guarantee the payment of a note then past due, and still in the hands of the payees. His contract excludes the idea that he intended to be held only as an indorser, and, in execution of his contract, he writes his name upon the back of the note, and leaves it with the payees, who overwrite his signature with the actual contract he has made, which satisfies in form the statute of frauds. The question, then, in its last analysis, is one of agency only. The actual contract is proved for the purpose of showing the authority to overwrite the signature. Were the payees authorized to thus overwrite the signature? The question is an open one in this state, although the case of *Moor* v. *Folsom* seems to indicate that an affirmative answer should be given to the question, but the opinion expressly disclaims any purpose to so decide. It was a matter of indifference who wrote out the formal contract of guaranty after the minds of the parties had met, the contract made, and the defendant had signed his name on the back of the note. The writing was only the evidence of what the parties had done. The defendant's signature to it was the material thing. He could sign his name in blank, and authorize the payees or any one else to write his contract over his signature. It was not necessary that the authority to do so should be in writing or expressly given, if clearly indicated by his acts.

In the light of the law and commercial usage, there can be but one reasonable inference to be drawn from the defendant's act in delivering his blank indorsement to the payees in execution of his contract of guaranty. Such act was authority to them to write over his signature anything that was consistent with his undertaking to guarantee the paper.

We are of the opinion upon principle and authority, and so decide, that where one not a party to a negotiable note, after it has been delivered to and while it is in the hands of the payee, indorses it in blank, upon a valid consideration, for the purpose of assuming the liability of a guarantor, such act authorizes the payee to write over the signature the contract of guaranty in full, and, that being done, it is a sufficient note or memorandum in writing to take the case out of the statute of frauds. *Beckwith* v. *Angell*, 6 Conn. 315; *Ulen* v. *Kittredge*, 7 Mass. 233; *Tenney* v. *Prince*, 4 Pick. 385, 16 Am. Dec. 347; *Webster* v. *Cobb*, 17 Ill. 459; *Chaddock* v. *Vanness*, 35 N. J. L. 517; *Harding* v. *Waters*, 6 Lea, 324; 1 Brandt, Suretyship, § 176, and *notes;* Tiedeman, Com. Paper, § 270. Such was the rule in the state of New York at one time, and it is still the law of that state that, where the paper is not negotiable, the holder may overwrite the indorser's name with a contract of guaranty or that of a maker, according to the intention of the parties. *Richards* v. *Warring*, 1 Keyes, 576; *Cromwell* v. *Hewitt*, 40 N. Y. 491, 100 Am. Dec. 527.

2. It is urged by defendant that there was no valid consideration for his contract. The consideration was the extension of the time of payment of a past-due note. This was a sufficient consideration to support the guaranty. *Nichols & S. Co.* v. *Dedrick* (Minn.) 68 N. W. Rep. 1110.

3. The defendant also claims that he was discharged by the delay of the plaintiffs in enforcing collection against the maker of the note,—citing *Crane* v. *Wheeler*, 48 Minn. 207. The case is not in point, for the guaranty in that case was the collection of the note; here the payment of the note was guaranteed, and mere neglect of the holder to pursue the maker does not discharge the guarantor. *Hungerford* v. *O'Brien*, 37 Minn. 306.

It follows that the plaintiffs made a prima facie case, and were entitled to have their case submitted to the jury.

Order reversed, and a new trial granted in full.

Canty, J.:

I concur in the result arrived at in the foregoing opinion, but not in the reasons

given for arriving at that result. In my opinion, the doctrine is wholly unsound which holds that one party to a contract within the statute of frauds may constitute the other party his agent to reduce the contract to writing, and thereby take it out of the statute of frauds. The party may authorize his agent to write out the contract or to sign the contract, or both, and the agent's authority need not be in writing, but the agent so authorized must be some one else than the opposite party to the contract. "One rule, however, has been settled, both under the 4th and 17th sections, that neither party can be the other's agent to bind him by signing the memorandum. And it makes no difference that the pretended agent has not himself any beneficial interest in the contract, but stands in a fiduciary relation to third persons, so long as he is, in a legal point of view, the real party to, and the proper one to sue upon the contract." Browne, Stat. Fr. 4th ed. § 367. Any other rule would permit the most palpable evasion of the statute of frauds. But the majority opinion in this case, following the authority of such cases as *Ulen* v. *Kittredge*, 7 Mass. 233, and *Moor* v. *Folsom*, 14 Minn. 340 (Gil. 260), 100 Am. Dec. 227, is in direct violation of this rule. The case of *Hodgkins* v. *Bond*, 1 N. H. 284, long ago repudiated the doctrine of *Ulen* v. *Kittredge*, and it seems to me for good reasons.

I am of the opinion that the plaintiffs are not prevented by the statute of frauds from maintaining this action on the contract implied by the blank indorsement, without writing anything over it, and that the alleged guaranty written by plaintiffs over that indorsement does not in any manner change the real character of the contract which the law so implies from the blank indorsement and all the extrinsic facts appearing from the evidence received on the trial, and that, therefore, this guaranty so written over the defendant's signature is immaterial, and does not defeat a recovery in this action; that the real contract is the same as the one pleaded; and that there is no variance between the pleading and proof. It is true that defendant did not indorse the note at the time it was made, and before it was delivered, or as a part of the original transaction in which the note was made and delivered, but on the face of the instrument, unexplained, he appeared to have done so; that is, after defendant had so indorsed the note in blank, and before plaintiffs' agent had so written the guaranty over the signature, it appeared to be the signature of a joint maker, who signed his name on the back of the note before it was delivered. Such a blank indorsement of an irregular indorser, appearing on the back of a promissory note unexplained, is presumed to have been made at the time the note was made, and before delivery, so as to constitute the signer a joint maker. 1 Dan. Neg. Inst. § 718. In *People's Bank* v. *Howes* (Minn.) 61 N. W. Rep. 457, we held that, where a party signs his name on the back of a negotiable instrument, "the law says that the parties intended to bind themselves by the relations thus apparently assumed;" and this principle runs all through the law merchant. The indorsement does not on its face appear to be within the statute of frauds, as it appears to be one of the signatures to an instrument which under the law merchant imports consideration. If such an instrument does not on its face appear to be within the statute of frauds, it cannot by parol evidence be brought within that statute. While there are few adjudications directly on the point, it has long been the prevailing opinion that the statute of frauds was not intended to restrict the law merchant. See 1 Dan. Neg. Inst. § 567. In the case of *Nichols & S. Co.* v. *Dedrick* (Minn.) 63 N. W. Rep. 1110, this court took that position. To hold otherwise would be to repeal much of the law merchant so far as it applies to persons signing and indorsing negotiable instruments, who are in fact mere sureties. Instruments under seal also import a consideration, and it has always been held that this rule of law has not been repealed or affected by the statute of frauds. 1 Brandt, Suretyship, 2d ed. § 82. To hold otherwise would be to destroy the liability of every surety on almost every bond, as such bonds seldom express or recite the consideration for the promise of the surety. The books often speak of original and collateral sureties and guarantors, but, as observed by Kent (3 Com. 123), "there is no such word in the statute of frauds as 'original' and 'collateral.'" If the agreement is to answer for a debt or default which is wholly that of another, it is within the statute, the only difference being that the original consideration will support the surety's promise made as a part of the original transaction, while it takes a new consideration to support his subsequent promise.

If, instead of signing his name on the back of this note, the defendant had signed his name on the face of it, under that of Connors, the principal debtor, he would, on the face of the instrument, appear to be an original joint maker of the note. Could he, in that case, avoid his liability by showing that he was not in fact an original maker of the note, but that he in fact signed it several months after it came due? Certainly not. This proof would go to show that he was a mere guarantor, and not an original joint maker, and that the original consideration for the note was not the consideration for his promise; but, if there was in fact a new consideration for his promise, he would still be liable. This evidence would not bring his promise within the statute of frauds. The same rule would apply if he had made, signed, and delivered to the order of plaintiffs his own promissory note, several months after it appeared on its face to be due, of the same date as the original note, and as collateral security for the same debt. He could not avoid his liability on this note by showing that he was in fact a mere guarantor of the antecedent debt of Connors, if there were in fact a new consideration for his undertaking. The statute of frauds would cut no figure in the case. Now, it seems to me that, as far as the statute of frauds is concerned, the case at bar stands on the same footing as it would if defendant had taken

either one of these two methods to secure plaintiffs, instead of the method he has taken. If he had signed his name at the foot of the original note under that of Connors, or had made his own note of the same date and terms as the original note, instead of signing his name on the back of that original note, he would in either case appear to be an original maker, and so he does in the case at bar. He can no more avail himself of the statute of frauds in the present case than he could if he had taken either of the other two methods to secure plaintiffs. This rule would not apply in the case of *Moor* v. *Folsom*, 14 Minn. 340 (Gil. 260), 100 Am. Dec. 227, as in that case the indorser wrote over his signature the date of his signing, so that it affirmatively appeared by the instrument itself that he was not an original maker. I know of no principle on which the indorser in that case should have been held liable, as it also affirmatively appeared by the instrument itself that he was an irregular indorser, through whom the note had never passed.

GEORGIA SUPREME COURT.

R. M. PATTILLO, *Plff. in Err.*,
v.
W. I. ALEXANDER.

(.....Ga.....)

(April 1, 1895.)

*1. **In a suit upon a contract made and to be executed in the state of Tennessee,** in the absence of any evidence to the contrary, this court will presume that the rules of the common law prevail there.

2. **According to the rules of the common law,** the indorser of a promissory note is entitled to have the same duly presented for payment, and on a failure or refusal to pay he is entitled to notice; and a failure of the holder to present for payment, or to give notice of nonpayment, discharges the indorser from liability.

3. **Where, upon a promissory note executed and payable in the state of Tennessee** to a named payee, or order, and containing no stipulation for the payment of attorney's fees, suit was brought by a holder against the payee, who had indorsed upon the note the following undertaking, signed by him: "I guarantee attorney's fees up to 10 per cent if this note has to be collected by law, on (and?) its prompt payment,"—there being no other indorsement of the paper by the payee;—*Held*, that by the terms of this agreement, it having been made for the purpose and in the course of negotiation, the payee became and was an indorser thereof, and liable as such, with a superadded liability for such reasonable sums, not exceeding 10 per cent, as might be expended for attorney's fees by the holder in the collection of the note. *Held*, further, that in order to bind the payee for the payment of the note, it was incumbent upon the plaintiff to prove presentment and notice of nonpayment. *Held*, further, that, in order to charge the payee with the payment of attorney's fees, it must appear that in the effort to recover from the maker the sums due on the note the holder had incurred a liability or had expended for attorney's fees the amount sought to be recovered from the payee, not exceeding 10 per cent of the debt due.

*Headnotes by ATKINSON, J.

ERROR to the Circuit Court of Bartow County to review a judgment in favor of plaintiff in an action brought to enforce an alleged guaranty of the collection of a promissory note. *Reversed.*

The facts are stated in the opinion.

Mr. **J. W. Atkin** for plaintiff in error.

Messrs. **J. B. Conyers** and **Graham T. Holtzclaw** for defendant in error.

Atkinson, J., delivered the opinion of the court:

Except as controlling those matters which are so essentially local in their nature as to be at all times the subject of special statutory regulation, and which, by reason of this peculiar characteristic, are embraced within the term "local idiosyncrasies" of the law, the rules of the common law have been adopted in most of the states of the Union; and the property rights of the citizens of such states have been adjusted with reference to, and the laws governing the same administered in accordance with, its doctrines. This is the reason of the rule that, as to such matters concerning which there is no such recognized variance between the laws of another state and that law which is the common source of all our jurisprudence as will afford to the courts of different states a basis for judicial cognizance of such difference, the courts of one state will presume, in the construction of contracts executed and to be performed in another, that the rules of the common law prevail there, and will determine the rights of litigants accordingly. This is a salutary rule, and one which has been adopted in this state (see *Woodruff* v. *Saul*, 70 Ga. 271), and is one of such general acceptance as to be recognized by the courts of last resort in most of the states of the Union. 1 Whart. Ev. §§ 314 *et seq.*; *Rape* v. *Heaton*, 9 Wis. 328, 76 Am. Dec. 269; *Sherrill* v. *Hopkins*, 1 Cow. 103; *Monroe* v. *Douglass*, 5 N. Y. 447; *Brimhall* v. *Van Campen*, 8 Minn. 18 (Gil. 1), 82 Am. Dec. 118; *Newton* v. *Cocke*, 10 Ark. 169; *Seaborn* v. *Henry*, 30 Ark. 469; *Martin* v. *Hazzard Powder Co.* 2 Colo. 596; *Johnson* v. *Chambers*, 12 Ind. 102; *McAnally* v. *O'Neal*, 56 Ala. 299.

2. The contract of the indorser is not that he will at all events pay a bill which he has by the act of his indorsement transferred to

NOTE.—As to stipulations for attorney's fees in note, see also Bowie v. Hall (Md.) 1 L. R. A. 546, and *note*; Wright v. Traver (Mich.) 3 L. R. A. 50, and *note*; Exchange Bank v. Tuttle (N. Y.) 7 L. R. A. 445, and *note*; Montgomery v. Crosthwait (Ala.) 12 L. R. A. 140; Bank of Commerce v. Fuqua (Mont.) 14 L. R. A. 588; Farmers Nat. Bank v. Sutton Mfg. Co. (C. C. App. 6th C.) 17 L. R. A. 595; Dorsey v. Wolff (Ill.) 18 L. R. A. 428.

See also 35 L. R. A. 381; 42 L. R. A. 139; 47 L. R. A. 495.

another, but his agreement, by the common law, is to pay upon demand by the holder upon the drawer, and notice of nonpayment or of dishonor to him. The rule which requires notice to the indorser of nonpayment, as a prerequisite to his liability, is based upon the implied undertaking of the indorsee that he will use due diligence in the prosecution of his demand against the maker; that he will present the paper for payment immediately upon its maturity, and will not, by his negligence, expose the indorser to a hazard of loss, against which he, in case of notice of dishonor, might be able otherwise to protect himself. And, if he fail to perform this duty to give timely notice of nonpayment, the law presumes injury to the indorser, and discharges him. A formal protest for nonpayment, though now, in this and many other states, required by statute, in certain cases, was not necessary by the law merchant, save only as to foreign bills of exchange; and as the present case involves only the application of the rules of the law merchant to the contract now under consideration, formal protest for nonpayment was not necessary here in order to bind the indorser. Protest was deemed necessary only as a certain and simple means of proving presentment of the paper, and the fact that the same was dishonored, and the rule requiring it was applicable only to foreign bills of exchange; and as we have seen, except where required by statute, this formality is not requisite in order to bind an indorser. Notice to him of nonpayment, however, is nevertheless indispensable, as that is one of the conditions upon which he becomes liable upon his contract of indorsement. The time within which such notice was to be given was not fixed by any unvarying rule, under the common law. It was only requisite that demand be made immediately upon maturity of the paper, and that notice of nonpayment should be given within a reasonable time; and a reasonable time would depend to a great extent upon the means of transportation, and the facilities existing at the point where the paper was presented for payment for the transmission of that class of intelligence. In most of the states of the Union, by adjudged cases, where no statute prescribes the time within which notice shall be given, the term "reasonable time" has been defined with such certainty and precision as to afford almost a fixed rule upon that subject. This case being referable to common-law principles for its solution, as to whether or not this indorser received notice at all, and, if so, whether he received it within a reasonable time, taking into consideration the means of communication between the places where the paper was presented for payment and the residence of the indorser, would, if at all doubtful, present questions of fact for a jury, it being borne in mind that notice itself was indispensable to his liability. Chitty, Bills, *448; Dan. Neg. Inst. §§ 970, 971, 1035 *et seq.* But where the matter of fact, in the very nature of things, is not doubtful, the court may adjudge, as a matter of law, that in the particular case the notice is not given within such a time as legally to impose a liability upon the indorser. Of course, no rule can be framed by which it can be stated, as a matter of law, within what time, generally, a notice of nonpayment must be given in order to bind an indorser, for that would depend upon the particular facts of each case; but where the facts are undisputed, and the time allowed to elapse is manifestly unreasonable, it may be pronounced with perfect confidence that in a certain case the notice was not timely given. The question then becomes one of law, and not of fact, and the court may and should pronounce thereon without submitting it to a jury. *Whitaker* v. *Morrison*, 1 Fla. 29, 44 Am. Dec. 627; *Van Hoesen* v. *Van Alstyne*, 3 Wend. 75; *Sice* v. *Cunningham*, 1 Cow. 397; [*Tindal* v. *Brown*], 1 T. R. 167; *Furman* v. *Haskin*, 2 Cai. 369. In the present case, according to the evidence in the record, some four months elapsed after the note became due before it was presented for payment, and half a month more elapsed before notice of nonpayment was given. Surely, in this day of fast mails, instant communication by telegraph, and other equally effective means for transmitting intelligence, it can be with certainty said that a delay of four and one-half months in giving notice of nonpayment upon a demand which should have been made, both maker and indorser living in populous cities, between which there is daily communication by telegraph and by mail, with a distance of not more than 100 miles intervening, is unreasonable, as a matter of law. The trial judge should have so directed the jury, and if they, though not so instructed, found to the contrary, the verdict was wrong.

3. The note sued upon in this case was executed in the state of Tennessee, and was made payable to the order of the present defendant, at the city of Chattanooga, in said state. Upon it the defendant made the following indorsement: "I guarantee attorney's fees up to 10 per cent if this note has to be collected by law, on (and?) its prompt payment. [Signed] R. M. Pattillo." Afterwards, suit was brought by the plaintiff, as the holder, upon this note, against the payee alone, upon this indorsement, as a contract of guaranty; and the defendant answered that, if liable at all, his liability was that of an indorser, and not as a guarantor merely, and, the holder having failed to demand payment promptly at maturity and give him notice of dishonor, he was therefore discharged. The court ruled the contract of the payee not to be one of indorsement, and a verdict was rendered for the plaintiff. In order to determine the liability of the payee to the holder,—he being the only person against whom this action is brought,—it is necessary to inquire what is his true relation to this paper, according to the understanding and intention of the parties at the time. The note passed into the hands of the plaintiff, who was the immediate indorsee. In arriving at the intention of the parties, it is competent, necessary, and proper to inquire somewhat into the history of the transaction out of which this indorsement of this paper grew. The original maker had delivered the paper to the payee, and by the payee it had been

negotiated, or was in process of negotiation, to the present holder. It was necessary, in order to invest the holder of this paper with such a title thereto as would enable him to demand its payment of the maker, that there should be an assignment of the payee's interest to the holder. This might have been accomplished by an ordinary assignment, without liability over upon account of the paper to the holder at all, or it might have been accomplished by an indorsement by the payee, either in blank, or to this holder. A simple indorsement by the payee of his name upon the paper would have served the double purpose, both of transferring the title to the holder, and of charging the payee with the obligation to pay in the event the maker upon presentation declined to honor it. Such an indorsement would have served to have fixed absolutely the liability of the indorser for the amount of the note. In the contemplated contract and plan of negotiation there was another element of risk, not provided for in the note, and against which the purchaser desired to protect himself; and there was therefore in contemplation of the parties a necessity for some guaranty beyond the point of mere redemption of the note in the event it was dishonored. The purchaser did not desire to incur the expense of a collection by law, and the note itself containing no stipulation for the payment of attorney's fees, in order to protect the holder against possible expense on that account, it was necessary in some way to charge the indorser with the superadded obligation to pay attorney's fees; and hence the form of indorsement employed by them. Negotiation and transfer of title were as much the object designed to be accomplished by the parties to this transaction as was the guaranty of ultimate redemption by the maker. To accomplish the fact of negotiation, and to effectuate this primary purpose, it was necessary to treat this entry upon the back of this note as an indorsement; otherwise, there was nothing which gave to the holder the right to demand payment of the maker. If, independently of this indorsement, there had been another simple indorsement by the payee upon the back of this paper, this simple indorsement would have had the effect to transfer the title to the paper, and, in addition, would have bound the payee to the same obligation under which he is now held, save only as to the attorney's fees; and such a condition of affairs might have afforded some ground for treating the indorsement now under consideration as a contract of guaranty only. Treating this indorsement as a guaranty only for the prompt payment of the note at its maturity, it would impose no greater obligation upon the payee than would a simple contract of indorsement; for the effect of a simple contract of indorsement is to transfer the title to the paper, and give, in addition, an implied guaranty of the solvency of the maker. The form of words employed in making this contract is not specially important, except in so far as it serves to throw light upon the nature of the undertaking upon the part of the payee who signed it. It is the purpose designed to be accomplished, and which is legally accomplished by the fact of indorsement, which must at last determine the nature and character of the contract. The effect of indorsement upon a promissory note in the form employed by the parties to this transaction, made by one not a party to the paper, might be an entirely different thing than when employed by the payee, who designs to guarantee, not only the solvency of the maker, but likewise to transfer the title. In the former case,—that is, in the case of a stranger to the paper,—such a contract would import nothing more than a contract of guaranty, for the reason that he would have no title which he could transfer, and therefore the only object which he could legally accomplish by making such indorsement would be to guarantee the solvency of the maker. But in the case of the payee, who in the delivery of the paper may have a dual purpose to accomplish, and in a case where, in the course of the negotiation of the paper, and as a part of the transaction which resulted in a complete change of ownership, that interpretation is the more natural one which gives to this entry such force as an indorsement as will serve, not only to transfer by that act the title, but at the same time guarantee the solvency of the maker, with an enlarged and extended liability, resulting from the special guaranty of attorney's fees. Such a construction gives effect to every word contained in the special indorsement, and at the same time gives full expression to the intention of the parties, as manifested by the whole history of this transaction. This guaranty of attorney's fees was, as we have seen, necessary, or deemed such by the holder, as the ordinary contract of indorsement—the note itself not stipulating for the payment of attorney's fees—would not bind the payee, in the event of default, to the payment of expenses of collection, whereas, aside from this guaranty, the mere indorsement would otherwise fully bind the payee. Whatever seeming ambiguity may be involved in the terms "on" or "and" its prompt payment is instantly dispelled upon a careful analysis of the words employed in this special indorsement. The contract of guaranty imposed in this indorsement, by its very terms, whether read "on" or read "and" its prompt payment, committed the payee only to the payment of attorney's fees; the guaranty being to pay attorney's fees up to 10 per cent if the note had to be collected by law, and its prompt payment. In the mere act of transferring the title, treating this as an indorsement, the payee had already guaranteed the prompt payment of the note at its maturity; and therefore there was nothing upon which the words "on its prompt payment" or "and its prompt payment," could operate, save only upon the payment of attorney's fees. It could not have been designed to guarantee attorney's fees up to 10 per cent "if this note has to be collected by law, on its prompt payment," because, if the note were promptly paid according to its tenor, it could not be collected by law; and therefore the words "on [if the doubtful word be so read] its prompt payment" cannot be construed to apply to the prompt payment of the

note, for such a construction would impute to the parties a purpose to provide against a contingency which by no possibility could arise. Therefore, to give effect to the guaranty at all, the word must be read "and;" and the effect of this construction is to guarantee the prompt payment of the 10 per cent attorney's fees in the event the note had to be collected by law.

The question then arises, Does the word "and," as employed, operate to extend the contract of guaranty to the note, or is it confined in its operation to the attorney's fees only? The use of the words "and its prompt payment," instead of "on its prompt payment," could not be applied to the note, because such a guaranty would be wholly superfluous; for if, in the act of negotiation, the payee, aside from the special contract with respect to the prompt payment of the note, binds himself to the prompt payment of the note, it were idle to say that the words "and its prompt payment" were used with reference to the note itself, for by the act of indorsement, which involves, not only the physical act of signing his name, but delivery for the purpose of negotiation, being already bound to the payment of the note, and not bound to the prompt payment of attorney's fees, the words "and its prompt payment" must of necessity refer to the payment of attorney's fees, and not to the note. The evident object of this guaranty was to embody in the indorsement a feature of liability which would not inhere in the simple contract of indorsement itself; but the fact that the independent guaranty of attorney's fees accompanies the indorsement of the paper does not in any sense militate against the fact of indorsement. The contract of indorsement is not consummated by the mere signing of one's name upon the back of the paper. This is one of the constituent elements of a contract of indorsement, but, in addition to this, there must be a delivery of the paper. The contract consists partly of the written indorsement, partly of the delivery of the bill to the indorsee, and may also consist partly of a mutual understanding with which the delivery was made by the indorser and received by the indorsee. Byles, Bills, 154. Let us test the effect of this paper by another illustration: It will be admitted that title in a chose in action is necessary to authorize the holder to maintain an action thereon against another. Suppose, instead of this being an action against the indorser of this paper to bind him as a guarantor or indorser upon this contract of indorsement, the action had been by the holder (suing in his own name) against the maker of this paper. Suppose the maker had objected to its introduction in evidence upon the ground that it was made payable to a named payee, and had not been by him indorsed so as to vest title in the holder. It would have been competent to establish the contract of indorsement, and the consequent assignment of the title of this paper to the holder, by showing the actual signing of the indorsement now under consideration, and by showing, in addition thereto, that this contract was made in the course of the negotiation of this paper, and that in pursuance of its negotiation, under this indorsement, the paper was actually delivered by the payee to the present holder. The fact of delivery would have to be proven by extrinsic testimony. It might be presumed from the possession of the holder, but the purpose for which the delivery was made could likewise be established by parol evidence. There could be little doubt, under such circumstances, that, for the purpose of a transfer of title, this indorsement would have been held to be an indorsement by the payee. *Upham* v. *Prince*, 12 Mass. 14; *Blakely* v. *Grant*, 6 Mass. 386; *Myrick* v. *Hasey*, 27 Me. 9, 46 Am. Dec. 583. As another illustration, let us suppose that, instead of having sued the payee upon this paper as upon a promissory note, the plaintiff had sued him specifically as an indorser thereon, but in the same action with the maker, and in the county of the latter's residence, if within this state; and let us suppose that the payee had filed a plea to the jurisdiction, setting up that he was not an indorser upon the paper. It would have been competent for the holder of the paper to have established his liability as an indorser, and the consequent jurisdiction of the court, by showing that the payee, being the owner of this paper, made this indorsement in the course of its negotiation for the purpose of passing the title, and, in pursuance of this contract, delivered the same to the holder. Proof of the purpose for which he signed it, and that the delivery was made in order to effectuate the purpose to transfer the title, would bind him as an indorser. The plaintiff in the present case brings this action upon this promissory note and this alleged contract of guaranty, without undertaking to state distinctly how or wherein the payee would be liable to him upon the paper. There is no possible theory upon which, upon the paper itself, the defendant could be liable to the plaintiff except upon the theory that this alleged guaranty by the payee was really operative as a contract of indorsement. If the promissory note in question had been delivered in pledge, merely as collateral security to a main obligation, and had been by the payee indorsed in the form here under discussion, there would have been great force in the assumption that this was a mere guaranty by the payee of the solvency of the maker of this note; for, if not intending to negotiate it at all, but merely to deliver it in pledge, this guaranty had been made, it would not have had the effect to pass the title, but merely to guarantee the solvency of the maker of the note, and if, as ancillary to a suit for the recovery of the main debt, this action had been brought against this payee as a guarantor, this entry could not be treated as an indorsement of the paper, because the delivery in pledge is entirely consistent with the form of indorsement here employed, and, upon proof that by the act of delivery it was not assigned to negotiate the paper, the idea of a design to enter into the technical contract of indorsement would be rebutted. Thus, at last, we see that the intention of the party, as manifested in the act of delivery, is the real key to the solution

of whatever legal difficulties may surround the construction of this contract.

This discussion has proceeded, of course, upon the idea that this controversy is at first hand,—it is between the original parties to this transaction. The nature of the indorsement may be explained, as between these parties, by showing the purpose of the delivery. If the controversy had arisen upon a paper which was by its own terms negotiable, or which by subsequent indorsement in blank by the payee had been thus rendered negotiable, and upon such a paper this special indorsement had been entered by a holder other than the payee, and the issue had been thus between such an indorser, or an original payee of a paper negotiable by delivery only, and an innocent third party, different rules would prevail. To negotiation of a paper not by its own terms negotiable, indorsement or assignment is absolutely essential, and a contract of guaranty merely of the solvency of the maker could not amount either to an assignment or indorsement. The payee or a subsequent indorsee alone can enter into the technical contract of indorsement, because they in succession alone have power to transfer or assign the paper; but any person may guarantee the solvency of the maker, and be liable as a guarantor. In *Geiser Mfg. Co.* v. *Jones*, 90 Ga. 307, *Chief Justice* Bleckley uses this significant language, in dealing with a case in which the following indorsement was made upon the note sued upon by a person other than a party to the contract: "For a consideration not herein named, we guarantee the payment of this claim" to the Geiser Manufacturing Company. In discussing this the chief justice says: "Had the Geiser Manufacturing Company, the payee of these notes, signed a contract upon them with a third person, in the terms of that placed thereon by Jones & Toll [who were the third persons making the indorsement], and had afterwards negotiated them to a third person, the Geiser Company could, under our law, be sued and made answerable as indorsers." He cites, as authority for this proposition, *Vanzant* v. *Arnold*, 81 Ga. 210. In the latter case it was held by this court that, notwithstanding a superadded obligation in some respects similar to the one under consideration in this case, a contract of indorsement was nevertheless complete. It has been questioned somewhat whether the view here presented as to the character of the contract made by this indorsement is not in conflict with the view taken by the Supreme Court of the United States in the case of *Central Trust Co.* v. *First Nat. Bank*, 101 U. S. 68, 25 L. ed. 876. It will be seen upon examination of that case that the indorsement signed by the payee was intended as a simple guaranty of the solvency of the maker. It was not the form of indorsement usually employed in the transfer of negotiable paper in strictly commercial transactions, and this guaranty by the payee itself indicates that the trust company discounted it, not upon the faith of the credit of the original maker, but upon the faith of the guaranty alone. The form of the contract of guaranty, accompanied by a delivery thereunder, would of itself serve to charge the trust company with notice of any defenses the maker might have had, and thus take it out of the rule which protects innocent purchasers without notice against pre-existing defenses. In order for a transfer or assignment to confer upon an indorsee the benefit of this rule it must be accomplished according to the law merchant; that is, by indorsement. No transfer by any other method accomplishes this result, and the decision now under review is only authority for the proposition that the form of indorsement then under consideration, when employed in the transfer of paper, was not such an indorsement, according to the strict technical significance of that term, as would cut off the defenses of the maker. In that case the question was not whether the trust company was such an indorsee as to acquire a title to the chose in action, but whether, under the form of indorsement employed, it was such an indorsee as to cut off equitable defenses of the maker. So the question in this case is not whether the contract under consideration is such an indorsement, in its strict technical sense, as cuts off defenses of the maker, but whether the payee is such an indorser as entitles him to notice. He may be the latter, and not the former. We think he falls within the latter class. The mere guaranty of a paper does not involve the idea of negotiation nor negotiation necessarily the idea of guaranty, unless the contract of assignment be of such a character as to operate as a guaranty of the solvency of the maker; and the mere fact that the contract of the indorser may contain a stipulation for a guaranty which extends his obligation beyond that of a mere indorser does not affect his legal relation to the paper. *Partridge* v. *Davis*, 20 Vt. 499; *Deck* v. *Works*, 18 Hun, 266. A contract in the following form indorsed upon a promissory note: "We guarantee payment of this note, waive demand and notice of nonpayment,"—was held to be an indorsement with an enlarged liability. *Robinson* v. *Lair*, 31 Iowa, 9. A guaranty indorsed on a note by the payee thereof may operate as well as an indorsement as a guaranty, and may make the party signing liable as an indorser. *Green* v. *Burrows*, 47 Mich. 70; *Heard* v. *Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811. As between the original parties, in considering the effect of contracts of guaranty, the court will look to all the surrounding circumstances, and will not be necessarily controlled by the use of the word "guaranty," according to its technical acceptation. We think that the principle that a guaranty indorsed on a note by a third person would amount to a contract of guaranty only, while a similar guaranty indorsed on a note by the payee thereof in the course of and for the purpose of negotiation constitutes an indorsement, is sustained by the principle decided in the *Geiser Case*, *supra*, and likewise in *Tuttle* v. *Bartholomew*, 12 Met. 452. In the case of *Prosser* v. *Luqueer*, 4 Hill, 420, 40 Am. Dec. 288, *Chancellor* Walworth, in the New York court of errors, having under review an indorsement upon a promissory note in the following words: "For value received, I guarantee

the payment of the within note, and waive notice of nonpayment,"—held that such guaranty amounted to an indorsement, and that, under a statute authorizing indorsers and makers to be sued in the same action, the action was properly brought against the guarantor as an indorser. In defining the nature of this contract he uses this language: "But a general guaranty like this, upon a note payable to bearer, is in law a general indorsement of the note, with a waiver of the condition precedent of a notice of nonpayment by the drawers. It is true that in the present case the note was not payable to bearer, but there is a stronger reason why the indorsement in the present case should be construed to be a regular contract of indorsement, in a strict commercial sense, inasmuch as, the paper not being negotiable by delivery alone, an indorsement must have been made by the payee in order to transfer the title. In *Buck* v. *Davenport Sav. Bank*, 29 Neb. 407, the following words were written upon the back of a negotiable note, and signed by the payee: "Demand, notice, and protest waived, and payment guaranteed." This was held to constitute a valid contract of indorsement by the payee, with an enlarged liability. In other words, this decision simply means that without the guaranty of payment, and waiver of notice and protest, the liability would have been simply that of an indorser in blank,—that is, a liability dependent on demand and notice,—and the waiver of notice of nonpayment served simply to extend the liability of the indorser, by making him liable upon the nonpayment of the paper. To the same effect is *Heard* v. *Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811. In the case of *Jaffray* v. *Kraus*, 79 Hun, 449, it was held that where a married woman was the payee in a promissory note, and made and signed thereon the following indorsement: "I hereby charge my separate estate with the payment of this note,"—this constituted an indorsement, only, in the strict commercial sense, and, though the effect of the indorsement was likewise to charge her separate estate with the ultimate redemption of the paper, it was nevertheless an indorsement, and that she was entitled to notice of nonpayment, as an indorser, in order to bind her and her separate estate to the payment of the paper. It was insisted in that case that, inasmuch as the indorsement was made to give an additional credit to the transferee of the paper, she became and was thereby only a surety to the maker, and was not, therefore, entitled to notice as an indorser. It will be observed that she was the payee in this paper. The legal title to the promise of the maker was in her. The indorsement was entered for the purpose of negotiating the paper, and that fact gave her her character as indorser. If, on the contrary, she had not been the payee, and the memoranda had been placed there simply for the purpose of strengthening the credit of the maker, her position then would have been that of a guarantor, simply, and she would not have been entitled to notice. The court says: "It is to be observed that the notes were payable to her order, and indorsed by her, as far as the transfer of the notes was concerned, in blank, and she simply made the special provision in order to charge her separate estate. It was clearly intended to be an indorsement by this married woman, and there was no intention upon her part of assuming any other liabilities than any payee, by indorsing a promissory note, usually intends. The payee of a note, who indorses the same for the purpose of giving credit to the maker, does not thereby become a simple surety, although such indorser knows that the indorsement is asked for for the purpose of giving credit to the maker upon the purchase of goods, and that the note will be used for such purpose. That is the whole transaction as alleged in the complaint, and such allegations in no way alter the rights of the defendant, or change the character of her contract." So, in the present case, the note sued upon was made payable to the order of the defendant, and was indorsed by him, as far as the mere transfer of the note was concerned, in blank, and he simply made a special provision in order to charge himself with liability for attorney's fees upon the happening of the contingency therein provided for. This latter undertaking in no way affected his character as an indorser. So far as that element of liability is concerned, it remained unchanged and wholly unaffected by his additional undertaking. Inasmuch, then, as this contract of indorsement was made for the purpose of passing title to this promissory note to the present holder, and was made in the course of its negotiation, the payee's true relation to the paper was that of an indorser; and, in order to bind him to its ultimate redemption, it was necessary for the plaintiff to have shown notice to him of its nonpayment. The refusal of the court to charge to the effect that he was entitled to notice, as an indorser, of nonpayment, was error, and a new trial upon that ground should have been awarded.

In addition to principal and interest, the jury found for the plaintiff a certain amount of attorney's fees. Treating this as a contract of guaranty, and giving to the plaintiff the most favorable view that could be taken of it, this finding was wholly unsupported by the evidence. The contract of this indorser was conditioned to pay attorney's fees, not exceeding 10 per cent, which might be incurred by the holder in the collection of the amount due on the note by law. The record was wholly silent as to any expense incurred, or as to the value of the service of any attorney; and therefore it was absolutely necessary, before the plaintiff could recover upon that account, that he should prove, either that he had incurred a certain amount of expense, and that it was reasonable, and within the limit of 10 per cent, or that the service of an attorney for that purpose, within that limit, was reasonably worth the sum sought to be recovered. There was no proof, nor offer to prove either, and the finding of the jury for attorney's fees was therefore wholly unsupported by the evidence.

We do not deem it necessary or material to inquire further into the commission of any errors alleged as resulting from rulings by

the court upon the trial, inasmuch as the main question determined in this case, to the effect that this defendant was an indorser, and entitled to notice, practically disposes of the litigation in his favor.

Judgment reversed.

MONTANA SUPREME COURT.

Re Estate of J. C. RICKER, Deceased.

APPEAL OF William A. CHESSMAN, Executor.

(14 Mont. 153.)

1. A trust in land bought by an executor for himself is not established in favor of the heirs by the fact that part of the purchase price was paid from funds of the estate, where he has long since accounted for such funds, with interest, and his accounts have been annually approved; and the fact of such payment cannot be overcome by a claim that a higher rate of interest ought to have been charged against him, which would make him still indebted to the estate.

2. An executor may lawfully be allowed his commissions on the disbursements of the year at his accounting on the close of the year.

3. The mere fact that a debtor to the estate has the legal title to a piece of land does not show that a compromise with

NOTE.—*Liability of executors, trustees, etc., for compound interest.*

I. *Origin, growth, and general statement of the doctrine.*
II. *Principle of the allowance.*
III. *Option to take interest or profits.*
IV. *Grounds for allowance.*
- a. *Generally.*
- b. *Misconduct or gross delinquency generally.*
- c. *Use and admixture of trust fund.*
- d. *Failure or refusal to account.*
- e. *Neglect to invest.*
- f. *Improper investment.*
- g. *Unnecessarily calling in investment.*
- h. *Neglect in winding up or paying over.*
- i. *Nonperformance of trusts for accumulation.*
- j. *Neglect or violation of duty imposed by statute.*
- k. *Interest or profits made.*
- l. *Interest or profits which might have been made.*

V. *Who are chargeable.*
VI. *Jurisdiction to allow.*
VII. *How computed.*
- a. *Method of computing generally.*
- b. *Upon what computed.*
- c. *When allowance should commence.*
- d. *Rate per cent and length of rests.*
- e. *Termination of allowance.*

VIII. *What sufficient to release from accountability.*
IX. *Effect of allowance on compensation.*
X. *Effect of allowance on costs.*

I. *Origin, growth, and general statement of the doctrine.*

The doctrine of the liability of executors, trustees, etc., for compound interest, is of modern growth. It is based upon the use of the trust fund by the executor or other trustee for his own benefit, and under the earlier English practice he was not held chargeable with interest therefor.

Thus, in Child v. Gibson, 2 Atk. 603 (1743), the court refused to charge an executor with interest upon trust funds used by him, saying that "there never was a case in this court where a master was directed to charge interest upon an executor who makes use of assets come to his hands in the way of his trade."

This case is cited as an example of a long line of cases decided at about the same time and previous thereto. All of them, however, have been overruled by more modern decisions, some of which will be found in this note, but many of which have been omitted as not involving the element of compound interest. And the liability of the executor or other trustees for compound interest in a proper case is well settled in both England and America, all or nearly all of the more modern cases conceding the liability, but turning upon the question as to whether the facts of each particular case bring it within the rule.

There are, however, a few exceptions.

Thus, in Atty-Gen. v. Solly, 2 Sim. 518 (1828) (set forth *infra*, under heading, IV. c, *Use and admixture of trust fund*), denying annual rests in a case in which no fraud appeared, the court said that Raphael v. Boehm, 11 Ves. Jr. 92 (1805) (set forth *infra*, under heading, IV. i, *Nonperformance of trusts for accumulation*), which is the leading English case upholding the doctrine of liability, was an excepted case, and that it could never understand upon what principle *Lord* Eldon confirmed the master's report therein.

And in *Re* McCall's Estate, 1 Ashm. 357 (1830), the previous authorities were reviewed and Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507 (1815), which is a leading American case upholding the same rule, was disapproved and said to find no support in the then present state of the English law, and Raphael v. Boehm, *supra*, was said to be unsupported by either the previous or subsequent authorities, and the opinion was expressed that the current of authority was strongly against the allowance of compound interest.

And in Dietterich v. Heft, 5 Pa. 87 (1847), it was said that the leading English case of Raphael v. Boehm, *supra*, has been much questioned in later chancery decisions, and the principle strongly condemned.

And in *Re* Lawrence, 2 Connoly, 53 (1889), the court refused an allowance of compound interest against a testamentary trustee on a payment which he was ordered to make by a decree, and allowed simple interest, but failed to state the facts upon which the ruling was based.

But in *Re* Harland's Accounts, 5 Rawle, 323 (1835), the view expressed in *Re* McCall's Estate, *supra*, that compound interest can be awarded under no circumstances, at least against an administrator, was disapproved.

Though in Norris's App., 71 Pa. 106 (1872), the court criticized and commented upon the rule laid down in *Re* Harland's Accounts, *supra*, that compound interest may be charged in case of gross delinquency, saying that no instance was known in which any man had ever yet paid compound interest by the judgment of a court of the state, and that it is to be noted that they have had a number of such cases before them.

And in Myers v. Myers, 2 McCord, Eq. 214, 16 Am. Dec. 648 (1827), the allowance of compound in-

See also 47 L. R. A. 721.

him by the executor of a claim due the estate was improper.

4. The rate of compound interest paid by an executor on funds retained in his hands, which is more than banks would pay for a part of the time, and which has made double the income that could have been obtained by investing the money as directed by the will, will not be increased to the maximum rates at which there is evidence that money could have been loaned, with no allowance for expenses, delays, and failures,—especially where the executor has disbursed more than $50,000 during a long term of years, and his accounts for the whole estate have been found correct in every item, and there is no delinquency or suspicion of fraud on his part.

5. The question of the rate at which executors' commissions should be computed cannot be raised for the first time on appeal.

(May 15, 1893.)

APPEAL by the executor from a decree of the District Court for Lewis and Clarke County charging him with certain amounts which it was claimed he should account for as executor of J. C. Ricker, deceased. *Reversed.*

The facts are stated in the opinion.

Messrs. **Massena Bullard** and **D. S. Wade,** for appellant:

The failure to invest in government securities was not malversation or breach of trust. The court had the inherent authority and power to make the order concerning the investment of these funds when it became necessary so to do for the protection or preservation of the funds and the interests of the legatees, or if it became impossible or impracticable to carry out the provisions of the will concerning investments.

Croswell, Exrs. & Admrs. § 439; Schouler,

terest against trustees was discussed, and the right to make it affirmed, though in that case it was not interest on interest, but interest on profits, that was allowed.

The doctrine now obtaining in England is generally stated in Penny v. Avison, 3 Jur. N. S. 62 (1856), to be, that more than the usual and established rate of 4 per cent may be charged upon balances due from a trustee, first, when in the opinion of the court the trustee ought to have received a higher rate; second, when he actually had received more; third, when he is presumed to have received more; and fourth, when he is estopped to say that he did not receive more.

And in Jones v. Foxall, 15 Beav. 388, 21 L. J. Ch. 725 (1852), it was said that in some of the cases the court has charged the trustee with annual rests because the trust under which he acted in distinct terms required him to accumulate the fund at compound interest. In other cases the principle seems to have been that the court visits the executor or trustee with an account in the nature of a penalty for his misconduct, where he has, not merely committed a breach of trust, but has himself endeavored to derive, or has actually obtained, some pecuniary advantage from the use of the money of which he has thus obtained possession.

So the American rule, which seems to have been adopted from the more modern English one, is stated generally in Diffenderffer v. Winder, 3 Gill & J. 341 (1831), and Winder v. Diffenderffer, 2 Bland, Ch. 166 (1829), to be that compound interest may be charged when a trustee or holder of money has been directed and undertakes to invest the sum placed in his hands in a way to make it productive, and fails or refuses to do so, and when a trustee has received rents and profits which he should have applied so as to be productive, or toward the maintenance of devisees, but, failing or refusing to do so, retains and uses the money as his own, in a manner to derive profits from it, and he fails to show clearly what these profits were.

And in Wright v. Wright, 2 McCord, Eq. 185 (1827), it was said that compound interest is allowed against executors and other trustees only when the will creating the trust directs the fund to be laid out in a particular way as an accumulating fund, or when he unnecessarily calls in money which is out at interest and accumulating, or employs it in trade, or in some other manner, and refuses or neglects to account.

So in Perkins v. Hollister, 59 Vt. 348 (1887), and in Barney v. Saunders, 57 U. S. 16 How. 535, 14 L. ed. 1047 (1853), it was said that when a trust to invest has been grossly or wilfully neglected, or when the funds have been used by the trustees in their own business, or profits made of which they gave no account, interest is compounded as a punishment or as a measure of damages for undisclosed profits.

II. *Principle of the allowance.*

Some of the cases, principally those of an earlier date, place the allowance of compound interest against executors, trustees, etc., upon the ground that it is a punishment or penalty for gross neglect, mismanagement, or misconduct in the execution of the trust.

Thus, in Jones v. Foxall, 15 Beav. 388, 21 L. J. Ch. 725 (1852), it was said, in giving a general summary of the doctrine, that the principle seems to have been that the executor or trustee is visited with an account in the nature of a penalty for his misconduct.

And in Saltmarsh v. Barrett, 31 Beav. 349, 8 Jur. N. S. 787, 31 L. J. Ch. 783, 10 Week. Rep. 640, 5 L. T. N. S. 87 (1862), it was said that a charge of 5 per cent with annual rests imposed upon an executor for retaining funds of the estate and investing them in trade, was imposed as a punishment for his conduct.

So in Bryant v. Craig, 12 Ala. 354 (1847), it was said that the charge of compound interest seems to be adopted as a punishment when, from the gross mismanagement of the trustee, it is difficult, if not impossible, to ascertain what the income of the estate would otherwise have been.

And in Thorn v. Garner, 42 Hun, 507 (1886), in which the court refused to charge compound interest for a mere neglect to invest, it was said that it was allowed in cases of gross delinquency, or as a penalty for negligence or wrongdoing, or for some clear violation of trust.

So in Barney v. Saunders, 57 U. S. 16 How. 535, 14 L. ed. 1047 (1853), and Perkins v. Hollister, 59 Vt. 348 (1887), the court placed charges of compound interest in the alternative, as a punishment or as a measure of damages for undisclosed profits, and in place of them.

The overwhelming weight of authority, however, holds the rule that compound interest, or interest computed with periodical rests, is not charged against executors, trustees, etc., for the purpose of punishing them for any intentional wrongdoing, but rather to carry into effect the principle enforced by courts of equity that the trustee shall not be permitted to make any profit from the unauthorized use of the trust fund and to reach the profits thereby realized.

This was the rule laid down and adopted in Miller v. Lux's Estate, 100 Cal. 609 (1893), and substantially the same rule was adopted in Wheeler v. Bolton, 92

Exrs. & Admrs. § 335; *Twaddell's App.* 5 Pa. 17; *Lansing* v. *Lansing*, 45 Barb. 182.

Where the trustee has performed, without authority, an act which at the time it was done was obviously for the benefit of all concerned, and which upon proper application would have been ordered, his act will be ratified and held of the same validity as if previously ordered.

Gray v. *Lynch*, 8 Gill, 405.

The trustee takes upon himself the burden of proving entire bona fides and that there was reasonable ground to believe that the fund would be benefited; and if this can be shown, the courts will sustain his action.

Washington v. *Emery*, 4 Jones, Eq. 82; *Cornwise* v. *Bourgum*, 2 Ga. Dec. 15.

But suppose there had been a breach of trust in not following the will as to investments, what are the consequences? The executor only becomes personally liable for losses, if the investment he made did not equal the investments directed by the will.

See Schouler, Exrs. & Admrs. § 329, and *note*.

In such a case the standard or measure of loss would be what would have been made or realized by the estate or legatees if the directions of the will had been followed. The court will inquire and ascertain the amount due if the will had been followed.

1 Perry, Tr. § 472, p. 553, and *note;* Schouler, Exrs. & Admrs. § 336; *Twaddell's App.* 5 Pa. 18; *Smith* v. *Wilmington Coal, Min. & Mfg. Co.* 88 Ill. 498; *Richardson* v. *Knight*, 69 Me. 285.

With what interest or rate of interest is this executor legally chargeable under the circumstances and proof in this case?

The justice of charging an executor with

Cal. 159 (1891); Ringgold v. Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 280 (1826); Perrin v. Lepper, 72 Mich. 456 (1888); Cruce v. Cruce, 81 Mo. 676 (1884); McKnight v. Walsh, 24 N. J. Eq. 498 (1873); Utica Ins. Co. v. Lynch, 11 Paige, 524 (1845); Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507 (1815); Hazard v. Durant, 14 R. I. 25 (1882); Turney v. Williams, 7 Yerg. 173 (1834); Reed v. Timmins, 53 Tex. 84 (1879); Burdick v. Garrick, L. R. 5 Ch. App. 233, 39 L. J. Ch. N. S. 339, 18 Week. Rep. 387 (1870); *Ex parte* Strutt, 1 Cox, Ch. Cas. 439 (1788).

And in McKnight v. Walsh, Turney v. Williams, Reed v. Timmins, and Burdick v. Garrick, *supra*, the allowance is said to be made on the principle, either that he has made, or has put himself in such a position as to be presumed to have made, profits to that extent.

And in Hazard v. Durant, *supra*, because he has either actually or presumably made it or ought to have made it.

So in Cruce v. Cruce, *supra*, it was said to be charged for the purpose of attaining the actual or presumed gains, and to make certain that nothing of profit or advantage remains to the trustee except perhaps his commissions or compensation.

In Cruce v. Cruce, *supra*, the court cited several cases holding that a special case must be made out to justify the exaction of compound interest, such as wilful violation of duty, or gross delinquency, and distinguished them saying that it was thought that in most of them the special circumstances were such as disclosed the actual gains to have been equivalent to such compensation, or the conduct of the trustee in withholding or destroying evidence of his gains had left the court at liberty to presume they were fairly represented by such computation.

And in Cannon v. Apperson, 14 Lea, 553 (1885), it was said that an executor or other trustee who has used the trust fund for his own benefit, and thereby made more than simple interest, will be charged with the whole profit, either by charging him with compound interest, or in such other manner as will best carry out the principle of giving the beneficiary all the profits.

And in Utica Ins. Co. v. Lynch, *supra*, the same rule was applied to a receiver who employed the moneys of the receivership in trade, making more than simple interest.

So in Perrin v. Lepper, *supra*, it was held that compound interest is awarded by a court of equity only for the purpose of furnishing adequate means of redress when the law fails to do so.

And in Schieffelin v. Stewart, *supra*, the allowance was said to be made in order to reach profits made when they are not otherwise ascertained.

And in Utica Ins. Co. v. Lynch, *supra*, it was said that compound interest and computing it with periodical rests merely constitutes a convenient method of charging a trustee with the amount of profits supposed to have been made by him from the use of trust moneys, when the actual amount made beyond simple interest cannot be ascertained.

And in Evertson v. Tappen, 5 Johns. Ch. 497 (1821), holding that compound interest will not be allowed in favor of a trustee, it was said that this mode of computation is sometimes resorted to in order to meet the profits which the trustee may have made out of the trust property and will not disclose.

So in Miller v. Lux's Estate, *supra*, it was said that where the conventional rate of interest exceeds the statutory rate, the executor should be charged with legal interest compounded annually in order to fully reach the profit realised by him from the use of the trust fund, the rule being intended to secure fidelity in the management of trust estates.

And in Cruce v. Cruce, 81 Mo. 676 (1884), it was said that the order for the accounting of a trustee should be framed with reference to approximating his gains from the use of the trust fund, notwithstanding his failure to disclose his profits, when they are known to the court by means of other evidence, unless they should be less than a prudent management of the fund should have produced.

As trustees are charged with compound interest upon the ground of the presumed gain to them from the use of the trust fund, however, they will not thus be charged when the circumstances forbid the presumption of gain on their part and it appears that they invested the trust fund in good faith, though in violation of the trust, and though the *cestui que trust* could not be indemnified by a less allowance than compound interest. Ringgold v. Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250 (1826).

And in *Ex parte* Strutt, 1 Cox, Ch. Cas. 439 (1788), an assignee in bankruptcy was held not to be chargeable with interest on moneys retained in his hands at a greater rate than 4 per cent, unless a special case is made for that purpose, as that he had made a greater profit from the money.

And the same rule was applied in charging interest against executors on balances in their hands, in Tebbs v. Carpenter, 1 Madd. 290 (1816).

And in *Re* Hilliard, 1 Ves. Jr. 90 (1790), it was held that interest at 4 per cent should be allowed against assignees of a bankrupt who have received funds and failed to make a dividend, and if it is established that more was made the rate should be increased.

So in Cannon v. Apperson, 14 Lea, 553 (1885), it was said that simple interest only will be charged against

compound interest at the rates fixed in this case for a long series of years will be realized when it is remembered that in loaning money for a long number of years, with the utmost vigilance and care, there are always losses, and always times of depression and stagnation when money cannot be loaned at all.

King v. *Talbot*, 40 N. Y. 95.

Compound interest will not be charged or allowed as a penalty or to punish the executor or trustee. It is only resorted to as a means to compel the trustee to refund the interest he has actually received or that he is presumed actually to have received.

Utica Ins. Co. v. *Lynch*, 11 Paige, 524; *Hood's Estate*, Tucker, 396; *Prescott's Estate*, Id. 430; *Spear* v. *Tinkham*, 2 Barb. Ch. 213; *Manning* v. *Manning*, 1 Johns. Ch. 527; *McKnight* v. *Walsh*, 24 N. J. Eq. 498; *English* v. *Harvey*, 2 Rawle, 305; *Re Harland's Accounts*, 5 Rawle, 329; *Light's App.* 24 Pa. 181; *Re McCall's Estate*, 1 Ashm. 357; *Barney* v. *Saunders*, 57 U. S. 16 How. 535, 14 L. ed. 1047; *Williams* v. *Petticrew*, 62 Mo. 460; *Scott* v. *Crews*, 72 Mo. 261; 7 Am. & Eng. Encyclop. Law, p. 430; *Boynton* v. *Dyer*, 18 Pick. 1; *De Peyster* v. *Clarkson*, 2 Wend. 77; *Ackerman* v. *Emott*, 4 Barb. 626; *Garniss* v. *Gardiner*, 1 Edw. Ch. 128; *Lansing* v. *Lansing*, 45 Barb. 182; *Fay* v. *Howe*, 1 Pick. 527, *note*; *Clemens* v. *Caldwell*, 7 B. Mon. 171; *Lukens's App.* 7 Watts & S. 48; *Hall* v. *Simmons*, 6 Ga. 272; *Cartledge* v. *Cutliff*, 21 Ga. 1; 1 Perry, Tr. § 471; *Hughes* v. *People*, 111 Ill. 457; *Wilmerding* v. *McKesson*, 103 N. Y. 329; *Graver's App.* 50 Pa. 189.

By what theory or principle is the executor required to pay interest from the very day of his appointment, when he is compelled to hold the funds of the estate in his possession for the

an executor or trustee who has used the trust fund, where it is evident that the profit made by him could not have exceeded that amount.

And in Dillman v. Hastings, 144 U. S. 136, 36 L. ed. 378 (1891), it was held that the administrators of a deceased agent who had invested money for his principal should not be held to account for a greater rate of interest than the legal rate on the money invested, in the absence of a special agreement, where it does not appear that they received interest at a higher rate.

See also Gilman v. Gilman, 2 Lans. 1 (1870), set forth *infra*, IV. i, under heading, "*Nonperformance of trusts for accumulation*. And see generally, *infra*, IV., heading, *Grounds for allowance*, and its subdivisions.

III. *Option to take interest or profits.*

It has been intimated that when an executor or other trustee has made profits from the use of the trust fund, such profits should be awarded to the beneficiary instead of interest, at least where the amount can be ascertained, and that interest should only be given when it would be impracticable to ascertain the profits.

Thus, in Montgomerie v. Wauchope, 4 Dow, P. C. 109 (1816), in which an allowance of interest was made against a trustee, curator, and tutor appointed cashier of the trust by his cotrustees, who retained large balances in his hands without investing, a reversal was had and the case was sent back for review so that it might be ascertained if it were the law of Scotland that the allowance should have been of the profit made from the use of the trust fund as contradistinguished from interest, and if so to give opportunity to present that claim to the court.

Montgomerie v. Wauchope, *supra*, distinguishes Raphael v. Boehm, 11 Ves. Jr. 92 (1805), on the ground that in that case the executors as trustees were bound by the very words of the trust instrument to accumulate the trust fund by laying out the interest from time to time to form capital.

So in Clark's Estate, 53 Cal. 355 (1879), it was held that an executor, who was a farmer who used the trust fund in connection with his own for a number of years in conducting his farming operations, was chargeable with legal interest computed with annual rests, when from the nature of the transaction it would be difficult, if not impracticable, to ascertain what profit was realized from the trust fund.

And in Perrin v. Lepper, 72 Mich. 456 (1888), it was held that where a surviving partner, who is also executor of the deceased partner, converts the entire assets of the firm and most of the individual assets of decedent to his own use, and files a false inventory, and covers up his fraud by false entries and the suppression of books, papers, and documents, and makes large profits which cannot be ascertained because of his manipulation of the books, and persistently evades and resists judicial investigation and claims that nothing is due, and his administrator, after his death without accounting, resists for years all attempts to get at the true state of the firm's books,—the estate will be charged in equity with the amount of capital furnished by the deceased partner, if it can be ascertained with a reasonable degree of certainty, and with such interest in lieu of profits, computed in such manner and at such a rate, as will, in view of all the facts and circumstances, repay what has been lost; and the profits earned may be allowed though greater than compound interest. But in making the allowance the court will take into consideration the consequences of its decree and see to it that an oppressive or unjust result is not reached.

The rule would seem to be well settled, however, that the beneficiary may, in such case, elect, at his option, either to take interest or profits.

Thus in Docker v. Somes, 2 Myl. & K. 655, 3 L. J. Ch. N. S. 200 (1834), it was held that where a trustee mixes trust funds with his own moneys, and employs both in trade, the *cestui que trust* may, if he prefers, insist upon having a proportionate share of the profits instead of interest upon the amount of the trust fund so employed, the power of the court not being confined to giving interest at different rates and with or without rests.

And where an administrator invests in securities not approved by the probate court, he may be charged with such amounts of interest or principal as he has actually collected, and with simple interest for the time during which interest was not collected, or, at the option of the heir, with the principal sum invested with interest upon annual balances computed as provided for in the statute with relation to general accounting. Sanderson v. Sanderson, 17 Fla. 820 (1880).

So where a guardian uses the money of his ward in trade, the ward, upon attaining his majority, is entitled to take the profits of the trade, or the principal money with compound interest. *Dictum* in Gully v. Dunlap, 24 Miss. 410 (1852).

And where executors and trustees have violated their trust by selling out stock and lending the proceeds to their friends upon personal security, charging themselves with the dividends as before, the beneficiaries have an option to have the stock replaced, or their money produced by the sales with interest at 5 per cent or more if more had been

purpose of paying the debts until a year from that date?

1 Perry, Tr. 4th ed. § 462; *Fox* v. *Wilcocks*, 1 Binn. 194, 2 Am. Dec. 433; *Verner's Estate*, 6 Watts, 250; *Findlay* v. *Smith*, 7 Serg. & R. 264; *Bitzer* v. *Hahn*, 14 Serg. & R. 232; *Com.* v. *Mateer*, 16 Serg. & R. 416; *Walthour* v. *Walthour*, 2 Grant, Cas. 102; Lewin, Tr. 279; *Ogilvie* v. *Ogilvie*, 1 Bradf. 356; *Jacot* v. *Emmett*, 11 Paige, 145.

After the expiration of one year, interest begins to run on the balance found in their hands on the annual accounting.

Re McCall's Estate, 1 Ashm. 357; *Boynton* v. *Dyer*, *supra*; *Gilman* v. *Gilman*, 2 Lans. 1.

Where sums have been received after that time, the court will allow six months from the time of the receipt before the charge of interest is to commence.

Worrell's App. 23 Pa. 44; *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 511, 7 Am. Dec. 504; *McKnight* v. *Walsh*, 24 N. J. Eq. 498; *Voorhees* v. *Stoothoff*, 11 N. J. L. 171; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231; 7 Am. & Eng. Encyclop. Law, p. 427, and *notes*.

If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, he will be liable to pay simple interest at the rate established by law as the legal rate in the absence of special agreements.

1 Perry, Tr. 4th ed. § 468; *King* v. *Talbot*, 40 N. Y. 86; *Nelson* v. *Hagerstown Bank*, 27 Md. 53; *Duffy* v. *Duncan*, 35 N. Y. 187; *Young* v. *Brush*, 38 Barb. 294; *Owen* v. *Peebles*, 43 Ala. 338; *Wistar's App.* 54 Pa. 60; *Newton* v. *Bennett*, 1 Bro. Ch. 359; *Littlehales* v. *Gascoyne*, 3 Bro. Ch. 73; *Mousley* v. *Carr*, 4 Beav. 49; *Mumford* v. *Murray*, 6 Johns. Ch. 1; *Ja-*

made by it. Poocock v. Reddington, 5 Ves. Jr. 794 (1801).

And property purchased by a guardian with money of his ward without an order of the probate court for that purpose cannot be taken on execution as that of the guardian, previous to the exercise by the ward of his right to elect to take the property or the purchase price with compound interest. Gully v. Dunlap, *supra*. See also King v. Talbot, 40 N. Y. 76 (1869), 50 Barb. 453 (1867), and Sanderson v. Sanderson, 17 Fla. 820 (1880), set forth *infra*, IV. f, under heading, *Improper investment*.

It has been held, however, that the choice of the beneficiary extends only to an election between simple interest and profits.

Thus, in *Ex parte* Strutt, 1 Cox, Ch. Cas. 439 (1788), it was held that when the assignee of a bankrupt who has retained the moneys of the estate in his hands is sought to be charged with interest thereon, either 4 per cent must be taken, or an inquiry must be had as to what profit he made of the money, and the result of that inquiry abided by.

And in Norris's App., 71 Pa. 106 (1872), it was held that an executor cannot be charged compound interest upon moneys of the estate in his hands, under Pennsylvania Act of March 29, 1832, section 17, providing that the amount of interest to be paid in all cases by executors, administrators, and guardians shall be determined by the orphan's court under all the circumstances of the case, but shall not in any case exceed the legal rate of interest for the time being, but he may be held for more than compound interest by a surcharge of profits, where he has used the money of the estate.

But it is to be observed that, in the latter case at least, the ruling was the result of the statutory enactment.

Cestuis que trust have not the option, however, to charge their trustees, who were directed by the testator to invest the trust fund in parliamentary stocks, or funds, or on real estate securities, but failed to make either investment, with the moneys which would have been produced if the moneys had been invested in the funds, but are only entitled to have the trust fund replaced with interest at 4 per cent. Robinson v. Robinson, 1 DeG. M. & G. 247, 21 L. J. Ch. N. S. 111, 16 Jur. 255 (1851).

And an administrator, who is charged with interest on annual balances, cannot be charged with interest on the interest he has made and returned. The distributees must elect between the two methods of accounting, and are precluded by a choice of the ordinary one. Massey v. Massey, 2 Hill, Eq. 492 (1836).

IV. *Grounds for allowance.*

a. *Generally.*

The question as to what constitutes a sufficient ground for the imposition of a charge of compound interest against an executor or other trustee has given rise to such a number of apparently conflicting, and sometimes almost irreconcilable, decisions, many of which were made without stating their grounds or noticing conflicting ones, as to render it difficult to bring the subject within anything like general rules, or to locate any defined boundaries within which the liability is to be confined.

Indeed it has been frequently stated that there is no general rule as to liability to pay interest on trust funds, and that each case must depend upon its own peculiar circumstances. Granberry v. Granberry, 1 Wash. (Va.) 246, 1 Am. Dec. 555 (1793); Morgan v. Morgan, 4 Dem. 353 (1886); Jones v. Foxall, 15 Beav. 388, 21 L. J. Ch. 725 (1852); Clark v. Anderson, 10 Bush, 99 (1873); Perkins v. Hollister, 59 Vt. 348 (1887).

A large discretion seems to have been exercised by the court with regard to the facts and circumstances attending each particular case, and it is to this discretion that the obscurity in discovering the principle is to be attributed. *Dictum* in Jones v. Foxall, *supra*.

Though the discretion of a court of equity to allow or not to allow interest against executors is a legal one governed and controlled by fixed principles of law. Jones v. Ward, 10 Yerg. 160 (1836).

For a discussion of these questions, see the following subdivisions.

It is thought, however, that the fact that the liability is based upon the existence of several elements explains much of the apparent inconsistency, many of the cases turning upon the question of the existence of one or more of the elements, and the existence or non-existence of the others being conceded, they are passed unnoticed.

When a statute is enacted on the subject, it becomes, of course, a mere matter of statutory construction.

Thus, interest will be compounded against a trustee after January 1, 1854, under Georgia Act of January 1, 1848, fixing the rate of interest to be charged against guardians, executors, and administrators already appointed and qualified, on trust funds in their hands at the rate of 7 per cent without compounding for the first six years, and thereafter at the rate of 6 per cent compounded annually, where the trustee had been previously appointed, though it was a case for simple interest only under the previous rule. Cartledge v. Cutliff, 21 Ga. 1 (1857).

And a guardian qualifying in 1860, in Georgia, is not affected by the temporary legislation on the subject of compound interest which took place pending the war, as the first six years of his term

cot v. *Emmett*, 11 Paige, 142; *Kellett* v. *Rathbun*, 4 Paige, 102; *DePeyster* v. *Clarkson*, 2 Wend. 77; *Garnies* v. *Gardiner*, 1 Edw. Ch. 128; *Spear* v. *Tinkham*, 2 Barb. Ch. 211; *Manning* v. *Manning*, 1 Johns. Ch. 527; *Brown* v. *Bickett*, 4 Johns. Ch. 303; *Williamson* v. *Williamson*, 6 Paige, 298; *Dunscomb* v. *Dunscomb*, 1 Johns. Ch. 508, 7 Am. Dec. 504; *Minuse* v. *Cox*, 5 Johns. Ch. 448, 9 Am. Dec. 313; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231; *Gray* v. *Thompson*, 1 Johns. Ch. 82; *Armstrong* v. *Miller*, 6 Ohio, 118; *Aston's Estate*, 5 Whart. 228; *Worrell's App.* 23 Pa. 44; *Graver's App.* 50 Pa. 189; *Hess's Estate*, 69 Pa. 272; *Peyton* v. *Smith*, 2 Dev. & B. Eq. 325; *Jameson* v. *Shelby*, 2 Humph. 198; *Re Dyott's Estate*, 2 Watts & S. 565; *Kerr* v. *Laird*, 27 Miss. 544; *Lomax* v. *Pendleton*, 3 Call (Va.) 538; *Handly* v. *Snodgrass*, 9 Leigh, 484; *Carter* v. *Cutting*, 5 Munf. 223; *Wood* v. *Garnett*, 6 Leigh, 271; *Griswold* v. *Chandler*, 5 N. H. 497; *Lund* v. *Lund*, 41 N. H. 355; *Turney* v. *Williams*, 7 Yerg. 172; *Wright* v. *Wright*, 2 McCord, Eq. 185; *Knowlton* v. *Bradley*, 17 N. H. 458, 43 Am. Dec. 609; *McKim* v. *Hibbard*, 142 Mass. 422; *Re Myers' Petition*, 131 N. Y. 409; 7 Am. & Eng. Encyclop. Law, p. 426; *Ashburnham* v. *Thompson*, 13 Ves. Jr. 402; *Wyman* v. *Hubbard*, 13 Mass. 232; *Williams* v. *American Bank*, 4 Met. 317; *Stearns* v. *Brown*, 1 Pick. 531; *Mathes* v. *Bennett*, 21 N. H. 199; *Knight* v. *Loomis*, 30 Me. 204; *Norris's App.* 71 Pa. 106; *Dexter* v. *Arnold*, 3 Mason, 290; *State* v. *Mayhew*, 9 N. J. L. 89; *Voorhees* v. *Stoothoff*, 11 N. J. L. 171; *Darrel* v. *Eden*, 3 Desauss. Eq. 241, 4 Am. Dec. 618; *Hough* v. *Harvey*, 71 Ill. 72; *Lake* v. *Park*, 19 N. J. L. 108; *Hall* v. *Grovier*, 25 Mich. 428.

The executor should not be charged with interest for the year upon the funds that

had not expired when that legislation ceased to operate. McCullough v. Johnson, 61 Ga. 554 (1878).

The rule for computing interest against trustees under that act, who were such at the time of its passage, is 7 per cent per annum for the first six years after January 1, 1848, without compounding, and afterwards 6 per cent per annum compounded annually. Royston v. Royston, 29 Ga. 82 (1859).

Other statutes are referred to in different divisions of this subject.

b. *Misconduct or gross delinquency generally.*

The rule seems to be well settled that, except, perhaps, under particular statutory provisions, and in case of trusts for accumulation, executors, trustees, etc., will only be charged with compound interest when they have been guilty of some positive misconduct or wilful violation or omission of duty. Wheeler v. Bolton, 92 Cal. 159 (1891); Powell v. Powell, 10 Ala. 900 (1846); Ackerman v. Emott, 4 Barb. 628 (1848); Garniss v. Gardiner, 1 Edw. Ch. 128 (1832); Bennett v. Cook, 5 Thomp. & C. 138, 2 Hun, 580 (1874); Freeman v. Freeman, 4 Redf. 211 (1880); Uglow's Estate, 2 Redf. 312 (1876); Thorn v. Garner, 42 Hun, 507 (1886); Tucker v. McDermott, 2 Redf. 312 (1876); *Re* Guardianship of Thurston, 57 Wis. 104 (1883).

Or gross delinquency or such gross negligence as to be evidence of a corrupt intention. Smith v. Kennard, 38 Ala. 695 (1863); Fall v. Simmons, 6 Ga. 265 (1849); Ackerman v. Emott, *supra*; Clarkson v. De Peyster, Hopk. Ch. 424 (1825); Freeman v. Freeman, Uglow's Estate, Thorn v. Garner, and Tucker v. McDermott, *supra*.

And that, where the omission of the trustee is due to simple negligence without any actual intent to cheat or defraud, simple interest alone is allowed. Adams v. Lambard, 80 Cal. 426 (1889); Bryant v. Craig, 12 Ala. 354 (1847); Smith v. Kennard, 38 Ala. 695 (1863); Wilmerding v. McKeeson, 103 N. Y. 329 (1886); Butler v. Jarvis, 51 Hun, 248 (1889); Garniss v. Gardiner and Bennett v. Cook, *supra*; Dietterich v. Heft, 5 Pa. 37 (1847).

But that if the omission or violation is wilful compound interest is allowed. Adams v. Lambard, 80 Cal. 426 (1889); Hughes v. People, 111 Ill. 457 (1885); King v. Talbot, 40 N. Y. 76 (1869); Butler v. Jarvis, 51 Hun, 248 (1889).

'And where he is guilty of fraud or of such gross neglect in the execution of his trust as to be evidence of a corrupt intention, he may be charged with compound interest. Bryant v. Craig and Smith v. Kennard, *supra*; Childress v. Childress, 49 Ala. 237 (1873); Calhoun v. Calhoun, 41 Ala. 369 (1867); Crump v. Gerock, 40 Miss. 765 (1866); Torbet v. McReynolds, 4 Humph. 215 (1843).

The line of distinction is drawn on the difference between mere negligence and malfeasance. Bryant v. Craig, *supra*; Lukens's App. 7 Watts & S. 48 (1844); Williams v. Powell, 15 Beav. 461, 16 Jur. 398 (1852).

Thus in Jones v. Ward, 10 Yerg. 160 (1836), it was said that the acts of malfeasance, which will render an executor or administrator liable for interest, are such acts of negligent or wrong administration as will disappoint the claimants in the assets.

And in King v. Talbot, 40 N. Y. 76 (1869), it was said that when the failure of a trustee in his duty is wilful or characterised by bad faith, the highest rate of interest should be imposed. But when good faith and honest mistake concur, the rate of interest rests in a discretion that permits the consideration of all the circumstances which go to show that substantial justice can be done to the *cestui que trust* by allowing a less rate.

So in Alvis v. Ogiesby, 87 Tenn. 172 (1888), it was said that nothing but very culpable conduct will justify the compounding of interest against an administrator.

And in Cavendish v. Fleming, 3 Munf. 198 (1812), it was held that an executor is chargeable with interest on his actual receipts only, except as to debts lost by his negligence or improper conduct.

So in *Re* Harland's Accounts, 5 Rawle, 323 (1835), guardians were held to be chargeable with interest actually made on sums invested only, when the estate has been managed with fidelity, and there is no evidence of admixture or use or of unnecessary delay in settlement.

And in Latham v. Wilcox, 99 N. C. 367 (1888), it was held that a guardian will be charged with simple interest only on the price of property sold by him as such, where it does not appear that he ever collected the proceeds of sale.

And in Crump v. Gerock, 40 Miss. 675 (1866), it was held that a guardian or other trustee is chargeable with compound interest only in extreme cases, as where he has been guilty of some fraud.

Nor is a guardian chargeable with compound interest who is negligent in some particulars, but who acts in good faith in all respects and is wholly free from fraud. Clarkson v. DePeyster, Hopk. Ch. 424 (1825).

Or for an encroachment upon the estate of a ward for the payment for her board when the estate is small and she is able to earn her own living. Starling v. Balkum, 47 Ala. 314 (1872).

So simple interest only should be allowed against a trustee on the balance of his account when the trust fund was lost without his fault. Livingston v. Wells, 3 S. C. N. S. 347 (1876).

he was required to pay out during the year.

Boynton v. *Dyer*, 18 Pick. 1.

The proper mode of taking the account of trustees is to treat all the income of the trust received during the current year as unproductive; and to charge against the income of the current year all the disbursements, including the compensation or commissions of the trustee for the same year, and to strike a balance, upon which as a general rule interest is to be allowed, but in such a way as not to compound it.

1 Perry, Tr. § 468; *Boynton* v. *Dyer, supra; Pettus* v. *Clawson*, 4 Rich. Eq. 92; *Jones* v. *Morrell*, 2 Sim. N. S. 241; *De Peyster* v. *Clarkson*, 2 Wend. 77; *Vanderheyden* v. *Vanderheyden*, 2 Paige, 288, 21 Am. Dec. 86; *Lukeens's App.* 47 Pa. 356; *Reynolds* v. *Walker*, 29 Miss. 250; *Roach* v. *Jelks*, 40 Miss. 754; *Crump* v. *Gerock*, Id. 765; *Rowland* v. *Best*, 2 McCord, Eq. 317; *Jordan* v. *Hunt*, 2 Hill, Eq. 145; *Walker* v. *Bynum*, 4 Desauss. Eq. 555; *Powell* v. *Powell*, 10 Ala. 900; *Sheppard* v. *Starke*, 3 Munf. 29; *Burwell* v. *Anderson*, 3 Leigh, 348; *Garrett* v. *Carr*, Id. 407; *Campbell* v. *Williams*, 3 T. B. Mon. 128; *Jones* v. *Ward*, 10 Yerg. 160; *Eliott* v. *Sparrell*, 114 Mass. 404; 7 Am. & Eng. Encyclop. Law, p. 429; *Callaghan* v. *Hall*, 1 Serg. & R. 241.

The private property of an executor or trustee cannot be taken away from him by vague suspicions or conjectures. Land cannot be impressed with a trust, upon lame, unwarranted, or inconclusive presumptions.

1 Perry, Tr. § 137; *Philpot* v. *Penn*, 91 Mo. 48; *Railsback* v. *Williamson*, 88 Ill. 497; *Sheppard* v. *Pratt*, 32 Iowa, 296; *Childs* v. *Griswold*, 19 Iowa, 362; *Stall* v. *Cincinnati*, 16 Ohio St. 169; *Parmlee* v. *Sloan*, 37 Ind. 469; *Cutler* v.

And a trustee will not be charged with compound interest on funds appropriated by a defaulting cotrustee, though liable therefor, when the cotrustee, who had been a former attorney for the decedent and confided in by him, and of good standing and reputed wealth, had represented to him that he had properly invested such funds. Bates v. Underhill, 3 Redf. 373 (1878).

And an executor will not be held liable for compound interest on funds of the estate coming to the hands of his co-executor, which are misapplied by the latter, where there was no wrongful intention on his part. Wilmerding v. McKesson, 103 N. Y. 329 (1886).

Nor for interest with annual rests, where there was no act of wilful mismanagement or culpable neglect proved against him, and every charge was allowed against him upon his own return, for a mere failure to obey a direction to pay interest annually for maintenance of the beneficiary. Wright v. Wright, 2 McCord, Eq. 185 (1827).

So the sureties in the bond of an executor who has not settled his accounts and procured his discharge as such are only liable for the residue of the personal estate, after payment of debts and legacies, received by the executor and not disposed of according to the terms of the will, with simple interest thereon, when no wilful breach of duty on the part of the executor is shown. White v. Ditson, 140 Mass. 351, 54 Am. Rep. 473 (1886).

And an administrator having knowledge of the facts, who fails to bring suit for the recovery of a slave belonging to the estate until the right of action is barred by the statute of limitations, is responsible for the value of the slave with interest, but is not chargeable with compound interest when there is an entire absence of fraud and of *mala fides*. Torbet v. McReynolds, 4 Humph. 215 (1843).

And one who was appointed executor and testamentary guardian in a will directing that testator's property be kept together for the benefit of the family, who within two years from the time he became executor paid an extravagant debt incurred by one of the minor legatees at school to save him from disgrace, is chargeable with the amount with interest from the time it was paid, but the payment is one as executor and not as guardian, and simple interest only can be allowed. Jones v. Ward, 10 Yerg. 160 (1836).

Nor should interest be compounded against an administrator for paying a debt of the estate barred by the statute of limitations. Alvis v. Oglesby, 87 Tenn. 172 (1888).

And simple interest only should be allowed against an administrator who interposes an unsuccessful claim to the ownership of a half interest in the property of the intestate where he had at no time claimed any part of the earnings as his own. Wright v. Wright, 4 Redf. 351 (1879).

And a trustee who has failed to keep accounts, and failed to settle with the heirs, and withheld from them a true statement of the affairs of the estate because of over caution, will not be charged with compound interest, where there was no breach of trust, and he shows the state of the trusteeship in his answer so far as within his knowledge. Armstrong v. Campbell, 3 Yerg. 201, 24 Am. Dec. 556 (1832).

So in Kattelman v. Guthrie's Estate, 43 Ill. App. 188 (1891), it was said that interest should be compounded only in case of a wilful withholding of the funds.

And in Myers v. Myers, 1 Bail. Eq. 23 (1830), it was held that compound interest should not be charged against an executor for the rent of lands and the hire of slaves belonging to the estate, where it is not made to appear that he ill-treated the slaves.

So in *Re* Harland's Account, 5 Rawle, 323 (1835), the rule was laid down that compound interest may be charged in case of corruption; and English v. Harvey, 2 Rawle, 305 (1830), and Say v. Barnes, 4 Serg. & R. 116, 8 Am. Dec. 679 (1818), set forth *infra*, IV., e, under heading, *Neglect to invest*, were distinguished as being cases of mere negligence.

And in Hughes' App., 53 Pa. 500 (1866), it was said that in cases of very gross delinquency a guardian will be charged with compound interest, but the court merely confirmed the report of an auditor charging a guardian with simple interest upon moneys of the guardianship received and used by him.

But this rule was disapproved in Norris's App., 71 Pa. 106 (1872). See *supra*, I., heading, *Origin, growth, and general statement of the doctrine.*

The rule in Kentucky, however, is said, in Page v. Holman, 83 Ky. 573 (1885), to be that a trustee may be charged compound interest, even in the absence of fraud or intended misconduct.

And the rule in South Carolina is that only simple interest can be charged against a trustee, unless it appears that he has dealt improperly with the interest-bearing fund, with the qualification that payments are to be deemed to have been made out of the interest, thus saving the principal and making the interest productive. Livingston v. Wells, 8 S. C. N. S. 347 (1876).

e. Use and admixture of trust fund.

The use of the trust fund, and its admixture by the trustee with his own money, have almost universally been held to be a sufficient ground for the

Tuttle, 19 N. J. Eq. 560; *White* v. *Sheldon*, 4 Nev. 280; *Nelson* v. *Worrall*, 20 Iowa, 469; *Cuming* v. *Robins*, 39 N. J. Eq. 46; *Clarke* v. *Quackenbos*, 27 Ill. 260; *Baker* v. *Vining*, 30 Me. 128; *Carey* v. *Callan*, 6 B. Mon. 44; *Hyden* v. *Hyden*, 6 Baxt. 406; *Harvey* v. *Pennypacker*, 4 Del. Ch. 445; *Witte* v. *Horney*, 59 Md. 584; *Parker* v. *Snyder*, 31 N. J. Eq. 164; *Brickell* v. *Earley*, 115 Pa. 473; *Malin* v. *Malin*, 1 Wend. 626; *Snelling* v. *Utterback*, 1 Bibb, 609, 7 Am. Dec. 661; *Green* v. *Dietrich*, 114 Ill. 636; *Thomas* v. *Standiford*, 49 Md. 181; *Johnson* v. *Richardson*, 44 Ark. 365; *Enos* v. *Hunter*, 9 Ill. 211.

Where the trust fund constitutes a part only of the purchase money of an estate, the court usually gives a lien on the land only for the amount of the trust fund invested and interest; but where the entire land is the fruit of the trust fund, the *cestui que trust* has an election to take the land or the trust fund and interest.

2 Perry, Tr. § 842; *Hedrick* v. *Tuckwiller*, 20 W. Va. 489.

Executors are entitled to commissions as executors, and also as trustees, when, their duties as executors having ended, they take the estate as trustees, and afterwards act solely in that capacity.

Baker v. *Johnston*, 39 N. J. Eq. 493; *Pitney* v. *Everson*, 42 N. J. Eq. 361; *Blake* v. *Blake*, 30 Hun, 469.

A trustee will not be removed for every violation of duty.

Lathrop v. *Smalley*, 28 N. J. Eq. 192.

Executors and administrators have full authority to compromise claims, and are not liable for any damage resulting to the estate, except for an injudicious use of the power. If they act with fidelity and prudence, their

imposition of a charge of compound interest in a proper case. And some of the cases have acted upon that rule without qualification, and without referring to the amount of profits made from its use.

Thus the doctrine of many of the English cases was that an executor, or other trustee who used the trust fund for his own benefit, was chargeable with interest thereon at 5 per cent, the ordinary and usual rate being 4 per cent. Piety v. Stace, 4 Ves. Jr. 620 (1799); Heathcote v. Hulme, 1 Jac. & W. 122 (1819); Burden v. Burden, set forth in 1 Jac. & W. 134 (1819).

And in Westover v. Chapman, 1 Colly. Ch. Cas 177 (1844), trustees were held chargeable with interest at 5 per cent on balances of the trust fund mixed by them with their own moneys, though the will creating the trust authorized them to invest in good private securities.

And that trustees, who kept the trust fund and dealt with it as their own, and by agreement among themselves represented that it had been invested in stock, and accounted for it as such, were held chargeable with interest thereon at 5 per cent upon the same principle as if they had sold out the stock and used the money, was held in Bate v. Scales, 12 Ves. Jr. 402 (1806).

And an executor who, being a trader, after paying pecuniary legacies in due time, retained for many years balances belonging to the residuary estate, mixing them with his own money, was held chargeable with interest thereon at 5 per cent, though it could not be ascertained without a decree of the court who were entitled to the fund, in Sutton v. Sharp, 1 Russ. Ch. 146 (1826).

So an assignee in bankruptcy, who deposited the moneys arising from the assigned property upon his own account and used them as his own property, was held chargeable with interest thereon at 5 per cent and subject to removal, in *Ex parte* Townshend, 15 Ves. Jr. 470 (1809).

And one who paid money into a bank in which he was a partner was held chargeable with interest at 5 per cent, to be computed on annual balances, where he had been making a profit of about 5 per cent for about three years, and gave no satisfactory reason for keeping it, in *Ex parte* Baker, 18 Ves. Jr. 246 (1811).

And where executors, who, by signing joint checks, enable each other to receive money belonging to the estate of their testatrix, when they are both largely indebted thereto and become bankrupt, the sums so received are payable under their respective commissions and they are chargeable with 5 per cent interest to be added to the principal sums found to be provable against their estates. Bick v. Motly, 2 Myl. & K. 312, 4 L. J. Ch. N. S. 68 (1835).

See also as to scale of rates charged in England, *infra*, VII. d, heading, *Rate per cent and length of rests*.

So, many of the American cases have seemingly adopted the same rule, except that in America compound interest is allowed instead of interest in excess of the usual rate, holding without qualification that executors and other trustees who convert the trust fund to their own use and employ it in their business or trade are chargeable with compound interest.

This was the rule laid down in *Re* Dyott's Estate, 2 Watts & S. 557 (1841); and it was also adopted in Final Settlement in Black's Estate, Tucker, 147 (1869); Montjoy v. Lashbrook, 2 B. Mon. 261 (1842); Rowan v. Kirkpatrick, 14 Ill. 1 (1852); Miller v. Lux's Estate, 100 Cal. 609 (1893); *Re* Davis's Estate, 62 Mo. 450 (1876).

So in Page v. Holman, 82 Ky. 573 (1885), and Clark v. Anderson, 10 Bush, 99 (1873), it was held that a trustee who, instead of using the trust moneys for the advantage of the beneficiary, employs them in trade or speculation for his own benefit, will be considered as having loaned the money to himself, and will be held chargeable with interest thereon computed with periodical rests.

And in *Re* Hodges' Estate, 66 Vt. 70 (1894), and McCloskey v. Gleason, 56 Vt. 264, 48 Am. Rep. 770 (1883), it was held that a trustee or an administrator who mingles the entire trust fund with his own is chargeable with the highest legal rate of interest on the entire fund with annual rests.

So a trustee who sells the trust property receiving large sums of money therefrom, and refuses to pay them over to the party entitled thereto, making divers excuses at different times and all of the time using such moneys, realising large profits therefrom, is chargeable with compound interest upon the moneys in his hands. Hurd v. Goodrich, 59 Ill. 457 (1871).

And in Hapgood v. Jennison, 2 Vt. 294 (1829), an executor who purchased lands of the estate which were wild and unproductive, at tax sales, many tracts of which remained unsold by him for some time, and upon which he was frequently obliged to pay taxes, and to some of which the title and future sale for cash was uncertain, was charged with 6 per cent only, but the court said that had it been a monied estate instead of wild lands, and the money had gone into speculation, the court would not have hesitated to cast compound interest, making annual rests during the whole period.

And in Georgia, previous to Act of January 1, 1848, the rate of interest was 8 per cent. and simple

compromises are sustained, and they are protected.

Bacon v. *Crandon*, 15 Pick. 79; *Nelson* v. *Cornwell*, 11 Gratt. 724; *Potter* v. *Cummings*, 18 Me. 55; *Boyd* v. *Oglesby*, 23 Gratt. 674; *Alexander* v. *Kelso*, 3 Baxt. 311; *Wilkes* v. *Black* (Ark.) 4 S. W. Rep. 766; *Berry* v. *Parkes*, 3 Smedes & M. 625; *Chadbourn* v. *Chadbourn*, 9 Allen, 173; *Chase* v. *Bradley*, 26 Me. 531; *Wyman's App.* 13 N. H. 18; *Pusey* v. *Clemson*, 9 Serg. & R. 204; *Woolfork* v. *Sullivan*, 23 Ala. 548, 58 Am. Dec. 305; *Coffin* v. *Cottle*, 4 Pick. 454; *Bean* v. *Farnam*, 6 Pick. 269; *Patten's Case*, Tucker, 56.

Our statute, which authorizes administrators to compromise claims with the approbation of the probate court, does not take away the common-law right which existed prior to the passage of the statute.

7 Am. & Eng. Encyclop. Law, p. 286; *Moulton* v. *Holmes*, 57 Cal. 337; *Wyman's App.* 13 N. H. 18; *Chouteau* v. *Suydam*, 21 N. Y. 179; *Re Scott*, 1 Redf. 234; *Howell* v. *Blodgett*, Id. 323; *Chase* v. *Bradley*, 26 Me. 531; *Chadbourn* v. *Chadbourn*, 9 Allen, 173; Schouler, Exrs. & Admrs. p. 448, and *note;* Croswell, Exrs. & Admrs. § 433.

The executor had the right to compromise without obtaining leave of court, and there is no liability upon him for so doing, if he shows that the compromises were for the best interests of the estate.

Schouler, Exrs. & Admrs. § 298, pp. 386, 387; *Wood* v. *Tunnicliff*, 74 N. Y. 38; *Geiger* v. *Kaigler*, 9 S. C. N. S. 401.

The petitioner is entitled to an interest in lands purchased by the executor.

Troup v. *Rice*, 55 Miss. 278; *Fox* v. *Wilcocks*, 1 Binn. 194, 2 Am. Dec. 433; *Nixon* v. *Nixon*, 8 Dana, 6; *Weir* v. *Weir*, 3 B. Mon. 645, 39

interest was allowed as a rule, but where there was fraud or gross negligence upon the part of the guardian compound interest was allowed, the compounding to be done at the end of each six years. Royston v. Royston, 29 Ga. 82 (1859).

See also, as to purchase by trustee at his own sale, Ogden v. Larrabee, 57 Ill. 398 (1870), set forth *infra*, IV., d, under heading, *Failure or refusal to account.*

So, one having the trust funds in his hands, as a loan, at the time of the creation of the trust, which was so invested with his own means in lands, stock, business, etc., that the trust moneys could not be traced to ascertain the form of investment or the amount of profits made, was charged with interest upon interest thereon with annual rests, where, in violation of the testator's directions, he failed to invest the fund but continued it in his business. In McKnight v. Walsh, 24 N. J. Eq. 498 (1873), and 23 N. J. Eq. 136 (1872).

And an administrator who purchases property of a person indebted to the decedent, and in making payment therefor receipts for a sum of money as received by him as administrator, without setting such sum apart from his individual funds as money of the estate, is chargeable with interest thereon at the legal rate, with annual rests. Merrifield v. Longmire, 66 Cal. 180 (1884).

So an executor who deposits the funds of the estate in his individual account, and not only mingles them with his own but uses them for his own business purposes, is chargeable with compound interest thereon, though he so deposited them upon advice of counsel because of the difficulty of making secure investments. Berwick v. Halsey, 4 Redf. 18 (1878).

And an executor in a will who, previous to testator's death, was his partner, is properly chargeable upon final settlement, with compound interest upon the value of the testator's share, where he continues the partnership business without separating the testator's interest in the firm property and assets, employing them in the business. Hannahs v. Hannahs, 68 N. Y. 610 (1877).

And the procurement by a surviving partner of a conveyance of the partnership interest belonging to the decedent's estate from the decedent's administratrix, who was also a trustee for the decedent's children, by means of misrepresentation and fraudulent dealing and the continuance of the partnership business, will be regarded as a continued use of the partnership assets never accounted for, which will furnish a basis for an allowance of compound interest upon the surviving partner's wrongful refusal to account. Heath v. Waters, 40 Mich. 457 (1879).

So executors will be charged with legal interest computed with annual rests upon a loan made by them to a firm of which one of them is a member, except where payments on account exceeded the interest due at the time of payment, in which case rests must also be made at the time of such payments. *Re* Butler's Estate, 1 Connoly, 58 (1888).

And executors, one of whom is testator's widow, who, after the termination of an order giving her a monthly allowance out of the estate, continue such allowance until another order is made decreasing the amount allowed her, are chargeable with legal interest computed with annual rests on the difference between the latter allowance and the sums paid her, though there was no actual bad faith or intentional wrongdoing on their part. Miller v. Lux's Estate, 100 Cal. 609 (1893).

And in Sweet v. Sweet, Speers, Eq. 309 (1843), which was a proceeding for the removal of a guardian upon the ground that he had appropriated the funds of his ward to his own use, it was said that as he was bound to account for the interest of his ward's funds by the same rule as a borrower, with the advantage that interest is constantly accumulating without loss of time in reinvesting when paid in by the borrower, it might have been the best use that could be made of them.

On the other hand, many of the cases have adopted the rule that executors, trustees, etc., will only be charged with more than the ordinary rate of interest when they have, either really or presumptively, made more, and that interest will be compounded only when they have made more than simple interest.

Thus, in Atty-Gen. v. Alford, 4 De G. M. & G. 843 (1855), reversing 2 Smale & G. 488 (1854), 1 Jur. N. S. 861 (1855), it was held that an executor and trustee, who for several years neglected to invest trust funds, retaining them in his own hands, is not chargeable with interest at 5 per cent or upon the principle of annual rests, when there are no circumstances to lead to the conclusion that he has made any profit by his misconduct.

And in Burdick v. Garrick, L. R. 5 Ch. App. 233, 39 L. J. Ch. N. S. 369, 18 Week. Rep. 397 (1870), an agent standing in a fiduciary relation, who mixed trust moneys in his hands with those of his firm (solicitors) in their ordinary bank account, was held to be properly chargeable with interest thereon at the ordinary rate, but that it should not be compounded in the absence of evidence that he had made interest or profit by the use thereof, as a solicitor's business is not one in which compound interest can be made on the money embarked.

So, in Atty-Gen. v. Solly, 2 Sim. 518 (1828), a trustee of a charity estate, in which there was no direction to accumulate, and no fraud, who had used

Am. Dec. 487; *Re Stott's Estate*, 52 Cal. 406; *Seaman* v. *Cook*, 14 Ill. 501; *Norris's App.* 71 Pa. 106; *Myers* v. *Myers*, 2 McCord, Eq. 214, 16 Am. Dec. 648; *Cruce* v. *Cruce*, 81 Mo. 676.

Messrs. **B. P. Carpenter and Alex. C. Botkin**, for respondent:

The contention that when land is partly paid for from the trust fund and partly from the individual money of the trustee, the beneficiaries cannot impress a trust upon the property, but only a lien for the moneys of the estate used in the purchase, cannot be supported when the amount of the trust fund so employed is an aliquot part of the entire purchase price.

If only part of the purchase money be paid by the third party, there will be a resulting trust in his favor *pro tanto;* and the doctrine applies to a joint purchase.

4 Kent, Com. 306; *Sayre* v. *Townsend*, 15 Wend. 647; *White* v. *Carpenter*, 2 Paige, 238; *Hidden* v. *Jordan*, 21 Cal. 100; *Case* v. *Codding*, 38 Cal. 193.

A tutor, curator, or trustee shall not make a profit of the trust money and then retain the profit.

Brown v. *Rickets*, 4 Johns. Ch. 303, 8 Am. Dec. 567.

When there is simply a failure to invest he must account for what is commonly called statutory interest, meaning the rate provided by law in the absence of express contract; when there is any circumstance of malversation, or where he has mingled the money of the estate with his own and cannot or will not account for the profits that belong to the *cestuis que trust* the trustee must account for the highest current rate of interest with at least annual rests.

Perry, Tr. § 471, and *note;* *Barney* v.

the balance of the rents in carrying on his trade, was charged with interest at 5 per cent, but annual rests were refused.

And see also *Ex parte* Strutt, 1 Cox, Ch. Cas. 439 (1788); Tebbs v. Carpenter, 1 Madd. 290 (1816); *Re* Billiard, 1 Ves. Jr. 90 (1790), set forth *supra*, II., under heading, *Principle of the allowance*, holding the same rule.

So, in *Re* Ward's Estate, 73 Mich. 220 (1889), it was held that interest will not be compounded against a guardian upon moneys of his ward retained in his hands when the testimony does not satisfy the court that he received a net income therefrom that would amount to more than simple interest.

Nor will an administrator, who mingles the funds of the estate with his own, be charged with compound interest, where he was not engaged in a business in which the annual accumulations of interest could be used to advantage, and were so small as not to be susceptible of ready investment. Frey v. Demarest, 17 N. J. Eq. 71 (1864).

And a guardian was held not to be chargeable with compound interest at the rate of 12 per cent for delinquency in failing for a number of years to make his exhibits, during which he was getting the benefit of the trust fund, where he was engaged, not in trade, but in farming, and there was nothing from which it could be inferred that he realized anything more than ordinary interest or profit from its use. Reed v. Timmins, 52 Tex. 84 (1879).

And a trustee who invests a small trust fund with his own money on loan at 4½ per cent, charging himself with the amount received, is not chargeable with a greater rate of interest, where that is the common rate of investment and all that could safely be had in the neighborhood. Graver's App. 50 Pa. 189 (1865).

And the allowance of simple interest only against an executor who sold wild lands of the testator and bought them in himself, and the heirs elected to consider him as a purchaser, is proper when the lands were unsalable and no profits had accrued to him from them, and frequent taxes had been paid by him on them, and the title to some of them was doubtful. Jennison v. Hapgood, 10 Pick. 77 (1830).

So in McKim v. Blake, 139 Mass. 503 (1885), it was held that interest should be computed, in an action against a surety on the bond of a trustee who had wrongfully sold securities belonging to the trust estate and converted the proceeds to his own use, on the amount converted from the day it is found to be due up to the day of issuing the execution without rests, the allowance of compound interest being contrary to the general rule in Massachusetts.

And in *Re* Goetschius's Estate, 2 Misc. 278 (1893),

executors who had invested and applied the personal estate in their hands to their individual purposes were held to be chargeable with such interest as the investment earned and all profits realized on the sale or exchange of the securities, as well as for legal interest upon such funds as were applied to their individual benefit.

And in Cannon v. Apperson, 14 Lea, 553 (1885), in which an executor loaned the assets of the estate to a firm of which he was a member, which used them in its business, but did not appear to have made more than simple interest thereon, and some of the time there appeared to have been loss rather than profit, he was charged simple interest thereon where he had made yearly settlement correct except as to the matter of interest, and excused his failure to charge himself with the assets on the ground that it was to save the estate from taxation.

So in *Re* Commonwealth F. Ins. Co., 32 Hun, 78 (1884), holding that the amounts drawn by a receiver from time to time upon his individual checks might be shown when he had deposited the funds of the receivership in his private account in order that he might be charged with interest upon any of the trust fund so used, it was said that if the court can see that by mingling the trust funds with their own trustees have derived any benefit from their use, they are chargeable with interest, either simple or compound, as the facts developed may require.

See also, on this subject, *supra*, II., heading, *Principle of the allowance.*

The onus is in the trustee, however, to show that trust money has been kept apart and not used by him. Robert's App. 92 Pa. 407 (1880).

And an executor who mingles the funds of the estate with those of a firm of which he is a member will be presumed to have employed them in the business of the firm, and will be charged with legal interest with annual rests, though there is no evidence of any intended or actual fraud. *Re* Stott's Estate, 52 Cal. 403 (1877).

And where he has ample funds in hand but fails to pay legacies and divide the residue among the residuary legatees when the time for distribution arrives, and retains the money in his own hands without excuse, he is guilty of a breach of trust for which he is chargeable with 5 per cent interest on the money so retained; and if he pays the money in to his bankers and mixes it with his own, he will be deemed to have had the same benefit as if he had embarked it in trade, and will be charged with annual rests on the balance in his hands. Williams v. Powell, 16 Jur. 393 (1849).

And the burden of proof is with an executor, who has retained moneys of the estate in his own hands

Saunders, 57 U. S. 16 How. 537, 14 L. ed. 1048; *Hook* v. *Payne*, 81 U. S. 14 Wall. 252, 20 L. ed. 887; *Re Holbert's Estate*, 39 Cal. 597; *Raphael* v. *Boehm*, 11 Ves. Jr. 92; *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507; *Spaulding* v. *Wakefield's Estate*, 53 Vt. 661, 38 Am. Rep. 709; *Farwell* v. *Stein*, 46 Vt. 678; *Jennison* v. *Hapgood*, 10 Pick. 77.

The counsel for appellant constantly argue that the testimony of Chessman should be regarded as conclusive when not positively contradicted. In answer to this position it is sufficient to say that it is well established that a court or jury is not bound to give any weight or credit to the testimony of an interested witness whether a party to the action or not or whether contradicted or not.

Gildersleeve v. *Landon*, 73 N. Y. 609; *Honegger* v. *Wettstein*, 94 N. Y. 261; *Elwood* v. *Western U. Teleg. Co.* 45 N. Y. 554, 6 Am. Rep. 140; *Kavanagh* v. *Wilson*, 70 N. Y. 179.

Where an executor mingles the funds of an estate with his own and thereafter enters into investments or embarks in speculations, it will be presumed that the trust funds were used in such investments and speculations. This presumption is confirmed where his explanations of what he has done with the trust moneys are vague, evasive, and unsatisfactory; where he is shown to have been a borrower at the time such investments were made, and by other circumstances such as are here in proof.

Troup v. *Rice*, 55 Miss. 298; *Crowder* v. *Shackelford*, 35 Miss. 324; *Fox* v. *Wilcocks*, 1 Binn. 194, 2 Am. Dec. 433; *Lupton* v. *White*, 15 Ves. Jr. 441; *Nixon* v. *Nixon*, 8 Dana, 5; *Weir* v. *Weir*, 8 B. Mon. 645, 39 Am. Dec. 487.

The burden of proof is on the trustee to show

and mixed them with his own and paid them to his banker, to show that he has derived no benefit from the balance in his banker's hands, in order to relieve himself from a charge of interest thereon with annual rests. *Ibid.*

In compounding interest against a trustee on a trust fund used by him for his own benefit he will be deemed to have received interest and reloaned it as often as a prudent business man would have done with his own estate under like circumstances. Clark v. Anderson, 10 Bush, 99 (1873).

And when a trustee has misappropriated the funds of the trust, or neglected to properly invest them, the *cestui que trust* will be presumed to have lost at least lawful interest, and if the fund has been so used by the trustee that the accumulations in his hands exceed that amount the *cestui que trust* may recover whatever has been so received. Perrin v. Lepper, 72 Mich. 456 (1888).

And the settlement by an executor of several accounts with the commissioners, in each of which he claims a balance due in his favor, where at the time of each of such settlements he was actually largely indebted to the estate, furnishes conclusive evidence that he employed the sums actually due to the estate for his own use. Turney v. Williams, 7 Yerg. 173 (1834).

Where no fraud has been committed, however, the burden of proof that a guardian has received a higher than the legal rate of interest on money of his ward in his hands rests with those who represent the ward's interests and assert the fact, and they must identify the instances in which such interest has been received. Moyer v. Fletcher, 56 Mich. 508 (1885).

And in Atty-Gen. v. Alford, 4 DeG. M. & G. 843, 1 Jur. N. S. 361 (1855), it was held that misconduct on the part of an executor or trustee will not, as a general rule, warrant the presumption of the receipt of profits by him.

See also cases as to presumption and burden of proof set forth *infra*, IV.,d, under heading, *Failure or refusal to account.*

It seems probable that much of the apparent conflict between the foregoing classes of cases is to be explained upon the theory that the cases in which compound interest was charged without any apparent reference to the profits made were ones in which the presumption that more than simple interest was made would apply, but nothing seems to have been said about the presumption in the cases themselves.

Thus *Ex parte* Strutt, 1 Cox, Ch. Cas. 439 (1788), explains Treves v. Townshend, 1 Bro. Ch. 385, 1 Cox, Ch. Cas. 50 (1784), the court saying that in that case it was admitted that the assignee had mixed the money with his own, and the court thought that, as he had used it in his business, it was impossible but that he had made a profit on it to the amount of 5 per cent.

Interest is not chargeable with interest upon an account taken against an executor or administrator, however, unless he is shown to have used the funds or to have been guilty on wilful neglect. Powell v. Powell, 10 Ala. 900 (1846).

An executor not required by the will to make the fund productive is only chargeable with compound interest by reason of the use of the funds. Cannon v. Apperson, 14 Lea, 553 (1885).

Thus, an administrator will be charged with simple, and not with compound, interest upon a balance remaining uninvested and unaccounted for, and therefore presumed to have continued in his hands, where no evidence is produced to show that he used it for his own purposes, though it is admitted that he mixed it with his own moneys. *Re* McCall's Estate, 1 Ashm. 357 (1830).

And an executor will only be charged with simple interest, though he mingled and loaned the funds of the estate with his own, where he did so in good faith and without fault or want of prudence, disclosing all the profits and claiming no deduction for losses or services, and such interest exceeds what he actually received on the funds, and they had not been used in business trade or speculation. Perkins v. Hollister, 59 Vt. 348 (1887).

So where a testatrix appoints her three bankers, who were partners and were indebted to her, to be her executors, and one of them dies before her assets are collected or her will probated, appointing the other two partners his executors, who continue in trade without paying the indebtedness to her, and ultimately die, the estate of the partner first dying is only chargeable with simple interest at 4 per cent on the principal sum unpaid, there being no breach of trust on his part. Penny v. Avison, 3 Jur. N. S. 62 (1856).

And in Ker v. Snead, 11 Law Rep. 217 (1878), it was held that a trustee will not be charged with compound interest, except in case of provisions for accumulation, though he has mingled the trust fund with his own.

And the mere fact that a trustee was a common stockholder in an incorporated bank would not, of itself, charge him with interest for making a deposit as trustee in that bank, if the bank be of good credit and such as an ordinarily prudent man might select as a depository in his own business. But it might be otherwise if he were the sole stockholder or much the largest stockholder. *Dictum* in Cannon v. Apperson, 14 Lea, 553 (1885).

So a guardian will be charged legal interest only upon funds of his ward in his keeping, where he was unaccustomed to business and had innocently con-

the amount of his own funds invested in such speculations, or otherwise the *cestuis que trust* will take the whole.

1 Story, Eq. Jur. § 468; Perry, Tr. § 128; *Austin* v. *A. & W. Sprague Mfg. Co.* 14 R. I. 471; *Russell* v. *Jackson*, 10 Hare, 204; *McLarren* v. *Brewer*, 51 Me. 402; *Seaman* v. *Cook*, 14 Ill 501.

The cardinal object of equity is to see that the trustee never profits by malversation of the trust funds. To insure this, the beneficiaries are permitted to make their election as to whether they will take the actual profits or interest in lieu thereof.

1 Story, Eq. Jur. § 465; *Docker* v. *Somes*, 2 Myl. & K. 655; *Weir* v. *Weir, supra; Norris's App.* 71 Pa. 106; *Myers* v. *Myers*, 2 McCord, Eq. 214, 16 Am. Dec. 658; *Cruce* v. *Cruce*, 81 Mo. 681; *Oliver* v. *Piatt*, 44 U. S. 3 How. 401, 11 L. ed. 652.

Our statute permits the compromise of claims by executors or administrators "with the approbation of the probate court or judge."

There is no pretense that such approbation was secured in this case, and in its absence it devolved upon the executor to show that there had been no remissness on his part, and that the compromise was for the best interests of the estate.

Schultz v. *Pulver*, 11 Wend. 366; *Lowson* v. *Copeland*, 2 Bro. Ch. 156; *Powell* v. *Evans*, 5 Ves. Jr. 844; *Caffrey* v. *Darby*, 6 Ves. Jr. 487; Woerner, Law of Administration, § 324, and authorities cited in *note 4*.

Petition for rehearing.

The court was in error in assuming that the sum of $5,000 withdrawn by the executor from the funds of the estate, and invested in the property purchased from Child & Young, was

fused the ward's funds with his own and kept no accounts, though the evidence tended to show that in some unidentified instances he had received 10 per cent interest on money loaned by him. Moyer v. Fletcher, 56 Mich. 508 (1885).

And one who collects the funds of his ward in confederate notes of the "old issue," and pays them out in satisfaction of his individual debts, and shortly afterwards receives confederate notes of the "new issue" in payment of debts due him, designing to replace with them the notes of the estate used by him, is not guilty of such misconduct as will render him liable for compound interest. Brand v. Abbott, 42 Ala. 499 (1868).

And a guardian who hires the slaves of his ward under authority of the probate court by which the amount of the annual hire was fixed, carrying the sums so ascertained regularly year after year into his account and charging them to himself as a part of the income of the ward, the balances being regularly transferred from each account to the next, is not chargeable with compound interest on such sums so charged against him. Crump v. Gerock, 40 Miss. 765 (1866).

See also *infra*, IV., d, heading, *Failure or refusal to account*, in all the cases in which the element of the use of the trust fund is involved.

d. Failure or refusal to account.

Failure or refusal to account appears to be an essential element of the right to charge compound interest upon a trust fund, perhaps the pivotal element, as, if the use and profits were accounted for the trustee would be chargeable therewith as profits, and not as interest.

Thus compound interest is not allowed unless the trustee refuses or is unable to render an account of the use or profit actually made of the trust fund. Jennison v. Hapgood, 10 Pick. 77 (1830).

So, in Garniss v. Gardiner, 1 Edw. Ch. 128 (1832), it was said that as a general rule, executors, administrators, and trustees are liable to pay simple interest when they unnecessarily retain the moneys in their hands, hold them an unreasonable time, mix them with their own private funds, use them in the way of trade, or derive any personal advantage from them. It is only in special cases and under peculiar circumstances, which must be proved, that interest is to be compounded against them. But where they convert the trust money to their own use, and employ it in trade or business, making profits of which they refuse to give an account, they may be charged with compound interest.

And the rule would seem to be practically universal that the concurrence of a use of the fund with a failure or refusal to account for the profits is a sufficient ground for the charge.

Thus the burden of accounting for actual gains and profits rests upon the trustee, and if he fails or refuses to furnish evidence of them the rule should be adopted which most nearly approximates his actual gains and leaves no advantage or benefit to him by reason of his silence or refusal. Cruce v. Cruce, 81 Mo. 676 (1884); Asay v. Allen, 124 Ill. 391 (1888).

And a use of the moneys of an estate by an executor or administrator, which will render him chargeable with compound interest thereon, may be presumed from a neglect or refusal to account. *Re* Camp, 6 Mo. App. 563 (1879); Camp v. Camp, 74 Mo. 192 (1881); Kenan v. Hall, 8 Ga. 417 (1850).

And where it is impossible or impracticable to trace out and apportion the profits accruing to a trustee from the use of trust funds in connection with his own, the court will fix upon a rate of interest to charge the trustee as the supposed measure or representative of the profits. Bond v. Lockwood, 33 Ill. 213 (1864).

So if a trustee fails or refuses to account, and suppresses or destroys the evidence, so that the amount of his profits cannot be ascertained, he may be charged with the trust fund and such accumulations thereon as the best management would be likely to secure, such gains being presumed from his failure to report. Perrin v. Lepper, 72 Mich. 456 (1888).

And when he has profited, or there is reason to believe that he has profited, by the use of the trust fund, and fails to make a frank disclosure or conceals the amount made, he is chargeable with compound interest. Crump v. Gerock, 40 Miss. 765 (1866); Torbet v. McReynolds, 4 Humph. 215 (1843) *dictum*.

And when he acts in utter disregard of his trust, and treats the trust moneys as his own, and neither keeps nor renders any account thereof, he may be charged with interest computed with periodical rests. Adams v. Lambard, 80 Cal. 426 (1889).

And when he evades an accounting without repudiating the trust, and afterwards sells the trust property to an innocent purchaser, he will be charged with compound interest from the date of the sale, and is not entitled to any interest on his account. *Ibid.*

So when a trustee refuses to account for the profits arising from his use of the trust fund, or where he so mingles it and the profits therefrom with his own money and profits that he cannot separate and account for the profits that belong to the *cestui que trust*, the latter may have legal interest computed with annual rests; and this rule is especially applicable in cases involving a wilful breach of duty. State v. Howarth, 48 Conn. 207 (1880).

And a trustee who improperly purchases at his own sale under decrees of foreclosure, and after-

interest or earnings of the trust fund. It was in fact principal; and previous to its withdrawal for the investment mentioned had been on deposit in the name of Wm. A. Chessman, executor.

The court was in error in assuming that the judgment of the court below would give to the heirs both the interest in the property purchased with the funds of the estate, and the purchase price or interest on the purchase price. The $5,000 invested in this property and interest thereon from the date of the purchase, were excluded from the computation of the amount with which the account of the executor was ordered to be surcharged.

The court below found as a fact "that on the 20th day of May, 1893, the said William A. Chessman purchased of Levi H. Child and others an undivided one half of lot 8 of the Chessman & Davis Placer Claim, and an undivided one half of lot E of the Getchell & Child placer claim, in the county of Lewis and Clarke aforesaid, and paid therefor as purchase price of the same the sum of $10.000, and took the deed for the same in his own name; that $5,000 of the purchase price so paid for the same was money belonging to the said estate."

Upon such a state of facts the law is that the *cestuis que trust* may elect whether they will take the property or the amount so invested with interest. But they have had no opportunity to exercise their election, except in this proceeding; and if the decision of this court shall obtain, not only the petitioner, but all of the heirs, will be barred forever of the right to make such election.

4 Kent, Com. 11th ed. p. 334; Pom. Eq. Jur. § 1049; Schouler, Exrs. & Admrs. § 338; *Barker* v. *Barker*, 14 Wis. 139; *White* v. *Drew*,

wards sells the several parcels purchased, some of them at a considerable advance, failing to keep any exact account of the profits of the transaction or refusing to render an account thereof to the beneficiary, is chargeable upon the beneficiary's electing to affirm the sale with interest upon the sums used, computed with annual rests. Ogden v. Larrabee, 57 Ill. 398 (1870).

And one who for several years receives large sums of money from the trust estate, which he continually employs in trade and speculation for his own benefit, resisting all efforts to require him to account, and withholding the discovery sought for, and endeavoring to stifle inquiry as to the use made by him of the money received, making divers inconsistent claims as to the ownership of the trust fund, is chargeable with compound interest estimated upon the balance in his hands at the end of each year. Diffenderffer v. Winder, 3 Gill & J. 341 (1831), affirming same point in Winder v. Diffenderffer, 2 Bland, Ch. 166 (1829).

So where an executor fails to render a satisfactory account of his receipt of interest and its employment, interest should be compounded against him by the adoption of periodical rests. Johnson v. Beauchamp, 5 Dana, 70 (1837).

And one who denies the receipt of the assets, and accounts for neither principal nor interest, and converts all to his own use, may be charged, in favor of an infant legatee, with interest on the funds in his hands, compounded annually as if he had been a guardian. Swindall v. Swindall, 8 Ired. Eq. 286 (1852).

And one whose settlement has been delayed for an unreasonable time will be charged with legal interest with annual rests, on the money in his hands, when the only excuse offered is that his attorney was negligent, and that the attorney had died six or seven years before the trial, and that until about two years before the trial he had supposed that the estate had been settled, although there is no evidence that he derived any profit therefrom. *Re* Hillard's Estate, 83 Cal. 423 (1890).

And in *Re* Sanderson, 74 Cal. 199 (1887), where there had been great delay in an accounting by an executor, the appellate court held that it could not say that the court below was not justified in charging him with legal interest with annual rests.

So, an executor who uses the funds of the estate as his own, and claims them as such, and conceals from the legatees the fact that he had any in his hands, dealing in the meantime extensively in land warrants making large profits, is chargeable with compound interest. Turney v. Williams, 7 Yerg. 173 (1834).

And compound interest with annual rests will be allowed against an executor where he renders no account of the use made of the money in his hands, and claims it as his own, and denies his indebtedness to the estate, and repels the imputation of fraud or gross negligence in an unsatisfactory manner, and has been in the habit of demanding and receiving compound interest. Jennison v. Hapgood, 10 Pick. 77 (1830).

So, an executor and trustee under a will, who keeps no account of the trust fund, but uses the securities transferred to him in his own business, changing them from time to time, and realizing profits therefrom of which he renders no account, and who surcharges his account with items of expense unsupported by evidence, and some of which were unfounded in fact, is properly chargeable with interest at the legal rate computed with annual rests upon the fund in his hands. Cook v. Lowry, 95 N. Y. 103 (1884).

And one appointed executor, under a will, and guardian of testator's children, who fails to account for the assets coming to his hands, is chargeable with simple interest only for the time he acts as executor, but should be charged with compound interest as guardian from the time when the administration of the estate was or might have been concluded, unless he shows special equitable circumstances discharging him from his accountability. Hodge v. Hawkins, 1 Dev. & B. Eq. 564 (1837).

And an administrator, who converts the moneys of the estate in his hands as such to his own use, or employs them in his business without accounting for profits or disclosing what the profits were, is chargeable with compound interest with annual rests after the lapse of a reasonable time for the settlement of the estate. Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507 (1815).

In DePeyster v. Clarkson, 2 Wend. 77 (1828), it was concluded *arguendo* that Schieffelin v. Stewart, *supra*, and the English cases there cited were not supported by authority, but the case was decided upon another ground, and the latter case was said, in Garniss v. Gardiner, 1 Edw. Ch. 128 (1832), not to have been overruled thereby, but to continue to stand as authority.

So an administrator, who did not report the proceeds of a note coming to his hands to the court, as required by statute, but mingled them with his own money and used them in his own affairs and for his own benefit, keeping and rendering no separate account thereof, should be charged with compound, and not with simple, interest. Williams v. Petticrew, 62 Mo. 460 (1876).

And one who takes credit on an accounting for notes due the estate as uncollectible may be charged with interest at the rate of 10 per cent computed

42 Mo. 561; *Watson* v. *Thompson*, 12 R. I. 470; *Johnson* v. *Dougherty*, 18 N. J. Eq. 409; *Butler* v. *Lawson*, 72 Mo. 249; *Kyle* v. *Barnett*, 17 Ala. 306; *McCully* v. *McCully*, 78 Va. 159; *Maloney* v. *Kelley*, 54 Ala. 532; *Eckford* v. *De Kay*, 8 Paige, 89.

The court is in error in its statement as follows: "In this case, it appears that in rendering his account at the close of each year, the executor charged the estate with the commission allowed by law on funds of the estate, actually disbursed during the preceding year." On the contrary it is in proof, and uncontradicted and uncontested, that in each of the annual accounts hereinafter mentioned, the executor charged commissions in excess of the commissions allowed by law at the several times mentioned, respectively, and that the sums so charged in excess of the commissions allowed by law have been and now are retained and withheld by him.

The court is in error in its statement that "this transaction"—referring to the withdrawal of $6,500 belonging to the estate from the People's National Bank,—"substituted the executor as debtor to said estate in the sum of $6,500," etc.

A trustee is not permitted to borrow trust funds, and the transaction mentioned in no way changed the character in which the executor held the sum involved.

The court is in error in its statement that the interest returned in the annual accounts "amounts to $7\frac{9}{10}$ per cent per annum, compounded, upon the funds in hand from year to year, on the average, for the whole period of administration." The testimony of the expert accountant referred to is that the computation

with annual rests as for money appropriated to his own use, where the evidence shows that he collected moneys thereon which he failed to report. Camp v. Camp, 74 Mo. 192 (1881), 6 Mo. App. 563 (1879).

And the husband of an administratrix, who carries on a farming business with the assets of an intestate, and who admits that he has made profits, that he has kept no accounts, and blended the transactions of the farm with his other concerns, and cannot state the amount, will be charged with interest at the highest legal rate computed with annual rests. Walker v. Woodward, 1 Russ. Ch. 107 (1826).

So a guardian who converts the money of his wards to his own use, and uses it for a number of years without accounting for it in any way, will be charged with compound interest thereon. *Re* Eschrich's Estate, 85 Cal. 98 (1890).

And a guardian is chargeable with compound interest on notes received by him as such for funds arising from the estate and not accounted for and on money with which he ought to have charged himself for rent of lands of the estate which he had used. Latham v. Wilcox, 99 N. C. 367 (1888).

And one who has neglected for a long time to account for his ward's money, and has abandoned his trust and left the state without any apparent cause, whose ward was of age for five years prior to the judgment rendered in a suit upon the guardian's bond, is chargeable, in Missouri, with 10 per cent compound interest up to the date of the ward's coming of age, and after that time with 6 per cent. State v. Richardson, 29 Mo. App. 595 (1888).

And in Stephens v. Van Buren, 1 Paige, 479 (1829), in which executors had retained moneys of the estate belonging to infants in their hands for a number of years refusing without reason to pay it on demand of the guardian of the infants, a reference was made to a master to ascertain the amount due each of the infants, and he was directed to charge them with the interest which they had received or might have received with reasonable diligence, though the guardian did not ask for interest.

So in Johnson v. Hedrick, 33 Ind. 129, 5 Am. Rep. 191 (1870), in which there was a delay of some ten years in the final settlement of administrators, and there was evidence that they used the money of the trust in their own private speculation and refused to account for the result thereof, the court said that the master should have charged them with compound interest making annual rests for that purpose; but as no exception was taken to the report, an allowance of simple interest was affirmed.

So an assignee for the benefit of creditors, who mixes trust funds with his own depositing them in his own name, neglecting and failing to account when called upon to do so, and failing to state the disposition of the fund, will be charged with interest thereon with annual rests. Asay v. Allen, 124 Ill. 391 (1888).

And the *cestuis que trust* are entitled to an account, and to legal interest with annual rests, when a husband deeds lands to a third person and afterwards takes from the vendee a deed in trust for the benefit of his wife and family, and administers the trust for a number of years, mingling the rents and profits with his own money so that he cannot separate them and account for the profits. Bobb v. Bobb, 89 Mo. 411 (1886).

So in Lukens's App., 7 Watts & S. 48 (1844), it was said that a guardian who trades with the moneys of his ward or uses them for his own purposes in any way, whereby, for aught that appears to the contrary, he has made profit equal to compound interest thereon, of which he refuses to render an account, is chargeable with compound interest.

And in Scudder v. Ames, 89 Mo. 496 (1886), in which the judgment was reversed and the case remanded on other grounds, Sherwood, J., in a separate opinion, laid down the rule that on all claims the amount of which the administrator collects but wilfully conceals and omits to account for in his settlement, he should be charged interest with annual rests, but that he is liable for ordinary interest only on moneys in his hands ready for distribution at the time of filing his annual settlement where he fails to obtain an order of distribution or an order to loan the money.

And in *Re* Herteman, 78 Cal. 545 (1887), interest was allowed against an administrator on money of the estate drawn by him and mingled with his own funds and omitted from his account, but there was nothing in the case to show whether it was compounded or not.

Without the concurrence of the use of the trust fund, however, there is no such liability.

Thus, a guardian who neglects to file returns is not chargeable with compound interest upon moneys of his ward collected by a commissioner and remaining uncalled for in his hands. Baker v. Lafitte, 4 Rich. Eq. 392 (1852); Royston v. Royston, 29 Ga. 82 (1859); Childress v. Childress, 49 Ala. 257 (1873); Calhoun v. Calhoun, 41 Ala. 369 (1868).

Such failure is not of itself sufficient to authorize a finding of fraud. Royston v. Royston, *supra*.

And the failure to make annual settlements not being evidence of fraud but negligence merely, does not constitute such a mismanagement of the trust as renders him chargeable therewith. Calhoun v. Calhoun, *supra*.

And the omission of a guardian to give a state

was made for only a part of the time and was approximate at most.

The executor did not keep all of the moneys belonging to the estate in any of the banks designated by the order of the probate court procured by him on the 21st day of July, 1875; he failed to show what he has done, or what he did, with the sums not so deposited, and his explanations respecting the same are vague, evasive, and unsatisfactory; during the times these balances remained in his hands he was from time to time a borrower of money, and he mixed large sums of money belonging to the estate with his private funds, and used the same on his own account.

Petitioner respectfully submits that he may reasonably ask for the application to this state of facts of the fundamental principles of equity jurisprudence, that are found in the following authorities:

Pom. Eq. Jur. § 1079; 2 Redf. Wills, 886; Story, Eq. Jur. 1277; 2 Woerner, American Law of Administration, p. 1138; *Re Mairs*, 4 Redf. 160; *Rapalje* v. *Hall*, 1 Sandf. Ch. 399; *Martin* v. *Raborn*, 42 Ala. 648; *Bentley* v. *Shreve*, 2 Md. Ch. 219; *Hannahs* v. *Hannahs*, 68 N. Y. 610; *Gunter* v. *Janes*, 9 Cal. 643.

Statutory interest imposes no limit upon the discretion of the court in surcharging the accounts of an executor. Even usurious interest may be exacted, if it was realized; and it is in proof here, that from some of the investments which the executor made while he was using the funds of the estate he realized as high a rate as 216 per cent per annum.

Perry, Tr. § 468; *Barney* v. *Saunders*, 57 U. S. 16 How. 543, 14 L. ed. 1051; *Re Holbert's Estate*, 39 Cal. 597.

Section 248, Probate Practice Act, provides that "every executor and administrator is

ment of profits from the use of his ward's moneys will not be regarded as a suppression of the truth which will render him chargeable with compound interest thereon, where he had not employed them in trade and had had no use of them except as they remained with his own. Clarkson v. De Peyster, Hopk. Ch. 424 (1825).

And his mere omission to apply to the court for authority to invest his ward's money, and his failure to make annual settlements, are not evidence of fraud for which the court will allow compound interest against him, but establish negligence only. Bryant v. Craig, 12 Ala. 354 (1847).

So a partner who draws out money from copartnership funds is not chargeable with compound interest, but with simple interest only, on the sums drawn out, unless it appears that he has traded or speculated with the money, and made a profit on it, and refused on being called on for that purpose to disclose the profits. Stoughton v. Lynch, 2 Johns. Ch. 209 (1816).

And when a guardian, who is the brother of his ward, makes no reports and keeps no accounts of his guardianship, he will not be charged with compound interest on rents received from his ward's estate, where it can be fairly assumed that it was expended for her benefit, but should be imposed when and for such time as such application cannot be assumed. Finnell v. O'Neal, 13 Bush, 176 (1877).

Settlements made by a guardian in county court in accordance with directions in the will creating the guardianship are prima facie evidence in a suit in chancery in which claims against him for compound interest are asserted. Maupin v. Dulany, 5 Dana, 589, 30 Am. Dec. 699 (1837).

See also *infra*, IV. j, for other cases of failure to account where the failure was in disregard of a statute.

e. *Neglect to invest.*

Executors, guardians, and other trustees are usually held liable for simple interest at the ordinary legal rate only, for mere neglect or delay in investing the trust fund so as to render it productive. Gott v. Culp, 45 Mich. 265 (1881); Bryant v. Craig, 12 Ala. 354 (1849); Thorn v. Garner, 42 Hun, 507 (1886); *Re* Harland's Account, 5 Rawle, 325 (1835); Dietterich v. Heft, 5 Pa. 87 (1847); Pennypacker's App. 41 Pa. 494 (1862); Crigler v. Alexander, 33 Gratt. 674 (1880); *Re* Guardianship of Thurston, 57 Wis. 104 (1883); Perkins v. Hollister, 59 Vt. 343 (1887); Barney v. Saunders, 57 U. S. 16 How. 535, 14 L. ed. 1047 (1853); Crockett v. Bethune, 1 Jac. & W. 586 (1820).

Thus the rule that a guardian is chargeable with compound interest received by him does not apply to interest chargeable against a guardian on funds in hand. Brand v. Abbott, 42 Ala. 499 (1868); Childress v. Childress, 49 Ala. 237 (1873).

And an executor having money in his hands which he might have invested but did not, but upon which he does not appear to have made any profits, should be charged, in accounting, with simple interest thereon, but not with compound interest, where his duty would have been properly performed had he invested it at simple interest. Light's App. 24 Pa. 180 (1854).

And an executor who does not employ the moneys of the estate for his own benefit, but merely withholds them, is chargeable with interest, at the general rate only, something more than mere negligence being necessary to a greater charge. Rocke v. Hart, 11 Ves. Jr. 58 (1805).

And simple interest only will be allowed in computing the damages for breach of a guardian's bond by failure to account to the ward upon his becoming of age, when the guardian has not actually received interest and it does not appear that he could have invested the moneys, especially when the liability to be enforced is that of the sureties. Peelle v. State, 118 Ind. 512 (1888).

Nor will compound interest be charged against the committee of a lunatic upon balances found against him upon the settlement of his account, when the balances were small and the moneys were promptly collected and it does not appear that he used them or derived any profit therefrom. Crigler v. Alexander, 33 Gratt. 674 (1880).

The extent of the liability of trustees for interest on the trust fund for negligence in failing to invest it, however, depends upon the circumstances of each particular case. Morgan v. Morgan, 4 Dem. 353 (1886).

And in several cases interest with rests has been allowed.

Thus, interest may be charged on annual balances on an executor's account where no circumstances appear which will require him to keep moneys in his hands, and it may also be charged on balances in his favor. Darrel v. Eden, 3 Desaus. Eq. 241, 4 Am. Dec. 613 (1811).

So in Bradford v. Bodfish, 39 Iowa, 681 (1874), it was held that it is the duty of a guardian to invest the money of the ward, and if he holds it he is chargeable with interest thereon computed at the legal rate with annual rests.

And in Say v. Barnes, 4 Serg. & R. 112, 8 Am. Dec. 679 (1818), it was held that a guardian who fails to invest the money of his ward so as to render it productive is chargeable with interest thereon, and a reasonable rule is to compute it upon the balances in his hands at the end of every six months whether

chargeable in his own account . . . with all of the interest, profit, and income of the estate."

Harwood, J., delivered the opinion of the court:

This proceeding was instituted in the probate department of the district court of Lewis and Clarke county by Martha P. Ricker, petitioner on behalf of Jesse C. Ricker, a minor heir and legatee of Joshua C. Ricker, deceased, to require an account, under the provisions of the Probate Practice Act (sections 254-270), from W. A. Chessman, executor of said estate, touching his administration and disbursement of the property thereof. It appears from the record that Joshua C. Ricker died on the 1st of June, 1875, a resident of Lewis and Clarke county, Mont., leaving a widow, Martha P., and four minor children, and an estate, consisting of money deposited in certain banks, to the amount of about $18,000, which, together with other assets, consisting of certain personal effects, and demands owing the estate, and an undivided partnership interest with M. A. Price in two ranches and certain cattle, etc., altogether amounted to the appraised value of $34,467.55, excluding the homestead. The management and disposition of this estate were directed by the last will and testament of decedent, whereof William A. Chessman was appointed executor. By said will the testator devised to his wife, Martha P., the homestead and household furniture situate in the city of Helena, Mont., valued at $3,235, and directed the executor to pay, out of the funds of said estate, to said widow, for the support of herself and the support and education of said minor children, the sum of

it was used or negligently retained by him, unless he shows that the money was really lying dead.

But in English v. Harvey, 2 Rawle, 305 (1830), it was said that in Say v. Barnes, *supra*, the trustee was charged with the interest he received and interest on it up to the time of paying it over, but not compound interest.

And Dietterich v. Heft, 5 Pa. 87 (1847), explains and distinguishes Say v. Barnes, *supra*, saying that the rests there spoken of relate only to the amount of money which was received every six months by the guardian, at the end of which period, successively, the gross amount received in the previous six months was ascertained, and the amount was charged with simple interest up to the time of credit, and so of the amount of every succeeding six months, but there were no rests for the accumulation of interest upon the principal and charging compound interest.

So in Fay v. How, 1 Pick. 528 (1823), it was said that guardians will not be charged with compound interest, unless the circumstances are such as to raise a strong presumption of neglect in putting the money of the ward in a productive state.

And a guardian who did not invest the trust moneys so as to make them produce interest, and did not employ them in commerce but mingled them with his own moneys and in that way had their use, should not be charged with compound interest but with simple interest only, where owing to the existence of a state of war investments on bond and mortgage were attended with difficulty and after the termination of the war the growing exigencies of his wards required large advances and expenditures. Clarkson v. De Peyster, Hopk. Ch. 424 (1825).

Nor will compound interest be allowed upon a legacy against executors for failure to invest it, where it does not appear that they supposed themselves chargeable with interest thereon, or that they did not believe in good faith that they had invested for the benefit of the *cestui que trust* as directed by the surrogate the whole trust fund with the care of which they were charged. Thorn v. Garner, 42 Hun, 507 (1886).

A guardian in Alabama is not, as a general rule, chargeable with compound interest unless he collects it. Tyson v. Sanderson, 45 Ala. 368 (1871); Starling v. Balkum, 47 Ala. 314 (1872).

And in Vance v. Vance, 33 La. Ann. 186 (1880), it was held that a natural tutor who fails to invest his ward's estate, but uses it in his own interest, is liable for the moneys received by him with legal interest, but it should not be compounded, though the law requires a tutor to invest, under authority of the court, all amounts in his hands as often as they amount to $500.

See also, with relation to failure to invest when the duty to do so is imposed by law and failure to make profits which should have been made, *infra*, IV. j, headings, *Neglect or violation of duty imposed by statute*, and IV. l, *Interest or profits which might have been made*.

f. Improper investment.

The improper investment of the trust fund is equivalent to a failure to invest it, and is governed by the same rules with reference to the allowance of interest.

The fund will be treated as remaining in the hands of the trustee, and interest will be charged at the ordinary rate only. *Re* Emmet's Estate, L. R. 17 Ch. Div. 142, 50 L. J. Ch. 341, 44 L. T. N. S. 172, 29 Week. Rep. 464 (1881).

Thus, a trustee who invests trust funds in the purchase of debts at 10 per cent interest, which is declared by the court to be an improper investment, is chargeable with simple interest at the legal rate only, when the *cestui que trust* repudiates the investment, as the matter then stands as though no investment had been made. Cogbill v. Boyd, 79 Va. 1 (1884).

And interest should not be compounded against a guardian who in good faith lays out the money of his wards in the purchase of bank stock which, being depreciated, has by the decision of the court fallen upon him and he is required to account to his wards for the money received. Hughes v. Smith, 2 Dana, 258 (1834).

And the committee of a lunatic directed by order of the court to invest the funds of the lunatic in his hands in bonds and mortgages on real estate or in bonds of the United States or of the state or city and county of New York, who invests a part in a mortgage upon a leasehold estate which might be devested by failure of the mortgagor to pay interest, and leaves the rest on deposit in a bank which allowed but a small rate of interest, should not be charged more than simple interest at the legal rate, where no wilful misappropriation or neglect to invest appears. Butler v. Jarvis, 51 Hun 248 (1889).

In Butler v. Jarvis, *supra*, and King v. Talbot, 40 N. Y. 76 (1869), set forth *supra*, IV. b, under heading, *Misconduct or gross delinquency generally*, was distinguished, the court saying that compound interest was added under the peculiar circumstances of that case.

Nor will trustees authorized to sell real estate and invest the proceeds in stock, who exchange the real estate for other real property in violation of the trust, be charged with compound interest on the value thereof when they acted in good faith with no view of reaping any benefit to themselves.

$300 monthly for the period of five years, and thereafter the sum of $250 monthly; providing, however, that as each of said minor children reached the age of majority, and received a share of said estate, respectively, as provided in the will, then such monthly allowance should be diminished to the extent of such child's proportion thereof. The will further directed the executor, at such time, and for such prices, as he deemed for the best interest of the estate, to sell and convert into money all the effects of said estate; and that all such funds not otherwise required to be paid out, as provided by the will, be, as soon as practicable, invested in United States government securities; and that the interest accruing on such securities, save such part thereof as might be necessary to carry out the provisions of the will, be, from time to time, invested in like manner.

It appears from the first annual report by the executor, returned to the probate court at the close of the first year of said administration, that the available funds of said estate then on hand, after paying said monthly allowance for the widow and minor children, other current expenses, and certain debts of the estate and of said partnership estate, was $15,174.26; and thereafter, from year to year, the funds of said estate, with additional receipts from sales of property, collections of debts due the estate, and accumulations by way of interest on the funds on hand, ranged from the sum last stated upward to $19,818.43, which was the largest sum on hand at the close of any fiscal year during the administration, after meeting demands thereon by way of annuities, debts, and expenses of the estate, and of the partnership estate aforesaid, as shown by the annual

Ringgold v. Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 265 (1826).

And in Freeman v. Freeman, 4 Redf. 211 (1880), it was held that executors directed to invest a trust fund in bond and mortgage on real estate in the city of New York or its vicinity, who, with consent of the beneficiary, took a mortgage upon a dwelling house in New Jersey which was passed to testator's daughter by his will, which was not recorded in New Jersey, thus constituting a defect of title, are not chargeable with compound interest on the amount invested where they acted in good faith; but the question of the right to invest in another state was not noticed.

So in Ackerman v. Emott, 4 Barb. 626 (1848), in which executors having a general power to invest legacies unrestricted by any express direction, invested in bank stock which was, in whole or in part, the property of one of them, they were held personally liable for the loss caused thereby; but compound interest was disallowed, though the question as to whether the investment in unsafe securities in which a trustee was interested was a sufficient ground for its imposition, was not considered.

In Adair v. Brimmer, 74 N. Y. 539 (1878), however, in which real estate was devised to executors in trust with power to sell and invest the proceeds, and the executors transferred the lands which were undeveloped coal lands for the purpose of organizing a mining corporation to develop and work them, taking pay in stock of the corporation, and after the funds of the company were exhausted, bonds were issued to raise funds to build a railroad on the premises, some of which the executors took, the transaction was held to be unauthorized, and interest was charged against the executors on the amount paid for bonds at the rate of 6 per cent with annual rests.

And in Knott v. Cottee, 16 Beav. 77, 16 Jur. 753 (1852), a trustee directed to accumulate, who made an improper investment but retained no benefit to himself, was charged with 4 per cent with annual rests.

And in Micou v. Lamar, 7 Fed. Rep. 180 (1881), it was held that where wards reject improper investments and demand the equivalent, the guardian should be charged during the continuance of the guardianship with such a rate as a proper and safe investment would have yielded, compounded annually, which may be less than the legal rate.

And legatees under a will directing the executors to apply the income from the legacies given them so far as is necessary to their maintenance and education during their minority, and pay to them the principal and accumulation upon their respectively attaining majority, are not bound to accept railroad and bank stock, upon coming of age, in which the executors had invested the funds, but may call upon them to pay over the whole amount of their legacies with interest computed with annual rests, that not being a proper investment of the trust fund. King v. Talbot, 40 N. Y. 76 (1869), affirming 50 Barb. 453 (1867).

So when a guardian invests in securities not approved by the probate court, he may be charged with such amounts of interest or principal as he has actually collected with simple interest for the term during which interest was not collected, or, at the option of the heir, with the principal sum invested with interest upon annual balances, computed as provided for in the statute with relation to general accounting. Sanderson v. Sanderson, 17 Fla. 820 (1880).

And in Lukens's App., 7 Watts & S. 48 (1844), in which the guardian invested the funds of the ward in bank stock in his own name, which depreciated in price, and was transferred to the ward when she attained her majority at the price for which the guardian purchased it, it was said to be a case in which compound interest might properly be charged, but the case was disposed of by charging the guardian with the difference between the market value of the stock at the time of its purchase and that at the time it was transferred to the ward.

For investments in violation of statute, see *infra*, IV. j.

g. Unnecessarily calling in investment.

Where executors and trustees have violated their trust by selling out stock, and lend the proceeds to their friends upon personal security, charging themselves with the dividends as before, the beneficiaries have an option to have the stocks replaced or the money produced by the sales with interest at 5 per cent or more if more has been made by it, and the costs occasioned by their misconduct. Pocock v. Reddington, 5 Ves. Jr. 794 (1801).

And an executor in trust for infants, who unnecessarily calls in the trust fund which was invested on good security at 5 per cent interest, and keeps large balances in his hands, using them as his own, is chargeable with interest at 5 per cent and the costs of the proceeding for an accounting. Mosley v. Ward, 11 Ves. Jr. 581 (1805).

So an administrator, who, without reason, had sold out stock specifically bequeathed to an infant, retaining the proceeds after an order for payment, was charged with compound interest at the rate of 4 per cent per annum with annual rests from the date of the sale to the date of the decree. Walrond v. Walrond, 29 Beav. 586 (1861).

reports returned and approved by the court. When the partnership affairs were closed out, in 1883, and the estate received therefrom $4,350, the funds of the estate reached said sum of $19,818.43, as shown by the eighth annual report, returned that year, and approved by the probate court. The next annual report, returned in 1884, shows a balance of $18,425 on hand. Out of this sum, in addition to other demands, there was paid to the eldest child, March 5, 1885, the sum of $4,534, on her arriving at the age of majority. The annual report for the year 1885, after such payment, shows a balance of $11,980. Thereafter the annual reports show that the funds of said estate declined in amount, from year to year, by disbursement of annuities, current expenses, and the payment of two additional legacies to the second and third of said minor children, respectively, as they arrived at adult age, until 1891, when, as the report for that year shows, the funds of said estate were practically exhausted. The funds of said estate were not invested in government securities, as directed by the testator in the will. The circumstances which are claimed to have justified the court in ordering a departure from the provision of the will in that respect, as disclosed by the record, appear to be as follows: That the investment of the funds in United States government securities at the time in question would have required the payment of about $3,000 premium. That said premium would, of course, have reduced the funds of the estate by that amount; and that, with such reduction of the fund, the annual income from investment of the remainder in government securities would, according to the testimony, have been at the rate of 5 per

h. *Neglect in winding up or paying over.*

Executors, trustees, etc., are not usually held liable for anything more than simple interest for mere neglect in winding up the trust or paying over to the persons entitled to payment, unless they have received more.

This was held with reference to neglect to pay over by executors and administrators, in Black v. Blakeley, 2 McCord, Eq. 1 (1827).

And in *Re* McCall's Estate, 1 Ashm. 357 (1830), it was held that an administrator is not chargeable with compound interest upon balances remaining in his hands after the expiration of the first year.

So a trustee is not liable to pay compound interest for a mere failure to pay over trust funds, without any breach or abuse of his trust, when it does not appear that he used them or made any profit from them. Price v. Holman, 135 N. Y. 124 (1892).

And an executor will not be charged therewith for delay in paying over funds of the estate caused by his disputing the claim of the person entitled thereto, where more was claimed than the claimant was entitled to. *Ibid.*

Or on the value of land of his testator, which he has failed to reduce to possession, where adverse possession thereof was taken by others soon after testator's death, and he has at no time had funds in his hands with which to prosecute a claim for its recovery. Wheeler v. Bolton, 92 Cal. 159 (1891).

And the treasurer of a corporation, who fails to pay over to it moneys which he has collected, is not liable in equity for more than 6 per cent interest thereon, where the bill does not seek to recover the profits he has made though the corporation was thereby compelled to borrow money and to pay a greater rate therefor than 6 per cent. Parker v. Nickerson, 137 Mass. 487 (1884).

So a delay in the payment of legacies from June to September of the same year out of a fund paid by executors to themselves as trustees for that purpose, followed by a delay caused by the pendency of an action then brought, during which the funds were kept invested by making call loans at the usual rates, the pendency of such action preventing permanent loans, is not a sufficient ground for charging the trustees with compound interest. Ames v. Scudder, 11 Mo. App. 168 (1881), 83 Mo. 189 (1884).

Ames v. Scudder, *supra*, distinguishes *Re* Davis's Estate, 62 Mo. 450 (1876), under heading, *Use and admixture of trust fund*, upon the ground that in that case the executor had in hand a large surplus which he kept for three years after the debts of the estate had been paid, mingling the money with his own and using it for his own benefit, while in the suit at bar the executors were prevented from making permanent investments by the pendency of the suit and so invested by making call loans at the current rate for such transactions.

And in English v. Harvey, 2 Rawle, 305 (1830), it was held that an executor or guardian is liable for the interest which actually comes to his hands only, and cannot be charged with compound interest for neglect to put it out or pay it over.

So in Nelson v. Hagerstown Bank, 27 Md. 51 (1867), it was held that a trustee for the benefit of creditors, who withholds trust funds from parties to whom they are due because of an alleged lien claimed under a defectively executed instrument afterwards held to constitute evidence of a more general indebtedness of the estate only, is only answerable for the amount of interest received by him.

But he must make the estate good and may be charged with compound interest where other derelictions of duty concur with the failure to close up or pay over.

Thus, an executor who permits debts bearing 5 per cent interest to run on where he has in his hands a fund with which to pay them is chargeable with interest at that rate. Hall v. Hallet, 1 Cox, Ch. Cas. 134 (1784).

And an administrator who sold property of the estate on credit, receiving notes of solvent persons therefor, some of which were paid and the makers of the others remaining solvent for several years, during which they might have been collected and the estate closed, may be properly charged with compound interest upon the amount uncollected upon a forced settlement made fifteen years afterward. Scott v. Crews, 72 Mo. 261 (1880).

And an assignee for the benefit of creditors is properly charged with compound interest annually on an amount found due by him on the filing of his final report during a delay which was primarily caused by his failure to render a correct account of the affairs of the estate, especially when the delay could have been avoided by his disbursing the money among the creditors as it was his duty to do under Mo. Rev. Stat. 1879, § 337. *Re* Murdoch (Mo.) 31 S. W. Rep. 942 (1895).

And in Treves v. Townshend, 1 Bro. Ch. 385, 1 Cox, Ch. Cas. 50 (1784), it was held that the assignee of a bankrupt who kept money of the assigned estate in his hands for several years making no dividend thereon for the estate, was chargeable therewith with 5 per cent interest.

So an administrator who makes but a partial distribution, retaining a large sum in his own hands on unfounded pretences for nearly forty years, the suit for an accounting having been protracted in a

cent interest during the first part of the administration, which rate was reduced to 4 per cent during the latter part of that period; but, considering the sacrifice of premium, the rate of interest derived from said investment would have been, on the whole, about 3½ per cent. That the income thus obtainable, as was plain, would fall far short of sufficient to meet the required annuities and other demands upon the funds of said estate. That from these conditions, apparent at the beginning of the administration, as well as at all times thereafter, it was manifest that to carry out the provisions of the will requiring such funds to be placed in government securities, and only the interest derived therefrom used, as was evidently contemplated by the testator, and at the same time carry out the other provisions of the will as to the maintenance of the family, was impossible, because the amount required for the maintenance of the family alone was $2,400 per year, in monthly installments, for the first five years, and thereafter $3,000 per year, in monthly installments, for four and one-half years, until the eldest child became of age, which would require, during the first nine and one-half years of the administration, the payment of $25,500 for maintenance of the widow and children; and, if this had been the only demand on the funds of said estate, it was manifestly impossible to put the estate funds, available at any time, into government securities, and leave the same in such investment, and make those payments. That, if the funds of the estate had been invested in government securities, it would have been necessary for the executor to sell and convert into money, from time to time, sufficient thereof to raise funds, in addition

great measure by his fault, is chargeable, notwithstanding the lapse of twenty years before effectual suit was brought for an accounting, with full legal interest on the fund remaining undistributed during the whole period of retention, with the costs of the suit subsequent to the original decree, the account to be taken with annual rests with interest to be charged on annual balances. Stacpoole v. Stacpoole, 4 Dow, P. C. 209 (1816).

And an executor who, acting as such, pays himself a debt claimed to be due him personally from the estate, which claim is afterwards disallowed on appeal, is chargeable with simple interest on the amount thereof during the time the matter was in litigation, and with compound interest thereafter until paid. Clement's App. 49 Conn. 519 (1882).

An executor having a large available balance in his hands more than sufficient to pay all legacies, who pays but few of them, and sells stock and deposits the moneys in bank with his own, is guilty of a direct breach of trust for which he is chargeable with 5 per cent interest with annual rests, where he was engaged in trade, though he claims that he did not employ any portion of the moneys in trade. Williams v. Powell, 15 Beav. 461 (1852).

1. *Nonperformance of trusts for accumulation.*

The liability of executors, trustees, etc., for compound interest, or for such interest as should have been made, for noncompliance with the requirements of a trust for accumulation when they make use of the trust fund for their own benefit and give no account of the profits made by them, would seem to be beyond question.

Thus the rule that compound interest should be allowed in such case was laid down in Perkins v. Hollister, 59 Vt. 348 (1887), and the same was held in Spencer v. Popham, 5 Redf. 425 (1881); McKnight v. Walsh, 24 N. J. Eq. 498 (1873), 23 N. J. Eq. 136 (1872).

So an executor of a will directing the investment of a fourth part of the testator's estate for the benefit of a daughter and the payment semiannually of a part of the income thereof, the other three fourths going to the executor, who kept no separate trust fund and mingled the trust property with his own, and used it for his own profit, and managed the estate as though he owned it, ignoring her rights and paying her nothing on account thereof, and keeping no account with her, is properly chargeable with interest upon the trust fund at the legal rate computed with annual rests. Cook v. Lowry, 29 Hun, 20 (1883).

And a trustee of a trust fund consisting of a debt due from a firm of which he was a member, who disobeys a positive direction to call in the trust fund upon the death of the mother of the beneficiaries, and invest it in the trusts of the settlement, where it would have produced compound interest, and permits it to remain in the business of his firm for a long time, is chargeable with compound interest at 5 per cent with annual rests. Jones v. Foxall, 15 Beav. 388, 21 L. J. Ch. 725 (1852).

And an executor, who collects and applies to his own use all the interest on $1,000 directed to be invested as a legacy, should be charged interest on each $1,000 interest collected by him from the time of its reception, whether it be interest upon the principal or upon previously accumulated interest, as when the interest had accumulated to that sum there could be no excuse for not investing it. Male v. Williams, 48 N. J. Eq. 33 (1891).

So in Ringgold v. Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250 (1826), it was held that compound interest will be allowed against a trustee where he is directed to invest funds and reinvest the dividends, or where the trust directs an accumulation and the trustee has used the funds.

And in Crackett v. Bethune, 1 Jac. & W. 586 (1820), in which an executor, who was directed to lay out testator's personalty in funds, unnecessarily sold out stock, keeping large balances in his hands and resisted payment of debts by a false pretense of outstanding demands, he was charged with 5 per cent interest, but the court held that it was not a case for rests.

So an executor under a will directing an accumulation, who renders no account of the disposition of the fund or what he received, is chargeable, after allowing six months for receipt and investment, with annual interest on the principal sum and upon the annual amounts of interest from the time they fall due while the capital remains in his hands. Voorhees v. Stoothoff, 11 N. J. L. 171 (1829).

And in Raphael v. Boehm, 11 Ves. Jr. 92 (1805), an executor directed not to derive any advantage from keeping money in his hands without accounting for legal interest and to accumulate for the benefit of the *cestui que trust*, who used the funds for his own benefit, was charged with 5 per cent on all sums received by him computed with semiannual rests, the court saying that an executor directed by the will to accumulate cannot account as if the money had been laid out in the manner directed, if it was not so laid out, or if it was so laid out and he had sold out at an advance.

And that ruling was reaffirmed and approved in Raphael v. Boehm, 13 Ves. Jr. 407, 590 (1807).

So compound interest may be charged where a guardian or trustee is directed by the will of the testator creating the trust to place the trust funds at interest and upon the receipt of such interest to

to the income, to pay the annuities and other demands on said estate. That therefore it appeared impossible for the executor, or any person charged with the execution of said will, to carry out the provisions thereof, and that to attempt such procedure would have been inexpedient, in view of the necessities of the family.

In view of these conditions, as appears from the record, soon after the return of the appraisement and inventory, on July 21, 1875, an application was presented to the probate court having jurisdiction of said estate, setting forth that the funds thereof, as shown by the inventory and appraisement, amounting to about $18,000, were on deposit in the First National Bank, People's National Bank, and L. H. Hershfield & Bro.'s Bank, of the city of Helena, respectively, where the decedent had deposited the same in his lifetime, drawing interest at the rate of 12 per cent per annum, and asking the court to make an order "directing said money to remain in said banks, respectively, on interest, during the term of the administration of said estate, or, at the option of said executor, during said term;" whereupon the court, after consideration of said application, made an order "that the request of said petitioner be granted; that the deposits, on time, of such moneys of said estate, drawing interest for the estate in such banks, be, and is hereby, approved." Thereafter the administration of the executor proceeded from year to year during the course of sixteen years, with annual accounts returned into court, verified by the affidavit of the executor, showing, in detail, receipts and disbursements in respect to said estate. Such accounts appear to have been considered and

put it out again at interest in like manner, etc., which he wilfully fails to do, when to do it would have been practicable. *Dictum* in Lukens's App. 7 Watts & S. 48 (1844).

Many of the cases have gone farther, however, and adopted the rule that the trustee is liable for compound interest, or such interest as should have been made, for failure to execute an express trust to accumulate, though he did not use the trust fund and without reference to the question of his intention.

This was expressly held in King v. Talbot, 50 Barb. 468 (1867).

And in Knott v. Cottee, 16 Beav. 77, 16 Jur. 752 (1852), it was held that a trustee directed to accumulate, who makes an unauthorized and improper investment, but retains no benefit to himself, is chargeable with 4 per cent interest with annual rests.

And in Salisbury v. Colt, 27 N. J. Eq. 493 (1875), a failure by executors against the testator's intention to separate a legacy from the estate and invest it was held to be such a violation of trust as will justify charging them with compound interest.

And in Hough v. Harvey, 71 Ill. 72 (1873), in which the executor who was authorized to sell real estate and invest the proceeds for the benefit of the devisees held the money realized without making any investment or rendering the annual account required by law, but it did not appear that he had used the money or put it out at interest on his own account, an allowance of 10 per cent was refused and one of 6 per cent with annual rests was made.

So it is the duty of executors of a will, giving a legacy to an infant to be put out on bond and mortgage and paid when the infant attains his majority with the interest accruing thereon, to compound the interest by also investing it as soon as practicable, and when one of them lends the money set apart for the legacy to the other on insufficient security, he is liable for the amount with compound interest, and such liability is not affected by the fact that he stated such investment in his account to the orphan's court. Perrine v. Petty, 34 N. J. Eq. 198 (1881).

And executors directed by testator's will to sell his lands and invest the proceeds in bank stock or such other property as they may deem most advantageous to his children, who sell the lands, but do not invest the proceeds, but account therefor in money, are chargeable with interest on the annual balances in their hands, and their disbursements should be defrayed from the interest thus accruing. Garrett v. Carr, 3 Leigh, 407 (1832).

So executors directed to sell the whole estate on a credit of one, two, and three years, and invest the proceeds in stock to accumulate until certain of the legatees should come of age, who sell the property but fail to make any investment in stock and return no account of their administration, are chargeable with the whole amount of the sale with interest until the payments become due, after which the interests should be compounded with annual rests. Edmonds v. Crenshaw, Harp. Eq. 224 (1824).

And executors who are also legatees, who are directed by the will to apply the interest on a legacy to the use of a legatee annually, will be charged with interest on the arrears of interest due on such legacy, when at their request the court suffered it to remain in their hands because the estate was much in debt. Bowles v. Drayton, 1 Desauss. Eq. 489, 1 Am. Dec. 689 (1796).

So in Dornford v. Dornford, 12 Ves. Jr. 127 (1806), it was held that the estate of an executor in trust with a direction to accumulate, who retains the funds of the estate and becomes bankrupt, is chargeable with interest at 5 per cent with periodical rests.

But in Tebbs v. Carpenter, 1 Madd. 290 (1816), it was said that in Dornford v. Dornford, *supra*, compound interest was not directed.

So trustees to whom a debt was assigned in trust to call in an investment in Indian securities and accumulate, who neglected to take proper steps to call in the fund, and the debtor became insolvent and a considerable portion of the debt was lost, are chargeable with the amount lost, and should make good the accumulation which would have been produced, and pay the costs of the proceeding for an accounting. Byrne v. Norcott, 13 Beav. 336 (1851).

And in Wilson v. Peake, 3 Jur. N. S. 155 (1856), it was held that a trustee of an express trust to accumulate a legacy at compound interest for twenty-five years is chargeable with interest at 4 per cent, which is the usual rate which should be compounded until the expiration of twenty-one years, after which simple interest only should be allowed.

Wilson v. Peake, *supra*, however, is distinguished and explained in *Re* Emmet's Estate, L. R. 17 Ch. Div. 142, 50 L. J. Ch. 241, 44 L. T. N. S. 172, 29 Week. Rep. 464 (1881), the court saying that that case must be viewed with reference to its own facts, and particularly to the trust for accumulation which came to an end through the operation of the Thellusson Act, by which the accumulation could go no further than the twenty-one years, and that was the foundation of the judgment.

And in the latter case it was held that a trustee

approved by the probate court, as provided in the Probate Practice Act (sections 260–270); but in this proceeding those accounts were all open to any question which the petitioner desired to raise against them (Probate Practice Act, § 269). Under this privilege a large number of specifications were formulated, and filed in this proceeding, contesting the correctness and good faith of said accounts. The evidence shows, however, that there was no attempt to sustain these charges by proof, with but one exception, and that was in respect to an item of $400 credited in one of the executor's annual accounts for money claimed to have been paid out, on behalf of the estate, to a person employed at the partnership ranch of testator and said M. A. Price, as housekeeper. In this single attack upon the integrity of the executor's accounts, the court below found against the accusation; and the evidence, as reported in the record, appears to be overwhelmingly in favor of the executor; so that, as a result of opening to the assaults of petitioner the sixteenth annual accounts returned, from time to time, by the executor, and approved by the probate court, such accounts appear to stand unimpeached in every item. These accounts are in the record before us, and, after approval by the court, are, by statute, made evidence of their showing, subject, however, to be impeached on being opened to contest. *Ibid.* But, after passing through such contest without any disparagement, such accountings must, with more force, be considered as evidence of the showing therein made. Therefore, the result of the management of said estate by the executor, herein set down, is taken from said accounts, wherefrom it appears that during

under a will holding a fund which, after the determination of a life interest, he is directed to transfer and pay to a child upon his attaining his majority, and in case of the expiration of the life interest to apply the income to the support and education of the minor, who retained the fund after the child reached his majority without making any arrangement with him, or explaining his rights, the life estate having previously determined, will be deemed to have continued to hold the fund upon the same trusts and with the same obligation to accumulate, and is accountable therefor with compound interest.

This doctrine, however, is not universal, and seems to have been repudiated by some of the cases which have adopted the rule that failure to obey a direction to accumulate, with nothing more, is mere negligence and not misfeasance.

Thus in Tebbs v. Carpenter, 1 Madd. 290 (1806), it was held that an executor directed by testator's will to put the funds of the estate, after payment of expenses and a designated annuity, out into 4 per cents for the purpose of accumulation and division, who fails to do so, but makes no use of and acquires no benefit from the trust fund, is guilty of negligence only, and not of such misfeasance as will warrant a charge of more than the usual rate of interest against him.

And in Amiss v. Hall, 8 Jur. N. S. 584 (1857), a trustee under a will containing a direction to accumulate, with which he did not comply, was charged with simple interest at 4 per cent from one year after testator's decease.

So in English v. Harvey, 2 Rawle, 305 (1830), it was held that an executor directed by the testator's will to put the trust fund at interest for the benefit of the legatee, and to put the surplus at interest and accumulate it after paying for his support and education, who fails to do so, is not chargeable with compound interest, but only with the amount of interest actually received.

And in Freeman v. Freeman, 4 Redf. 211 (1880), it was held that executors directed to invest a trust fund in bonds and mortgages in a particular state and locality, who with the consent of the beneficiaries took a mortgage upon property in another state, which was passed to testator's daughter by his will, which was not recorded in the latter state, thus constituting a defect of title, are not chargeable with compound interest upon the amount invested when they acted in good faith.

So in Wilmerding v. McKesson, 103 N. Y. 329 (1886), in which a trust was created by will directing the separate investment of the trust fund, and the surviving members of the firm of which the deceased and one of the trustees under the will were members continued, retaining the books, papers, and securities belonging to the estate, and moneys realized from the estate were received by the surviving partners with the knowledge of the cotrustee, who was not a partner, and used in the business, after which the firm failed and the funds of the estate were lost, an allowance of compound interest against the cotrustee, who was innocent of wrongful intention, was denied, and he was only charged with interest at 5 per cent.

And in Ringgold v. Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 265 (1826), it was held that trustees authorized to sell real estate and invest the proceeds in stock, who, instead of doing so, exchange it for other real estate, will not be charged with compound interest on the value thereof when they acted in good faith with no view of reaping any benefit to themselves.

And in Mousley v. Carr, 4 Beav. 49, 10 L. J. Ch. N. S. 360 (1841), it was held that a tenant for life who was also trustee under the trusts of a doubtful will, who neglected to make proper investments of the trust fund, but who did not know that it was a trust fund which it was his duty to invest, should be charged with interest at 4 per cent only, without costs.

So the executor or other trustee will not be charged with compound interest when to carry out the directions of the trust would have been impossible or impracticable.

Thus, simple interest only will be allowed against executors who have converted a fund in their hands to their own use, where it does not appear that, and it is doubtful if, it could have been compounded as the will directed. Cranson v. Wilsey, 71 Mich. 356 (1888).

And a guardian directed to put the surplus income of the estate from year to year at interest on good security, who fails to do so but mingles such surplus with his own funds and uses it a part of the time in his business, will not be charged with compound interest, where the yearly balances were so small that proper investments in the mode provided by them were not often afforded, and it does not appear that any suitable opportunity to invest ever came to his notice. Rapalje v. Hall, 1 Sandf. Ch. 399 (1844).

And an executor will not be charged with compound interest for neglecting to invest interest accruing on funds of the estate received by him, annually, according to the directions of the will, where he states in his account that he has tried to keep the fund, together with the accumulated interest, invested as required by the will, but has not been able to do so except as stated in the account, and there is nothing to disprove the allegation or

said period the executor accounted for $56,609.96 derived from said estate, including accumulations by way of interest on the funds on hand, from time to time. Out of this it is claimed by the executor, and not disputed, that he paid to the widow and minor children, and to the three children first arriving at the age of majority, annuities and legacies amounting to $45,288.51, and that the liabilities of the estate, as shown by the annual reports and accounts, approved by the probate court, consumed the rest of the funds of said estate. The increase of said estate, during administration, shown in this result, was largely by way of interest on the funds on hand from year to year. From this source the increase appears to have amounted to between $14,000 and $15,000. The interest is returned in gross sums in the annual accounts, but the rate, according to the testimony of a witness called as an expert accountant to investigate said annual accounts, amounts to 7.9 per cent per annum, compound, upon the funds on hand from year to year, on the average, for the whole period of administration. These results are not controverted by the petitioner, except as to the one item of $400, above mentioned, wherein the executor's account was sustained on the proof. Notwithstanding these results, the court found and adjudged, in this proceeding, that, in addition to the amount so accounted for, the executor ought equitably to account to the heirs of said estate for the further sum of $51,000 and upwards ($51,684.73) on the 1st day of June, 1891, and also for an undivided one-half interest in a certain tract of land in the city of Helena, the value of which is not specifically shown, but, from the testimony in the record, appears to be of large value. From this

to show that he used the funds in his own business, or made any profit therefrom, or was guilty of any gross delinquency or violation of duty. Lansing v. Lansing, 45 Barb. 182 (1866), 31 How. Pr. 64 (1865).

And as a general rule all that can be imposed is what the trust would have produced had its terms been properly carried out.

Thus, in Clemens v. Caldwell, 7 B. Mon. 171 (1846), a trustee who failed to invest a trust fund in stock with the interest also as directed, but employed it in his own business, was held to be responsible for interest upon the annually accruing interest, where the directed investment was practicable; if not, then for such interest as would have been produced in the hands of an ordinarily prudent man.

And in Brown v. Sansome, 1 McClel. & Y. 427 (1825), in which trustees, to whom the personal property was bequeathed in trust to invest in government or real securities and to permit the interest to accumulate until it amounted to a designated sum, and then to lay out and invest the interest in government and real securities to be applied in the same manner as the principal, retained the trust moneys in their business, an inquiry was directed as to what the fund would have amounted to if it had been invested and accumulated as directed, and the trustees were decreed to pay the amount and charged with 5 per cent interest on the balance in their hands.

So a trustee, directed by the testator's will to invest in consols and accumulate the dividends, who invests in mortgage on real estate instead, is liable to make good the amount of stock which would have been purchased, together with the amount of accumulation which would have been produced by a proper investment of the dividends of such stock. Pride v. Fooks, 2 Beav. 430, 9 L. J. Ch. N. S. 234, 4 Jur. 213 (1840).

And an executor directed to deposit the income of a trust fund in some good savings bank or to devote it to some other safe investment, who fails to comply therewith, will, in the absence of evidence of intentional wrong or personal advantage acquired, be treated as if he had pursued the course required by the will, and charged, after the lapse of a reasonable time for investment, with interest at the same rate and compounded in the same manner as that which would have been realized had the direction been obeyed. Shepard v. Patterson, 3 Dem. 183 (1884).

And executors directed by the testator to lay out the residue of his estate in the purchase of lands or upon heritable or personal securities at such rate of interest as they should think reasonable, who lend the fund to one of their number on bond at 4 per cent, are chargeable with interest on moneys coming to their hands at the rate of 5 per cent when 5 per cent might have been made from heritable or government securities. Forbes v. Ross, 2 Cox, Ch. Cas. 113 (1788).

So a charge of interest upon interest against an executor under a will directing the estate to be put out at interest, which he did not do, is not a ground for reversal, when, if the executor had been treated as a borrower and annually charged with interest, and the interest and not the principal had been applied to disbursements, a larger balance would have been found against him. Handly v. Snodgrass, 9 Leigh, 484 (1838).

And the general rule that trustees will not be charged with compound interest when they do not appear to have made it has been applied to trusts to accumulate.

Thus, in Gilman v. Gilman, 2 Lans. 6 (1870), executors directed by the will to invest in United States government stocks, state, city, or town securities, or upon bond and mortgage, who, because of the objection of some of the legatees to United States government stocks and the difficulty of loaning upon bond and mortgage retained in hand large average balances for several years, holding them on deposit in different banks, were held not to be chargeable with compound interest thereon when it did not appear that they derived any other personal benefit therefrom than might have arisen incidentally to their credit from the possession of the deposits.

But see Hough v. Harvey, 71 Ill. 72 (1873), in which interest was computed with annual rests, though the executor did not appear to have used the fund.

Interest upon interest upon a legacy will not be allowed, however, unless it is plainly required by the terms of the will. Calloway v. Langhorne, 4 Rand. (Va.) 181 (1826).

As to what constitutes a direction to accumulate, it was held in Fowler v. Colt, 22 N. J. Eq. 47 (1871), that a will giving a fund in the hands of an executor, with its increase, constitutes a direction to the executor to accumulate by putting out at interest both principal and accrued interest, where the sum is large and the term of holding the trust is long; and in case of his failure to do so interest should be compounded against him with annual rests.

And in Myers v. Myers, 2 McCord, Eq. 214, 16 Am. Dec. 648 (1827), it was held that the receipt, by an executor directed by the will of the testator to have certain beneficiaries educated out of the profits of the estate, of rents and profits from the lands and profits from the labor of the negroes, constitutes an annual fund in his hands for the benefit of the *cestuis que trust*, upon which he is chargeable with interest unless he shows that he used it for that purpose.

judgment, and the order of the court overruling the executor's motion for new trial, this appeal is prosecuted.

In the review of the case here it is not proposed to enter upon an inquiry as to the legality of said order of the probate court of July 25, 1875, authorizing the executor to keep said funds in banks, at interest, instead of converting the same into government securities, nor as to what additional responsibility for the safety of such funds not so invested the executor and his bondsmen may have assumed by reason of such departure from the will, because neither party has drawn into consideration any such questions, as affecting the determination of this proceeding. Said order of the court allowing such departure from the letter of the will is only pertinent to this proceeding as part of the history of said administration. The executor would not be heard to question the legality of that order or allowed now to depart therefrom, to the detriment of said estate, nor has he sought any such position; and the petitioner, for obvious reasons, does not desire an accounting to proceed on the basis of the result which would have been obtained by investing in government securties, instead of accepting and retaining, along with the other heirs and legatees, the larger rate of interest acquired and paid over by the course pursued. Nor is it pretended that any loss whatever happened to the principal fund by reason of departure from the will. We observe, however, that the court below took occasion to animadvert upon that proceeding in strong terms of condemnation of the executor for procuring such order from the court, and appears to regard it, in some measure, as ground for finding that the ex-

But a will giving full power to the executors to dispose of any part or all of the property devised or bequeathed thereby which they might think best, and from time to time to make distribution among the wife and children of the testator, does not enjoin upon such executors the duty of putting out the balances in their hands from time to time for the purposes of accumulation, so as to charge them, upon failure to do so, with compound interest. Peyton v. Smith, 2 Dev. & B. Eq. 325 (1839).

And an executor directed by testator's will to manage his farms and distribute the profits thereof when his grandchildren shall arrive at full age is not chargeable with compound interest upon the annual balances in his hands; the will not directing the investment of the profits so as to make them productive, simple interest only should be charged. Lovett v. Thomas, 81 Va. 245 (1885).

So compound interest will not be allowed on a legacy where there is no express direction in the will that the legacy shall be invested in any particular securities, and in fact no valid investment has been made, though the legacy is directed to be paid with "accumulations of interest." Gravely v. Gravely, 25 S. C. 1, 60 Am. Rep. 478 (1885).

As to excuses for nonperformance of the requirements of the trust, see *infra*, VIII., heading, *What sufficient to release from accountability.*

1. *Neglect or violation of duty imposed by statute.*

The violation of some statutory duty by the performance of which compound interest might have been made justifies a charge of compound interest against the delinquent trustee.

Thus, under the Kentucky statute regulating the duties of guardians, requiring them to settle their accounts annually and to keep the money of their wards out at interest upon such security as the county court shall approve, if he uses the money he is bound to pay interest, and the interest which accrues annually becomes principal in his hands and bears interest for the ensuing year so long as he uses it, but if he cannot let the money he is not responsible for interest, and if he puts it out at interest and cannot collect interest annually so as to convert it into principal, as it is his duty to do, the interest does not become new principal until it is actually put out at interest or until the guardian uses it. Hughes v. Smith, 2 Dana, 253 (1834).

And it is the duty of a guardian to settle with the county court at least once in each year, and if he fails to do so, he should be charged with interest on the amount which would have been found against him in each year if a settlement had been made. Campbell v. Williams, 3 T. B. Mon. 123 (1825).

A guardian is not only liable for interest upon the principal of his ward's estate when he fails to invest within a reasonable time after it comes to his hands, but also for interest on interest when he unreasonably delays to invest it. Karr v. Karr, 6 Dana, 3 (1837).

And if he invests the money of his ward in permanent loans without taking security of any kind, where the statute declares that he shall be personally responsible for taking insufficient security he is chargeable with compound interest thereon where the same is thereby lost, from the time of the making of the loans. Clay v. Clay, 3 Met. (Ky.) 548 (1861).

The Kentucky statute requiring guardians appointed by the county court to settle the accounts annually adding the interest on the funds in their hands to the principal each year, however, does not apply to testamentary guardians, as they are not within the jurisdiction of the county court, leaving them liable to account in equity like other trustees and liable for such interest as they may make upon funds entrusted to them, or which they may be presumed to have made by faithful and prudent management. Maupin v. Duiany, 5 Dana, 589, 30 Am. Dec. 699 (1837).

So interest on a balance in the hands of a guardian for which he is to account under 1 Va. Rev. Code 1819, p. 407, §§ 7, 9, requiring guardians to account to the appointing court annually, and directing that any balance against the guardian may be put out at interest for the benefit of the ward upon such security as the court shall direct and approve, must be credited to the ward like other profits of the estate, and if the interest and other profit exceed the disbursements the surplus, whether it arises from interest or other profits, will constitute a balance against the guardian upon which, if he retains it, he must account for interest. Garrett v. Carr, 1 Rob. (Va.) 196 (1842).

And a guardian who has failed to account to the appointing court is chargeable with interest from the time and in the manner that he would have been charged if his account had been exhibited annually as required by law. *Ibid.*

So a guardian, who suffers nearly all the moneys of his ward to remain in the hands of his brother-in-law without any security and without approval of the court, and upon which no profits were made for the benefit of the ward, is chargeable with compound interest upon the moneys received by him, under the Illinois statute providing that guardians shall put to interest the moneys of their wards upon mortgage security to be approved by the court, the letting to be for one year, and the interest added to the principal each year. Gilbert v. Guptill, 34 Ill. 141 (1864).

ecutor ought to be removed. Thus, the action of the executor in that regard has been brought in question as bearing upon his good faith in making application for such order. Whatever additional responsibility for the safety of said fund may have been assumed by the executor in that matter, and whatever questions as to the legality of such departure from the direction of the will in that particular might be raised, if pertinent, we think the circumstances under which that course was adopted—the fact that it was decided upon to avoid foreseen sacrifice of thousands of dollars out of the limited funds of said estate, and, according to undisputed testimony, after consultation and approval by the widow, the only legatee then of mature age, and upon advice of able counsel affirming the legality thereof, and sanctioned by the order of the probate court, with the final return of interest to the beneficiaries in double the amount which could have been obtained from an investment as directed by the will—repels all attempted condemnation of the motive which prompted the executor to that course.

We therefore pass to the questions demanding determination in this case, which have been found entirely sufficient for our most patient and painstaking consideration. In proceeding with the consideration of these questions, and the law and authorities applicable, it must be borne in mind that in the case at bar the trustee has admittedly, at all times since he became executor, in respect to this estate, punctually, and as required by the conditions of the will, accounted for all of the principal fund of the estate which came into his hands, together with interest on such funds, from year to year, as the same

And a loan by a guardian of his ward's funds upon real-estate security without the direction or sanction of the county court, in violation of the statute, will be regarded as a wilful violation of duty for which he will be charged with compound interest upon any loss to the ward's estate growing out of the insufficiency of the security. Hughes v. People, 111 Ill. 457 (1885).

So compound interest must be allowed on an account of a guardian running through a number of years, under the Tennessee statute requiring guardians to account annually for interest on all sums in their hands. Jones v. Ward, 10 Yerg. 160 (1836).

And that there is no guardian of an infant appointed by reason of a fund in the hands of an administrator is not a ground for excusing the administrator from the payment of interest thereon during the administration, under the Florida statute under which interest is computed on annual balances of moneys retained by him. Sanderson v. Sanderson, 20 Fla. 292 (1883).

Money received and not reinvested according to law is presumed to be money retained by the administrator upon which he is required by the Florida statute to be charged with interest to be added to the principal annually. Sherrell v. Shepard, 19 Fla. 300 (1882).

And he is not relieved from liability therefor by the commencement of litigation against him, unless he then relieves himself by paying the money into court. *Ibid.*

k. *Interest or profits made.*

A trustee is accountable for all interest or profits actually received by him for the trust fund whether used in his private business or otherwise employed. Cruce v. Cruce, 81 Mo. 676 (1884); Perrin v. Lepper, 72 Mich. 456 (1888); Stephens v. Van Buren, 1 Paige, 479 (1829).

Thus, an administrator should be ordered to pay interest on money in his hands belonging to the estate on which he has made interest. Perkins v. Baynton, 1 Bro. Ch. 375 (1784).

And interest must be calculated against a trustee upon funds properly invested in authorized securities, at the rate actually yielded. *Re* Emmet's Estate, L. R. 17 Ch. Div. 142, 50 L. J. Ch. 341, 44 L. T. N. S. 172, 29 Week. Rep. 164 (1881).

So in Childress v. Childress, 49 Ala. 227 (1873), and Brand v. Abbott, 42 Ala. 499 (1868), the rule was laid down that it is the duty of a guardian in Alabama to charge compound interest upon debts after maturity, and for any compound interest received by him he is chargeable.

And in Jennison v. Hapgood, 10 Pick. 77 (1830), compound interest with annual rests was charged against an executor who had been in the habit of demanding and receiving compound interest.

And in Foster v. Foster, 2 Bro. Ch. 616 (1788), it was held that an admission of assets with which to pay rents by an executor of a receiver of an estate makes him liable for interest if any was made.

A guardian who has not been guilty of any gross abuse of his trust is not liable to account for more than simple interest upon the funds of his ward, however, unless he received compound interest thereon. Vaughan v. Bibb, 46 Ala. 153 (1871).

And the same rule applies to an executor or trustee. Atty-Gen. v. Alford, 4 DeG. M. & G. 843, 1 Jur. N. S. 361 (1855).

And substantially the same rule is held in Tyson v. Sanderson, 45 Ala. 368 (1871); Starling v. Balkum, 47 Ala. 314 (1872).

And in *Ex parte* Strutt, 1 Cox, Ch. Cas. 439 (1788), it was held that a special case must be made to charge an assignee in bankruptcy with a greater rate than 4 per cent on money retained in his hands, —as, that he has made a greater profit from them.

And the same was held of executors, in Tebbs v. Carpenter, 1 Madd. 290 (1816).

So in *Re* Harland's Accounts, 5 Rawle, 323 (1835), it was held that guardians are chargeable with the interest actually made on sums invested only, where the estate has been properly managed, and there is no evidence of admixture, or use, or unnecessary delay in settlement.

But an order for the taking of an account against a guardian who had not received compound interest, authorizing the master to charge either simple or compound interest, though erroneous so far as it authorizes a charge of compound interest, is without injury and not a ground for reversal when the master charges simple interest only. Tyson v. Sanderson, *supra*.

l. *Interests or profits which might have been made.*

A trustee is accountable for such interest or profits as he might have obtained by the exercise of reasonable skill and exertion in the management of the trust fund, whenever the character of his trust or the relation which he holds to the fund requires him to make it productive. Cruce v. Cruce, 81 Mo. 676 (1884); Frost v. Winston, 32 Mo. 489 (1862); Stephens v. Van Buren, 1 Paige, 479 (1829).

Thus, in *Re* Guardianship of Thurston, 57 Wis. 104 (1883), the general rule is stated to be that a guardian should be charged with compound interest only in cases of fraud or flagrant breach of trust, but if he fails to invest the trust fund in his hands so as to derive an income from it when he should have done so, he should be charged with

remained in his keeping, at rates which, according to the testimony, equaled, on the whole, 7.9 per cent compound. These results are admitted. The trial court, in treating the propositions involved in this case, "granted that, as a result, more profit and gain inured to the widow and children than the testator contemplated when he made the will." So, counsel for petitioner, in treating this appeal in their brief, say: "As a matter of fact, the appellant, in his reports returned to the probate court, has charged himself with compound interest with semiannual rests, whereas the directions of the court below to the referee, which were respected in the computation, called for annual rests only." It is therefore apparent that there is no contention that this executor has failed to account for all the property and funds committed to his charge, together with interest on the funds at the rates mentioned. But it is contended that he should be required to pay a higher rate of interest than he has returned, on such part of the estate funds as were, from time to time, in his hands, not deposited in bank at interest, as provided by said order of court. That demand is the only basis of claim made against the executor in this proceeding, and thereon rests said judgment for the recovery of money, as well as the decree impressing a trust in favor of the heirs in certain lands of the executor, as aforesaid.

1. With this premise, it is first to be inquired whether the law warrants the court in declaring a trust interest in lands of the executor in favor of the heirs upon the proposition that at a certain time he paid, in the purchase thereof, moneys in his hands belonging to the estate. It is found in this case that at a certain time in 1882 the execu-

simple interest at the legal rate, although such failure may not have been the result of any fraudulent intent or wilful disregard of duty.

So a guardian, who failed to invest the estate of his ward and during the course of a long guardianship had its management and use, was held chargeable with compound interest thereon, in Boynton v. Dyer, 18 Pick. 1 (1836).

And in Ryan v. Blount, 1 Dev. Eq. 382 (1830), it was held that a guardian is ordinarily chargeable with compound interest upon the moneys of his ward in his hands, but may be exempted from it by proving that after suitable exertions he was unable to realize it.

And in Atty-Gen. v. Alford, 4 DeG. M. & G. 843, 1 Jur. N. S. 361 (1855), it was held that an executor or trustee will be charged with such interest only as he has received, or which he ought to have received, or which it is to be fairly presumed that he did receive; and misconduct on his part does not as a eneral rule warrant such a presumption.

And in Browne v. Southouse, 3 Bro. Ch. 107 (1790), it was held that an agent of an administrator, who keeps money of the intestate in his hands when he is under duty to lay it out from time to time, is chargeable with interest thereon. But there was nothing to show whether it was compounded or not.

So the court may order a trustee to invest the proceeds of a sale in his hands so as to be productive during pendency of a litigation as to their disposition, and if he fails or refuses to obey the order, he may be ordered to bring in the whole amount with compound interest from the date of the order directing the investment. Latimer v. Hanson, 1 Bland, Ch. 51 (1828).

And a person holding funds of another for the purpose of investment and reinvestment, who mingles them with his own, may be charged with interest upon interest when he forebore investment and used the money for his own purposes. *Re* Kernochan, 104 N. Y. 618 (1887).

But a trustee will not be held responsible for more than legal interest because he might have loaned the trust funds at such rate, as a court of equity will not hold him responsible for a refusal to violate the law by loaning at a usurious rate. Montjoy v. Lashbrook, 2 B. Mon. 261 (1842).

And a guardian will not be charged more than the statutory rate of interest on moneys of his ward in his hands on proof that he could have loaned them at 1 per cent per month where he acts in good faith and does not make use of the funds for his own profit, as he is justified in loaning at the statutory rate and has the right to determine for himself whether he will do so or take the risk of caning at the increased rate. Guardianship of Cardwell, 55 Cal. 137 (1880).

Nor will compound interest be charged against a trustee when no realization of profits on the assets appears, nor any withdrawal of funds from their legitimate channels of accumulation, and there is nothing from which a presumption might arise that the assets would have been increased in any way if the line of duty had been more strictly followed. Ames v. Scudder, 11 Mo. App. 168 (1881), 83 Mo. 189 (1884).

And compound interest will not be allowed against a guardian of a spendthrift on a note due on demand from the guardian to the ward, in an action on the probate bond of the guardian, when the note is so small that the interest on it would not be a sufficient object to make new investments. Fay v. Howe, 1 Pick. 528 (1823).

V. *Who are chargeable.*

The decisions as to who may be regarded as trustees, so as to be held liable for compound interest in a proper case, are not numerous. It is universally conceded and taken for granted, however, as will be seen by an examination of the cases throughout the whole body of this note, that executors, administrators, ordinary trustees, and guardians are within the rule.

So the rule was applied to a receiver who had employed the moneys of the receivership in trade, in Utica Ins. Co. v. Lynch, 11 Paige, 524 (1845).

And to an assignee in bankruptcy, in *Ex parte* Strutt, 1 Cox, Ch. Cas. 429 (1788).

And in *Re* Murdoch (Mo.) 31 S. W. Rep. 942 (1895), it was held that an assignee for the benefit of creditors, who retains moneys of the assigned estate in his hands in violation of Mo. Rev. Stat. 1879, § 397, requiring payment to the extent of the funds in hand within one month of the allowance of claims, and who mingles the funds with his own and deposits them in his own name and uses them in his own private business, may be charged with compound interest thereon.

So in Hazard v. Durant, 14 R. I. 25 (1883), it was held that an officer of a corporation, who misappropriates the corporate funds and converts them to his own use, is liable as a trustee to the stockholders, but he will be charged with simple interest thereon only, and not with compound, when it does not appear that he made profit in excess of simple interest.

And in Robert's App., 92 Pa. 407 (1880), it was held that moneys received by a cotenant having title to the land of the cotenancy upon sale thereof by him are trust funds, and where he mingles such moneys with his own and uses them for his own benefit

tor, in the course of his private transactions, bargained to purchase from Child & Young a tract of land in the city of Helena, Mont., for the agreed price of $10,000, paying, at the time of the bargain, the sum of $2,000, and obliging himself in the transaction to pay, at a certain date the following year, the balance, of $8,000, whereupon a deed was to be delivered by the vendors, conveying said land to the purchaser; that in the final consummation of such purchase, in 1883, the executor made use of $5,000 of said estate funds. This is disputed, and the finding is excepted to as not sustained by proof; but we pass over this dispute, and consider the fact as found, together with the other facts existing in the case. It also appears without dispute, as above shown, that the executor has long since, and without any delinquency, accounted, as fast as the terms of the will directed, to the legatees for said $5,000 which is claimed to have been paid in the purchase of said land, with interest thereon at the rate of 7.9 per cent compound. Thus, the heirs have long since received and used said sum, with the interest returned thereon. And so, granting that said sum of money has been traced into the purchase of said land, it has also been traced out of and beyond said land, into the hands of the legatees, in the execution of the trust. Still, it is insisted that the heirs of said estate are entitled to a half interest in said land. This involves a peculiar situation. It plainly requires the trustee to carry an interest in the land, for the benefit of the heirs, for years after they have admittedly been paid, not only all the principal of the trust fund, which is claimed to have been paid into the purchase of said land, but interest thereon. This would seem

he is chargeable, on settlement of his account with his cotenant, with interest upon the amount received and with interest upon interest.

And that a husband may be a trustee for his wife, and when thus acting he may be compelled in equity to account in the same manner, and becomes liable for compound interest for an abuse of the trust upon the same grounds as a stranger, was held in Walker v. Beal, 76 U. S. 9 Wall. 743, 19 L. ed. 814 (1869).

So guardians of lunatics are chargeable with compound interest upon the trust estates in their hands in the same manner and to the same extent as guardians of infants, and bonds, etc., payable to them as such bear compound interest in like manner as bonds payable to guardians of infants. Spack v. Long, 1 Ired. Eq. 426 (1841).

And the rule was also applied to the committee of a lunatic, in Butler v. Jarvis, 61 Hun, 248 (1889).

So compound interest may be allowed on debits due from one partner to another, in case of bad faith, refusal to account, or private use of the money of the firm. Johnson v. Hartshorne, 52 N. Y. 173 (1873).

But not on balances against one partner and in favor of another. *Ibid.*

And compound interest is properly allowed in a decree for an accounting against a surviving partner by way of damages, where he has continued the partnership and resisted all attempts to ascertain its state, and wrongfully and persistently refused to account. Heath v. Waters, 40 Mich. 457 (1879).

But a partner who is to be paid interest on moneys advanced by him is not entitled to have his interest compounded on monthly balances. *Ibid.*

And no compounding of interest or computation with periodical rests should be made to the prejudice of either party in an adjustment of accounts in an action for an accounting by the representatives of a deceased partner against the surviving partners, who had continued the partnership business after their partner's death. Sangston v. Hack, 52 Md. 173 (1879).

A guardianship cannot be established for the purpose of holding the alleged guardian liable for compound interest for failure to invest the trust fund as required by testator's will, however, by proof that deceased had charged the alleged guardian with the special care of his children. Peyton v. Smith, 2 Dev. & B. Eq. 325 (1839).

And a direction in a will that the use of testator's property shall be in his wife, for her support and that of her children subject to the supervision of the executors, until a division can be conveniently made, does not constitute the executors the guardians of the children so that they can be held chargeable as such with compound interest for failure to invest the share of the estate belonging to the children. *Ibid.*

And annual rests should not be made in computing the amount due a mortgagee in possession accountable for rents and profits, where interest on the mortgage debt was in arrear when the mortgagee took possession, nor until the principal debt is entirely paid off. Bennett v. Cook, 5 Thomp. & C. 138, 2 Hun, 526 (1874).

VI. *Jurisdiction to allow.*

The allowance of compound interest against executors, trustees, etc., is undoubtedly a subject of equity jurisdiction. This would seem, from examination of the cases on the subject, to have been universally conceded and never questioned.

So probate courts have the same discretion within the scope of their jurisdiction, with reference to charging fiduciaries with compound interest on equitable principles, as appertains to a chancellor, subject always to correction for abuse. Price v. Peterson, 38 Ark. 494 (1882).

And in Cruce v. Cruce, 81 Mo. 676 (1884), it was held that probate courts are possessed, under Mo. Rev. Stat. 1879, § 232, authorizing them to exercise an equitable control in making executors and administrators account for interest received by them and accruing on moneys belonging to the estate loaned or otherwise employed by them, of the powers of a court of equity to exact compound interest from a delinquent executor.

The question of the allowance of compound interest in the settlement of the accounts of a guardian is one for the court, and a verdict of a jury, in response to an issue, that the guardian could have put the money out at loan and collected it promptly without delay or suit so as to put it out again promptly and keep it steadily at interest from year to year, not well supported by the evidence, furnishes no basis for a judgment compounding interest annually. Reed v. Timmins, 59 Tex. 84 (1878).

And the question of its allowance upon debits due one partner from another in case of bad faith, refusal to account, or private use of the money of the firm, is one of fact for the trial court, the decision of which is conclusive. Johnson v. Hartshorne, 52 N. Y. 173 (1873).

And the question of its allowance against an executor who takes out ancillary administration and sells lands in another state and brings the proceeds into the state of his domicil and that of the testator, is exclusively cognizable by the courts of the latter state. Jennison v. Hapgood, 10 Pick. 77 (1830).

to be allowing one to reap where he had not sown, and left the seed to the harvest. At least, it would be allowing the *cestui que trust* to have and use the trust funds, with interest thereon at the rate paid, for his maintenance, and at the same time require the trustee to carry an estate in the land in question for the benefit of the heir, without any of his funds remaining in said land. It has already been pointed out that the only ground of demand against the executor is that he ought to pay additional interest on such of the funds of the estate as were not kept deposited, at interest, in the banks, as will be more fully explained hereafter. By computing compound interest on such funds at a higher rate than the executor returned, a claim arises against him for a certain sum over and above the amount he has accounted for.

Now, counsel for petitioner insist that, when this sum arising from such compound interest equals the amount paid in the purchase of a certain tract of land by appellant during said administration, the heir has a right to take the land, at the purchase price, in lieu of an equal amount of the claim for interest against the executor. This is the position taken by counsel for petitioner in responding to the appeal by the executor, and also in the appeal by petitioner (which is consolidated with this), wherein petitioner's counsel urge their exception to the ruling of the court in refusing to decree a trust in favor of the heirs as to the whole tract of land above mentioned, and refusing, also, to declare a like trust interest, in favor of the heirs, in certain other tracts of land held by the executor. But the court impressed a trust upon lands of the executor

VII. *How computed.*

a. *Methods of computing generally.*

The general rule for the computation of interest against executors, trustees, etc., is to charge them as if the fund had been kept invested upon interest payable periodically, which interest had been received by him, and as if payments made by him had been made from the interest and principal thus received and in his hands when payments were made by him.

This rule was adopted in Spear v. Tinkham, 2 Barb. Ch. 213 (1847), with reference to executors mixing the trust fund with their own or neglecting to keep regular accounts of the investment and interest received thereon from time to time, the court holding that interest should not be computed upon the capital fund for a term of years with a deduction of the payments and the interest thereon.

So in Oswald v. Givens, Riley, Eq. 38 (1837), it was held that in the settlement of the accounts of an executor the payments made by him during the year are to be deducted from the charges against him, and the interest calculated on the balance for the ensuing year.

And in Miller v. Congdon, 14 Gray, 118 (1859), it was held that the account of an executor, who is also a trustee under the will to retain a legacy until the legatee attains her majority, paying her the interest or applying it to her use and maintenance, who fails to procure his discharge and makes no legal separation of the trust fund from the mass of the testator's estate, should be settled by adding the interest each year to the principal, deducting the payments made during the year, and taking the balance for the next year's principal.

So interest is chargeable on an administrator's bond on balances as they fall due, but not on the aggregate sum of principal and interest found due on a former accounting, and the question is not affected by an agreement of counsel to adopt such sum for the purpose of settling another estate. Chick v. Farr, 31 S. C. 468 (1889).

And the account of a trustee who has appropriated trust funds, against whom it is not necessary to compute compound interest in order to cover his gains, should be computed by deducting the disbursements for the year from the debits and receipts and using the result as the principal on hand for the next year, and deducting the interest on disbursements from the interest on debits and receipts and carrying the balance forward to apply on disbursements of subsequent years, and if the balance of interest for any year should be in favor of the trustee, it should be applied to a reduction of the debits chargeable against him in the succeeding year. Cruce v. Cruce, 81 Mo. 676 (1884).

So when a guardian has used the money of his ward he should charge himself in his annual account with interest from the time he received it, and the interest should be made a part of the principal, and interest should be computed on the balance then due up to the time for the next annual accounting. Bond v. Lockwood, 38 Ill. 213 (1864).

And the same rule was adopted in charging a guardian who had failed to invest the estate of his ward and during the course of a long guardianship had had its management and use, in Boynton v. Dyer, 18 Pick. 1 (1836).

And in Robbins v. Hayward (1822), referred to in 1 Pick. 529, it was held that when large sums of money have come to the hands of a guardian and no account has been rendered for many years, and rents from real estate and income from public stocks have been periodically received, his account should be settled with a rest for every year, including principal and interest, and the balance thus struck carried forward, to be again on interest, whenever the sum is large enough that a trustee acting faithfully and discreetly would put it in a productive state.

So where the terms of a testamentary trust provide that interest shall be added to the principal during the minority of the beneficiaries, and that from majority each beneficiary shall be entitled to the income of his portion, the share of each beneficiary becomes, on his attaining majority, a new principal, on which the trustee is chargeable with interest or dividends, a rest to be made at the date of majority of each beneficiary. McKim v. Hibbard, 142 Mass. 423 (1886).

In Jordan v. Hunt, 2 Hill, Eq. 145 (1835), however, it was held that a guardian who receives funds of his ward from time to time is not chargeable with interest on the funds received until the end of the year, when they are brought into the account and the balance in his hands after deducting the expenditures constitute the interest-bearing fund for the succeeding year.

And in *Re* Tutorship of Minor Heirs, 45 La. Ann. 134 (1893), it was held that a tutor should be charged, on the settlement of a tutorship, with legal interest on rentage and on the capital in his hands, and allowed credit of legal interest on all disbursements and indebtedness from their respective dates, without annual compound of interest.

And that interest on an amount converted by a trustee should be computed from the time the amount is found to have been due to the day when execution is awarded, without making a

only in the one case above mentioned, where it was found that in 1883 the executor had used, in the purchase of said piece of land, estate funds equal to one half the purchase price, but which sum the executor had afterwards accounted for, with interest as aforesaid, without delinquency, in compliance with the terms of the will. He must, therefore, not only have accounted for said $5,000 which is claimed to have been paid in the purchase of said tract of land, but for a large amount of interest thereon, as it is not disputed that he returned 7.9 per cent annually, until such funds were entirely paid over to the heirs. To impress upon lands of the trustee a trust in favor of the beneficiary, under these circumstances, would be allowing him, not only the advantage of compound interest at rates determined on by the court, but would permit him to collect such interest by selecting lands out of the trustee's estate, purchased during the continuance of the trust, at the purchase price paid therefor years before. It would not only give the heirs the advantage of compounding interest against the trustee for having temporarily used trust funds, in order to draw away from him the profit of such use, but would also give them the further advantage of increasing that exaction by whatever rate the property so selected might vouchsafe, whether it be thirty, sixty, an hundred, or a thousand fold. Counsel for the petitioner undertake to sustain the decree of the court declaring said trust in the lands of the executor, and their contention is that the court ought to have gone further, and decreed to the heirs additional trust interests in the lands of the executor, by invoking the doctrine of equity that the trustee shall not be permitted to

rest at the date of the commencement of the suit, was held in McKim v. Hibbard, 142 Mass. 422 (1886).

So in Scott v. Crews, 72 Mo. 261 (1880), it was held that an administrator who has paid out money for the estate should, upon being charged with interest with rests for an improper use of the funds of the estate, be allowed interest upon the amounts paid by him with the same rests and at the same rate.

Rests cannot be made by the master, however, unless so directed by the decree.

This was held in Webber v. Hunt, 1 Madd. 13 (1815), in a proceeding against a mortgagee in possession for an accounting.

But a decree directing the master, in taking an account against the executor, to ascertain balances in his hands at the end of each year and compute interest on such balances and make annual rests, charging him with interest after the rate and in the manner aforesaid upon such balances, requires that the interest computed on the balance due for the first year shall form a part of the balance due at the end of the second year, and upon which interest is to be then computed, and so on from year to year. Heighington v. Grant, 5 Myl. & C. 258 (1840).

And the object of a direction to compute interest at 5 per cent on all sums received, making half-yearly rests, in a decree against an executor directed not to derive any advantage from keeping the money in his hands without accounting for legal interest, and to accumulate for the benefit of the *cestui que trust*, is to charge compound interest; and the decree is properly executed when the executor has the whole property in his hands, by a computation of interest upon each receipt from the day it was received, the balance of the receipts with the interest so calculated and payments being struck at the end of the half year, and that balance so composed of principal and interest being carried forward as an item in the account producing interest. Raphael v. Boehm, 11 Ves. Jr. 921 (1805), 13 Ves. Jr. 407 (1807).

And a rest ought to be made, under a decree directing that in taking the accounts of a mortgagee in possession annual rests should be made, and that the rents and profits of the premises should be applied in reduction of the principal as often as they exceed the accrued interest, at the date of the receipt by the mortgagee of a sum in excess of the interest, though occurring in the interval between annual rests, and the subsequent annual rests should be computed from that date. Binnington v. Harwood, Turn. & R. 477 (1823).

But a decree for an accounting by a trustee will not be reversed on appeal because the master has made annual rests in the account without a direction in the interlocutory decree or otherwise to do so, when the facts stated in the bill and taken to be true by a default require rests in computing interest, and they are allowed by the master without objection, and his report is confirmed. Hurd v. Goodrich, 59 Ill. 457 (1871).

And the omission of the commissioner, in stating the accounts of an executor, to charge him with interest on annual balances in his hands, is a ground for surcharging and falsifying the accounts, executors being chargeable with interest on such balances generally. Burwell v. Anderson, 3 Leigh, 348 (1831).

And an error in directing the jury to compound the interest annually against a guardian from the date of his settlement to the time of the trial of an action for its recovery, is harmless, and not a ground for reversal when in fact the jury gave only about one year's interest. Tillett v. Com. 9 B. Mon. 441 (1849).

And an appeal by an administrator upon the ground that he had been charged compound interest on money not actually reduced to possession will be regarded as frivolous when it fails to show any particular item or charge in which it had been done. Sanderson v. Sanderson, 20 Fla. 292 (1883).

The master in a proceeding to charge a guardian with compound interest on the moneys of his ward should be directed to compute it at the rate of 6 per cent with annual rests under a rule fixing it at a uniform rate of 1 per cent less than the legal rate, when the guardianship terminated before the legal rate was changed from 7 to 6 per cent, though the direction and computation were made afterwards. Micou v. Lamar, 7 Fed. Rep. 180 (1881).

But the rule under which it is presumed that balances of interest in a trustee's hands were first applied to make payments for the estate has the effect of making interest an interest-bearing fund only where it was in fact, or should have been, employed to discharge current demands. Livingston v. Wells, 3 S. C. N. S. 347 (1876).

And where interest is charged against an executor or administrator, in settling his administration account, on balances due at the end of each year, it ought not to be carried to the accounts of the succeeding years so as to convert it into principal and make it bear interest, nor be deducted from the payments made in such succeeding years. Sheppard v. Starke, 3 Munf. 29 (1811); Granberry v. Granberry, 1 Wash. (Va.) 246, 1 Am. Dec. 455 (1793); Cavendish v. Fleming, 3 Munf. 198 (1812).

And in stating an account between a trustee bound by the terms of the trust to make annual payments, with his *cestui que trust*, simple interest

make any profit by the use of trust funds. While this is a salutary rule of equity, and must be upheld, it does not warrant the court in transferring to the heirs lands of the executor, or interests therein, under the facts existing in the case at bar. We think this is abundantly shown from the foregoing examination. But that doctrine has been asserted with such confidence, as sufficient to support the decree of the court declaring the trust, that we will briefly examine the question from that particular point of view.

The question, then is, If a trustee use trust funds to the extent of half the purchase price of a tract of land, but afterwards, in the execution of the trust, account for the fund so used, with compound interest at the rate of 7.9 per cent, has the trustee profited by this transaction to the extent of half the value of such tract of land? Suppose a man purchases a tract of land at the price of $10,000, and, not having funds at hand to pay the whole price at the time stipulated, he calls upon another having money on hand, who supplies the purchaser with $5,000, and the transaction thus stands for a time, until such $5,000 is called for, when the purchaser promptly returns the same, with compound interest at the rate of 7.9 per cent per annum. Now, suppose, some years after such payment, the party giving such accommodation, pointing to said tract of land, then of the value of $50,000, and relating the circumstances just narrated, insists that such purchaser is beholden to him to the extent of half said tract of land at its present value, together with half of the issues and profits from said land since its purchase, — in other words, that the purchaser had actually profited by such accommodation to the extent

should be allowed upon each annual payment from the time it is due till the date of filing the master's report, and charges paid by the trustee should be first deducted from the interest due up to the date of the charge, and the balance then deducted from the principal. But if the interest is more than the charge, the excess of interest is not to be added to the principal, which is to be left as before and the interest is to be added to the interest subsequently accruing. Merritt v. Jenkins, 17 Fla. 494 (1880).

So the allowance of interest on annual balances on an executor's account is not subject to the objection that interest is thereby compounded against him, where the expenditures for the year amount to more than the interest for that period, or where, if they amount to less, the balance is not added to the principal. Brown v. Vinyard, 1 Bail. Eq. 460 (1831).

And in De Peyster v. Clarkson, 2 Wend. 77 (1828), it was held that charging interest on an accounting by a guardian by carrying it into the current account as so much money in the hands of the guardian immediately applicable to his disbursements and payments for the account of his wards, is not objectionable as a system for compounding the interest against the guardian.

But after the termination of a guardianship the guardian's accounts should be adjusted and stated upon the ordinary principles as between debtor and creditor, and a decree for an aggregate sum embracing interest, as well as the balance of principal due at the close of the guardianship with interest on such aggregate sum, is erroneous, the interest being thereby compounded. Cunningham v. Cunningham, 4 Gratt. 43 (1847).

b. *Upon what computed.*

While the question as to what compound interest will be computed upon has been seldom raised, the general rule may be drawn from all the decisions, that it will be computed upon all of the trust fund which the executor or other trustee has converted or used, or with reference to which he has otherwise misconducted himself.

This was the rule adopted in *Re* Hodges' Estate, 66 Vt. 70 (1894), and McCloskey v. Gleason, 56 Vt. 264, 48 Am. Rep. 770 (1883).

But where there is no ground for charging bad faith, however, or any improper motive, and the violation of the trust is simply due to an erroneous view of their powers and duties, great caution should be exercised in ascertaining the sum for which they are chargeable, and care should be taken not to mulct them in a greater amount than the estate could have realized from the proper execution of the trust. *Dictum* in Adair v. Brimmer, 74 N. Y. 539 (1878).

Thus, an executor, who, under a bona fide belief that under a true construction of the will he was entitled thereto, sold out stock and retained one third and paid two thirds of the proceeds to his coexecutors, is only liable for the one third retained by himself, upon the subsequent decision of the court that the next of kin were entitled to the fund. Saltmarsh v. Barrett, 31 Beav. 349, 8 Jur. N. S. 737, 31 L. J. Ch. 788, 10 Week. Rep. 640, 5 L. T. N. S. 87 (1862).

And where a partner engages in speculation with the moneys of the firm, making large profits, and it does not appear how much of the moneys used was in excess of the amount he had a right to draw, one half of the amount used may be taken as the sum for which he is to be held accountable to his partner, with interest compounded annually. Pomeroy v. Benton, 77 Mo. 64 (1882).

But where he destroys the book in which he kept an account of the transaction, and pretends, upon examination as a witness, that he does not know and cannot ascertain the amount, he is chargeable with compound interest upon the amount of moneys used in excess of the amount which he had a right to draw. *Ibid.*

A guardian who receives securities, some of which bear annual interest and some simple interest, and collects them all and mingles the proceeds with his own moneys, rendering no account of the amount of interest moneys received, and invests in stocks and real estate with the fund formed by the comixture, receiving more than 6 per cent on his investment, is chargeable, however, with annual interest on the whole trust fund, though it could not be traced directly and wholly into these transactions. Farwell v. Steen, 46 Vt. 678 (1874).

And an administrator to whom stock belonging to the deceased had been transferred, upon which he received the dividends and used and appropriated them as his occasions required, should be charged with interest on the several dividends from the time they were respectively received, and if he has since sold the stock and invested the money elsewhere, it should be followed and whatever dividends or income he has received from reinvestments ought, in like manner, to be accounted for with interest. Garniss v. Gardiner, 1 Edw. Ch. 128 (1832).

And a guardian who charges himself with interest upon balances remaining in his hands is also chargeable therewith on additional sums not included in his account, when in the settlement of his account it is found that such sums ought to

of one half the value of said land, and half the issues and profits thereof since purchase, — although the purchaser had long since repaid the loan with interest. This would, we think, strike practical men as an extraordinary proposition. But we have drawn into this illustration material facts, which harmonize with those existing in the case at bar, except that in the illustration it was a voluntary accommodation, and in the present case trust funds were used; but we are simply inquiring, now, as to the measure of profit flowing from one to the other by such use of funds. Then, if the profits of such accommodation were to be taken away from the purchaser, and transferred to the other, applying the theory proceeded upon in this case, it would require the transfer of a half interest in the land, and half the issues and profits since the purchase, less $5,000, dropped from the account of issues and profits, to offset the $5,000 which the purchaser had returned to the lender, making no account, however, of the interest which the purchaser paid for the use of said loan; and, on this theory of accounting for profits, the one whose $5,000 was thus temporarily used would find that he had first received back his $5,000 on demand, with compound interest, and thereafter, although the purchaser had carried the investment in the land as his own burden alone until it is of great value, half of the land, worth $25,000, and also half of the issues and profits, less $5,000, had been handed over, merely to take away the alleged profit of the temporary use of said $5,000. The only difference between the illustration and the accounting pursued in the case at bar is, that in the illustration it was a voluntary accommodation, and, also, in the account

have been charged. Blake v. Pegram, 109 Mass. 541 (1872).

c. *When allowance should commence.*

The period allowed before charging a guardian or trustee with interest upon trust funds coming to his hands depends upon the particular circumstances of each case and should be reasonable. Boynton v. Dyer, 18 Pick. 1 (1836); Shepard v. Patterson, 3 Dem. 188 (1884).

So in Rowland v. Best, 2 McCord, Eq. 317 (1827), it was held that interest should be allowed on the annual balances of an administrator's account after allowing a reasonable time for settlement of the estate, but not so as to allow compound interest.

Thus, in Gilman v. Gilman, 2 Lans. 1 (1870), it was held that when an investment is directed which may be made in public securities which can be obtained at any time in the market, thirty days is a reasonable time to allow for making the investment before the imposition of interest on the trustee for failure to invest.

And in Barney v. Saunders, 57 U. S. 16 How. 535, 14 L. ed. 1047 (1853), one month was allowed after each annual rest in which to reinvest the interest received when the sums received were small and a large part was liable to be called in for the use of the beneficiary.

So in Shepard v. Patterson, *supra*, three months were held to be a reasonable time to be allowed before charging an executor with compound interest upon the trust fund for failure to obey a direction in the will requiring the income to be deposited in some good savings bank or devoted to some other safe investment.

And in Ringgold v. Ringgold, 1 Harr. & G. 11, 18 Am. Dec. 250 (1826), six months was adopted as a reasonable time within which a trustee should invest the trust funds, a failure to do so rendering him thereafter chargeable with interest.

And in Barker v. White, 58 N. Y. 201 (1874), the same period was assumed to be proper in a proper case.

So in Boynton v. Dyer, *supra*, in which a guardian had failed to invest and had the use of his ward's estate, but had promptly rendered an account at the end of the first year, one year was allowed as a reasonable time within which to invest the estate before charging him with interest thereon.

And in Schieffelin v. Stewart, 1 Johns. Ch. 620, 7 Am. Dec. 507 (1815), two years, during which all the debts of the estate were paid, with a trifling exception, and during a large part of which the administrator had a balance in hand amply sufficient to close the concerns of the administration, was adopted as a sufficient period within which to settle the estate, so as to render him thereafter chargeable with compound interest in a proper case for failure to do so.

A trustee who denies the trust and claims in hostility thereto, however, cannot invoke the rule allowing a trustee six months for investment of trust funds, but is properly chargeable with interest from the time of receipt of the trust funds. Barker v. White, *supra*.

And a guardian chargeable with compound interest, who took office before the modification of the Act of 1847, Code, § 2606, is not entitled to exemption therefrom for the first year after his qualification, where the case was one in which time was not required at the beginning of the trust to collect assets and ascertain indebtedness. McCullough v. Johnson, 61 Ga. 554 (1878).

So in Foster v. Stone (Vt.) 31 Atl. Rep. 841 (1895), it was held that an administrator who appropriates the funds of the estate to his own use should be charged with interest upon the sums appropriated from the date of the appropriation, compounded annually.

And in Bond v. Lockwood, 33 Ill. 212 (1864), it was held that a guardian who has used the money of his ward should charge himself with interest from the time he received it.

And executors under a will directing a legacy to be taken from the personal estate before dividing it, and invested for the purpose of paying it when the legatee should attain his majority, who charge themselves in their annual account with cash reserved for the payment of the legacy, are chargeable with interest from the time the legacy was taken from the personal estate, as shown by their account, with annual rests. Elliott v. Sparrell, 114 Mass. 404 (1874).

And in McKim v. Blake, 139 Mass. 593 (1885), it was held that interest should be computed in an action against sureties on the bond of a trustee who has wrongfully sold securities belonging to the trust estate and converted the proceeds to his own use, on the amount converted, from the time it is found to be due up to the time of issuing execution, but without rests, the allowance of compound interest being contrary to the general rule in Massachusetts.

So in Davis v. May, 19 Ves. Jr. 383 (1815), it was held that annual rests will not be directed on an account against a mortgagee in possession from the time when the arrear of interest was discharged by the rents.

d. *Rate per cent and length of rests.*

The rate of interest to be charged against a trustee upon trust moneys in his hands depends upon

with appellant the $5,000 dropped to offset a half interest in the land accrued by way of compound interest, computed at higher rates than the executor had returned, prior to the date of the purchase of said Child & Young tract of land. This does not materially change the application of the illustration. But, aside from the other untenable conditions already observed, the fact just mentioned—that the money upon which this trust is proposed to be declared is not, in reality, for part of the trust money found in said land from the time of purchase, but is a demand for interest accruing on moneys which were never even in said land—would seem, in view of the authorities, to be sufficient to defeat all claim to a resulting or constructive trust in favor of the heirs in the present case. In order to sustain such a trust on the ground that the land was purchased with trust funds which were otherwise to be accounted for, the trust interest in the land must be founded on trust money paid in the purchase thereof, and other demands cannot be offset for an interest in the land. *Ducie* v. *Ford*, 138 U. S. 587, 34 L. ed. 1091, and cases cited; *Muller* v. *Buyck*, 12 Mont. 354. There is some question made in the authorities whether a trust ought to be declared in such a case, where only a moiety of the purchase price was paid by trust funds, or whether a lien only should be fastened upon the land to secure reimbursement of the trust fund. Mr. Story seems to approve the latter course as the more equitable and reasonable procedure. 2 Story, Eq. Jur. §§ 1211, 1277*g*. See also Perry, Tr. § 128; *Munro* v. *Collins*, 95 Mo. 33. If it appeared in this instance that the trust money had carried the burden of half the investment in said land from the time of purchase until the trust was declared, it might then be necessary to decide between

the particular facts of each case. *Dictum* in Bobb v. Bobb, 89 Mo. 411 (1886).

In RE RICKER'S ESTATE the court, in refusing to adopt the highest rate at which, according to some testimony, the money could have been loaned, said: "The rate must be fixed with due consideration or the result will be found out of all proportion to what could have been accomplished in the field of practical affairs." Also, that "it would not be possible in practice to make the gain compound along the line of the highest rates attainable, because in practice it would not be possible to reloan the money and the accumulated interest the instant it was due."

There is no fixed rule as to what would be a reasonable rest for compounding interest against an executor or other trustee upon trust funds converted to his own use, that also depending upon the particular facts and circumstances of each case. Clemens v. Caldwell, 7 B. Mon. 171 (1846); Johnson v. Beauchamp, 5 Dana, 70 (1837); Maupin v. Dulany, 5 Dana, 589, 30 Am. Dec. 699 (1837); Clark v. Anderson, 10 Bush, 99 (1873). See also the main case, RE RICKER'S ESTATE, in which less than the highest legal rate was required.

The leading principle seems to be to charge such a rate and with such rests as to approximate as nearly as possible to the actual or presumed profits of the fund. Cruce v. Cruce, 81 Mo. 676 (1884).

Or what the trust would have produced if properly managed. King v. Talbot, 40 N. Y. 76 (1869).

See also *supra*, II., heading, *Principle of the allowance*.

It has not been the practice in the United States, as it has been in England, to charge the guardian with different rates of interest, corresponding to different degrees of negligence or misconduct. *Dictum* in Moyer v. Fletcher, 56 Mich. 508 (1885).

A trustee, who uses the trust fund in his private business, is prima facie liable, at least for the legal rate of interest for the use of money. Cruce v. Cruce, *supra*.

And has been frequently held to be chargeable with the highest legal rate with annual rests. See *supra* II., c, and d, headings, *Use and admixture of trust fund*, and, *Failure or refusal to account*.

And it is to be observed that annual rests have been more frequently employed than any other period, which is probably due to the fact that the income upon investments is frequently realized annually.

Though a direction of annual rests in computing interest is not of course, but under special circumstances only, and never for a broken period. Davis v. May, 19 Ves. Jr. 383 (1815).

Thus, in Cruce v. Cruce, *supra*, the court allowed simple interest at the rate of 10 per cent against a trustee who had appropriated the trust moneys to his own use, upon an accounting running through fifteen years, on evidence that the moneys could have been invested at that rate of interest, but refused to compound it upon the ground that the result would exceed what could be expected from any prudent and careful administration of the estate under ordinary circumstances.

And in King v. Talbot, *supra*, in which the executors purchased railroad and bank stock with the trust fund when they were directed by the will creating the trust to apply the interest to the use of minors so far as necessary, and pay over the fund with accumulations upon their attaining their majority, they were held liable to the *cestui que trust* for the amount of the fund with interest at 6 per cent computed with annual rests, that being deemed to be approximately what the trust would have produced if properly executed.

And in Micou v. Lamar, 7 Fed. Rep. 180 (1881), it was held that, when wards reject improper investments made by their guardian and demand the equivalent in money, he should be charged during the period of the guardianship with such a rate of interest as a proper and safe investment would have realized, compounded annually, which rate may be less than the legal rate.

So a decree allowing 8 per cent interest with annual rests against an administrator who mixed the trust funds with his own and used them for the purposes of speculation for his own profit will not be disturbed on appeal when the assets with which he was chargeable consisted almost exclusively of notes due the intestate bearing 10 per cent interest. Hook v. Payne, 81 U. S. 14 Wall. 252, 20 L. ed. 887 (1871).

And an administrator, upon failure to report to the court the proceeds of a note bearing 10 per cent interest coming to his hands, and the appropriation thereof to his own use, is properly chargeable thereon with interest at the rate of 10 per cent compounded annually. Williams v. Petticrew, 62 Mo. 460 (1876).

So in *Re* Davis's Estate, 67 Mo. 450 (1878), an executor who kept the estate open and the money in his hands for three years after all the debts were paid, using the money in the meantime for his own purposes, was held to be properly chargeable with 8 per cent interest computed with annual rests, and the court on appeal said that a charge of 10 per cent would have been warranted.

And in Frost v. Winston, 32 Mo. 489 (1863), it was held that a guardian who had moneys of his ward

the distinctions just mentioned. But such is not the case here. The claim or money upon which the trust in the land is declared in favor of the heirs in this case arises for compound interest at a higher rate than the trustee returned. And, when the date of the purchase from Child & Young is reached, in casting the interest account, $5,000 of the claim thus accruing for interest prior to that date is dropped to offset the amount constituting half the purchase price. On the other hand, if it is proposed to claim an interest in said land for interest on the fund which was put into the land, the difficulties of the problem are still further augmented. By that theory compound interest would be required from the trustee for the use of the money put into the land, and the *cestui* would be allowed, on this very demand for compound interest (which is supposed to constitute the profit derived from the use of the trust money), to go back and take the land also, with its issues and profits from the time of purchase, in payment of the interest. This would be recompensing the *cestui* for the use of his trust money—First, by way of compound interest; and, secondly, by way of transferring to him the land, and the rents, issues, and profits of the land, besides compound interest.

Counsel for respondent urge, to support the judgment, that "the beneficiaries are permitted to make their election as to whether they will take the actual profits, or interest in lieu thereof." It plainly appears that the court below allowed them to elect, and take both ways. We have no doubt that with a closer investigation of these conditions, and more mature consideration of the authorities, the learned judge of the trial court below would have denied the claims put forth that a resulting trust could arise in favor of the

which he had lent or could have lent at the highest legal rate of interest, is properly charged with that rate of interest with annual rests, when called upon to account.

And in Lommen v. Tobiason, 53 Iowa, 665 (1879), an administrator who had been guilty of gross maladministration, and who had dealt with the moneys collected by him and furnished no data for reaching an accurate result, was held to be chargeable with the highest customary rate of interest at the time of the death of the decedent on notes belonging to the estate, the rate borne by which is not shown by his inventory, until they come to his hands, after which it should be computed at the legal rate with yearly rests.

And in Hough v. Harvey, 71 Ill. 72 (1873), an allowance of 10 per cent was refused and one of 6 per cent with annual rests made against an executor who had failed to obey a direction to accumulate, but did not appear to have had any use of the fund.

And in Wilmerding v. McKesson, 103 N. Y. 329 (1886), compound interest was refused, and simple interest at 5 per cent allowed, against a trustee who had been negligent but without wrongful intent, where his cotrustees appropriated the trust fund to their own use and failed.

So in Morgan v. Morgan, 4 Dem. 353 (1886), in which the trustee had allowed the trust fund to remain from time to time with a trust company, he was charged 5 per cent interest thereon with annual rests, and allowed to retain sums allowed by the trust company during the same period by way of interest.

But in *Re* Final Settlement of Tyler v. Cartwright, 40 Mo. App. 378 (1890), it was held that the highest rate of interest compounded at annual rests should not be allowed against a guardian for the income of his ward's property, where the ward was the child of the guardian, who was a widow, and both occupied the home place owned by them in common, without proceeding for a partition or making annual settlements.

And the master in a proceeding to charge a guardian with compound interest on the moneys of his ward should be directed to compute it at the rate of 6 per cent with annual rests, under a rule fixing it at a uniform rate of 1 per cent less than the legal rate, where the guardianship terminated before the legal rate was changed from 7 to 6 per cent, though the direction and computation were made afterwards. Micou v. Lamar, 7 Fed. Rep. 180 (1881).

The general rule for accounting by administrators under the Florida statute is that interest at the rate of 8 per cent is to be charged, the interest upon the balance found at the beginning of the year to be carried into the balance struck at its close, computing interest for the next year upon the whole, no interest being computed upon sums when received. Sanderson v. Sanderson, 17 Fla. 820 (1880).

And in Peelle v. Hipes, 118 Ind. 512 (1888), in considering the question of the allowance of compound interest against a guardian for failure to account, the court said that it inclined to the opinion that the penalty of 10 per centum prescribed by statute is an exclusive one, but it did not so decide.

So three years is a proper term for rests in computing interest against a guardian where he might, and therefore should, have loaned accruing interest at the end of every three years. Manpin v. Dulany, 5 Dana, 569, 30 Am. Dec. 699 (1837).

And a trustee having the trust funds in his hands as a loan at the time of the creation of the trust, who continues it in his business and is thereby enabled to keep certain railroad shares from which he receives the income semiannually, will only be charged with interest on the fund in his hands, with annual rests, where the half yearly interest received by him is too small for investment. McKnight v. Walsh, 23 N. J. Eq. 136 (1872).

And in Final Accounting in Black's Estate, Tucker, 147 (1869), it was held that administrators are chargeable with compound interest upon moneys of the estate used by them for their own benefit, and a computation with annual rests is reasonable when all the next of kin are minors except one, who has only just attained his majority.

So in Montjoy v. Lashbrook, 3 B. Mon. 261 (1843), it was held that a trustee who uses the trust fund for his own benefit should be charged with 6 per cent interest thereon annually, and if he fails to pay the interest it should be added to and made part of the principal annually.

And in Page v. Holman, 82 Ky. 573 (1885), it was held that trustees who have used the moneys of the *cestui que trust* in their own business, and mixed the trust funds with their own, will be treated as having loaned it to themselves, and interest may be compounded against them with biennial rests.

And in Feltham v. Turner, 23 L. T. N. S. 345 (1870), it was held that trustees expressly directed to accumulate the trust fund, who fail to do so, are liable to account upon the footing of yearly or half yearly rests.

And executors who grossly neglect or refuse to make annual returns to the court of the condition of the estates in their hands were held liable for any balance found to be due to legatees, with interest

heirs, under the conditions shown in this case; for it cannot be sustained by the application of appropriate principles of equity, or by reason or precedent.

2. As to the executor's commission: And herein the question to be determined is, whether or not an executor or administrator, where the conditions require the continuance of the administration over a period of years, can lawfully be allowed, at the close of each year, on the annual account, the commission provided by statute for the executor or administrator on moneys of the estate actually disbursed during the preceding year, by way of compensation for the care and management of the estate. That the executor in this case, in rendering his annual account at the close of each year, charged the estate with the commission allowed by law on funds of the estate actually disbursed during the preceding year, is not disputed; and this was approved, from time to time, by the probate court. In the present accounting the court below caused these commissions to be taken away from the executor, and, not only so, but required him to pay interest on the amount of commission from the date of each allowance. The interest amounts to considerable more than all the commissions, and altogether, through that ruling, the executor is adjudged indebted to the estate in the sum of $5,806.86. To support the ruling of the court below the case of *Re Dewar's Estate*, 10 Mont. 496, is cited. That case is far from supporting the ruling here under consideration. It seems remarkable that the court below, having before it such a clear and painstaking elucidation of the subject of commissions, and the construction of the statute providing therefor, as found in that case, should have so shaped a ruling as we find it in the case at bar in this particular. In this

from the time it fell due, compounded at the end of every six years. Kenan v. Hall, 8 Ga. 417 (1850); Fall v. Simmons, 6 Ga. 265 (1849).

And the same rule of rests every six years was applied in case of a guardian. Royston v. Royston, 29 Ga. 82 (1859).

So in Scott v. Crews, 72 Mo. 261 (1880), an administrator who sold property of the estate on credit, taking notes of insolvent firms bearing 10 per cent interest, a part of which was paid, and the makers of the others remained solvent for a number of years, during which they might have been collected and the estate closed, was charged on a forced accounting and settlement had fifteen years afterward with the amount remaining uncollected with interest at 10 per cent per annum, with three rests.

And in Greening v. Fox, 12 B. Mon. 187 (1851), in which a fund was placed in the hands of two trustees, who undertook jointly and severally to use it for the payment of the debts and to support the grantor and divide the remainder six months after his death between his children, but who divided the fund between themselves when they received it, each was charged with the amount received by him with interest computed with two year rests, when disbursements with interest from the time of payment were deducted, and a joint decree rendered against both for the entire sum due.

So in Johnson v. Beauchamp, 5 Dana, 70 (1837), annual rests for the computation of interest against an executor who failed to render a satisfactory account of interest received was deemed too short, when it was the custom to make annual reservations of interest and the currency was deranged and depreciated.

And in Smith v. Lampton, 8 Dana, 69 (1839), interest was computed against an executor directed to make a residuary bequest productive, who failed to account, with biennial rests for the same reason.

Six months' rests in computing interest against a trustee, however, have been made only where the amounts received were large and such as could be easily and at all times invested. *Dictum* in Barney v. Saunders, 57 U. S. 16 How. 535, 14 L. ed. 1047 (1853).

And trustees directed to invest, who grossly and wilfully neglected to do so, were held not to be chargeable with interest compounded every six months, and a charge of interest compounded annually allowing a month after each rest to make the investment was held proper, where the sums received by the trustees were small, and three fourths of the annual income was liable to be called for by the guardian of a beneficiary. *Ibid.*

So in Walker v. Beal, 76 U. S. 9 Wall. 743, 19 L. ed. 814 (1869), a trustee who acted in utter disregard of his trust and treated the trust moneys as his own, and neither kept nor rendered any account thereof, was held chargeable with interest to be compounded annually. But the court was evenly divided upon the question whether or not semiannual rests should have been directed.

But in Say v. Barnes, 4 Serg. & R. 112, 8 Am. Dec. 679 (1818), it was said to be a reasonable rule to compute interest against a guardian who fails to invest upon balances in his hands at the end of every six months.

And in Voorhees v. Stoothoff, 11 N. J. Eq. 171 (1829), six months was allowed for receipt and investment before charging compound interest against an executor who had failed to obey a direction to accumulate and rendered no account of the disposition of the fund.

A reversal on appeal will not be made for error in charging a guardian, who has retained the funds of his ward in his own hands but committed no breach of trust with relation thereto, with compound interest, where semiannual instead of annual rests were made for the purpose of deducting sums allowed for the maintenance of the ward and the difference between the amount thus computed and that computed by the proper method is only a little more than $10 and the guardian had presented an erroneous overcharge against the estate for expenses, evincing an entire disregard of the rights of the ward. *Re* Guardianship of Thurston, 57 Wis. 104 (1883).

In England, however, different rates of interest have been adopted corresponding to the different degrees of negligence or misconduct. See Moyer v. Fletcher, 56 Mich. 508 (1885).

Thus, in Jones v. Foxall, 21 L. J. Ch. 725, 15 Beav. 388 (1852), the rule is laid down that if an executor has retained balances in his hands which he ought to have invested, the court will charge him with simple interest at 4 per cent on these balances; if, in addition to such retention, he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing 5 per cent, he will be charged with interest at the rate of 5 per cent per annum; and if in addition to this he has employed the money so obtained by him in trade or speculation for his own benefit and advantage he will be charged either with the profits actually so obtained by him from the use of the money or with interest at 5 per cent per annum, and also with yearly rests.

So in Crackett v. Bethune, 1 Jac. & W. 586 (1820), it was said that in case of mere neglect to invest moneys of the estate, an executor should be charged

case the executor, at the close of the year, charged commission for disbursements of the past year. He was thus charging for services passed and finally completed. In the *Dewar Case* it is said: "It is the law that appellant's claim for fees being unsettled, unallowed, and inchoate, and the creature of the statute, it fell with the law creating it." Here, in the case at bar, the commissions taken away from the executor were settled, allowed, and approved by the court, for past services, whereas, in the *Dewar Case* the administrator sought to charge commissions at the commencement, under the law as then existing, for all the period of the administration, ignoring all changes in the law, by act of the legislature, during said period. In the *Dewar Case* the court further observed: "Appellant does not separate his services as to these two periods, and claim compensation upon services rendered in the three and a half months' period under the old law, and upon those rendered in the nineteen months' period under the amendment. If he did so, and claimed a higher percentage upon services fully performed and passed during the three and a half months' period, the argument of vested right would address itself to us with some force. *People* v. *Pyper*, 6 Utah, 160." It appears that, in the course of the executor's administration in the present case, the legislature reduced the rate of commissions, and the executor's commission was conformed to the change, as shown by indorsement on the fourth annual report of the executor by *Judge* Hedges. Thereby the learned judge applied the construction of the law as approved several years later, in the case of *Dewar's Estate*, *supra*. The ruling of the district court in this particular cannot be sustained.

3. What rate of interest should be required from the executor on funds to the credit of

the ordinary rate of interest, which is 4 per cent, but in a direct breach of trust, it has been usual to charge 5 per cent.

And in Knott v. Cottee, 16 Beav. 77, 16 Jur. 752 (1852), it was held that an executor directed to accumulate, who retains the trust fund but is not guilty of such misconduct as to make him answerable at 5 per cent, should be charged 4 per cent with annual rests.

So a trustee directed by the will to lend the trust fund at the best interest that could be obtained, who with the consent of his cotrustees himself took it at 4 per cent, was ordered to pay 5 per cent, the decision being placed upon the ground that a trustee cannot bargain for himself so as to gain an advantage. Forbes v. Ross, 2 Bro. Ch. 430, 2 Cox, Ch. Cas. 113 (1788).

And an executor is chargeable with 5 per cent where he appears to have made it from the use of the assets, or where by the non-application of the assets he has done damage to the estate to that amount; but where he has merely retained the assets for his own purpose he is chargeable with 4 per cent only. Hall v. Hallet, 1 Cox, Ch. Cas. 134 (1784).

And an executor and trustee under a will directed thereby to invest funds of the estate in government stock, or upon real-estate security, and accumulate the surplus after maintaining infants, who invests the estate in foreign funds but retains no benefit to himself, is chargeable with interest at 4 per cent with annual rests. Knott v. Cottee, *supra*.

So assignees or other trustees keeping a fund eight years without distribution, both of whom lent their shares of the fund, are chargeable with such rate of interest as they appear to save made, and if none appears to have been made, with 4 per cent. Hankey v. Garret, 1 Ves. Jr. 236, 3 Bro. Ch. 457 (1790).

And interest must be calculated against a trustee upon parts of the trust fund invested in authorized securities at the rate actually yielded, and parts of the fund improperly invested or not kept separate from the trustee's own money, will be treated as remaining in the trustee's hands uninvested, and interest will be charged at 4 per cent only. *Re* Emmet's Estate, L. R. 17 Ch. Div. 142, 50 L. J. Ch. 341, 44 L. T. N. S. 172, 29 Week. Rep. 464 (1881).

And in Newman v. Auling, 3 Atk. 579 (1747), the *Lord* Chancellor decreed an account for an annuity which was given by way of maintenance, with interest at 4 per cent, to be computed at the end of each half year, though the annuity was by bare grant without any power of entering.

e. *Termination of allowance.*

The unquestioned rule with reference to executors, administrators, and trustees would seem to be that the period of the allowance of compound interest against them would terminate only upon the recovery of the trust fund or its return to proper channels. With reference to guardians, however, the rule is different.

Thus, an allowance of compound interest against a guardian should cease upon the arrival of the ward at full age, as the relation of guardian and ward then ceases, and current interest only should be thereafter allowed. Clay v. Clay, 3 Met. 548 (1861); Tanner v. Skinner, 11 Bush, 120 (1774); Gilbert v. Guptill, 34 Ill. 141 (1864); State v. Richardson, 29 Mo. App. 595 (1888); Armstrong v. Walkup, 12 Gratt. 608 (1855); Micou v. Lamar, 7 Fed. Rep. 180 (1881).

So in Kattelman v. Guthrie's Estate, 142 Ill. 357 (1892), affirming 43 Ill. App. 188, it was held that the fact that a guardian retained his ward's money in his hands after she came of age and invested it in his own name did not render him liable for compound interest thereon, when she made no objection to his retaining and using the money, and voluntarily kept it in his hands after he had made a final settlement as guardian.

And in Moore v. Moore (Tex.) 31 S. W. Rep. 532 (1895), wards, who for many years after attaining their majority make no demand of the guardian for money received by him and not paid over, were held entitled to only ordinary legal interest after the time they became of age.

So the death of a guardian terminates the guardianship, and after that time he is chargeable with simple interest only on balances of the trust estate in his hands. Armstrong v. Walkup, *supra*; McKay v. McKay, 33 W. Va. 724 (1890).

And interest is not to be compounded on accounting in favor of a ward against executors of his deceased guardian after the death of the guardian; simple interest only can be allowed unless compound interest is shown to have been received. Ryan v. Blount, 1 Dev. Eq. 382 (1830).

And interest should be allowed in Missouri in an action upon the bond of a guardian brought after his death to recover for money appropriated to his own use, at the rate of 10 per cent, compounded annually to the time of the death of the guardian, and at 6 per cent simple interest thereafter, with no allowance for commissions. State v. Gilmore, 50 Mo. App. 353 (1892).

So the marriage of a female ward also terminates the guardianship, and after that time compound interest should not be charged against the guard-

the estate, not deposited in bank at interest, in view of the facts involved in this case? And, further, as to the question of compounding interest in accounting with trustees. As we proceed in the consideration of these questions, we shall also digress sufficiently to consider an exception on behalf of petitioner to the ruling of the court in refusing to charge the executor the full amount of a certain debt, and interest, owing said estate, where the executor had accepted, by way of compromise, and reported to the court, a less amount in settlement. It appears that, of the funds of said estate on hand at the death of the testator, some $6,000 was on deposit in the People's National Bank, then a banking institution in the city of Helena; that in 1878 said deposit amounted to $6,500; that said bank became insolvent, and went into the hands of a receiver, about July or August of that year, and, on winding up its affairs, claimants against said bank received only 55 per cent of their demands; that, about February or March prior to said failure, the executor, having come into possession of information concerning said bank which led him to doubt the safety of the estate funds therein, sought to draw such funds out, but the officers in charge of said bank refused to cash the certificate of deposit, claiming that it was a time deposit, and the sum was not demandable until maturity of the certificate at a later date; that the executor, however, insisted on drawing out such funds, and being at the time personally indebted to said bank for loans obtained therefrom in the sum of about $6,500, for which the bank held his individual note, the executor, in order to get the funds of the estate out of said bank, for the reason aforesaid, offset said certificate of deposit

jan. Armstrong v. Walkup, *supra*; Finnell v. O'Neal, 13 Bush, 176 (1877).

But a guardian may be charged with compound interest after his guardianship has ceased and another guardian has been appointed, where he exercised a control and influence over the new guardian so as to prevent the latter from calling him to account, and the new guardian is insolvent. Spack v. Long, 1 Ired. Eq. 426 (1841).

VIII. *What sufficient to release from accountability.*

Executors, trustees, etc., who have rendered themselves accountable for compound or other interest upon the trust fund in their hands, will not be excused therefrom, unless they show such equitable circumstances as ought in conscience to acquit them.

This was held with relation to a guardian, in Branch v. Arrington, 2 N. C. Law Repos. 52 (1815).

And in Johnson v. Miller, 33 Miss. 553 (1857), it was held that a guardian who charges himself with compound interest on his ward's money in his annual accounts, admits that he is chargeable with interest, and that he has used the money for his own benefit, and should not be relieved from the charge and held accountable for simple interest only, in the absence of a sufficient reason appearing on the record.

So the liability of an executor or trustee, who uses the trust fund for his own benefit, for compound interest, is not relieved or affected by the fact that he was at all times able to respond for the trust funds, or that they had at all times been protected against loss by reason of the misappropriation. Clark's Estate, 53 Cal. 355 (1879); *Re* Stott's Estate, 52 Cal. 408 (1877); Morgan v. Morgan, 4 Dem. 353 (1886).

And an executor will not be excused from the payment of interest on annual balances in his hands, unless it appears, not only that there are debts due by the estate, but also that he retained the funds for the purpose of meeting them. Brown v. Vinyard, 1 Bail. Eq. 460 (1831).

Nor is an executor who loans the assets of the estate to a firm of which he is a member relieved from liability for compound interest thereon as for an appropriation to his own use, upon the ground that it was a mere deposit with the firm as with a bank, when the firm used the money in its business. Cannon v. Apperson, 14 Lea, 553 (1885).

So an executor who has so dealt with the estate as to be chargeable with compound interest is not excused for its payment by the fact that the legatees were infants, having no guardian to whom he could pay the moneys of the estate, where he claimed the moneys as his own and concealed the fact that he had moneys of the estate in his hands, as it was his duty to bring it into court. Turney v. Williams, 7 Yerg. 173 (1834).

Nor is he excused therefrom during the pendency and continuance by consent of a proceeding brought by the distributees for an account, when in his answer he erroneously insists that the estate is indebted to him. *Ibid.*

And an administrator who has received moneys of the estate which he has not reinvested is not relieved from liability for interest thereon, under the Florida statute requiring interest on moneys retained by an administrator to be added to the principal annually, by the commencement of a litigation against him, unless he then relieves himself from liability by paying the money into court. Sherrell v. Shepard, 19 Fla. 300 (1882).

So a guardian who has so dealt with the estate of his ward as to render himself liable for compound interest upon the funds in his hands is not relieved therefrom by the approval of a person interested in the ward's estate, of an account by the guardian in which he had not charged himself with interest, where no discussion or controversy was had on the subject. Boynton v. Dyer, 18 Pick. 1 (1836).

Or by the settlement of two annual accounts in the probate court in which he had not charged himself with interest when no adjudication was had with reference thereto, as omissions and errors in a former account may be corrected in a subsequent one. *Ibid.*

And a settlement of accounts made by a residuary legatee with the acting trustee on attaining the age of twenty-five, by which only simple interest at 4 per cent was charged on the residuary estate, does not bind him with respect to a legacy to which he is entitled, held by the trustee under an express trust for accumulation at compound interest. Wilson v. Peake, 3 Jur. N. S. 155 (1856).

That some of the parties interested objected to investments in United States bonds as directed in one of the alternatives of the will, and that it was difficult to invest in bond and mortgage as required by the other alternative, and that the executors kept the fund in such a condition that it could be paid over to the persons entitled thereto at any time, is not a sufficient excuse for disobeying the directions of the testator to invest and accumulate. Gilman v. Gilman, 2 Lans. 1 (1870).

And one of several trustees neglecting to call in and invest a trust fund for accumulation, whereby it is lost, is not exonerated from liability therefor by the fact that during the time he was abroad with his regiment. Byrne v. Norcott, 13 Beav. 336 (1851).

So the fact that the question arises as against assignees after the bankruptcy of an executor does

for the credit of the amount thereof on his note of individual indebtedness to said bank, and assumed the indebtedness of said bank to the estate for the amount of said certificate of deposit, namely, $6,500. This transaction substituted the executor, as debtor to said estate in the sum of $6,500, in place of his indebtedness to said bank for money theretofore borrowed and used in his affairs. From this time on, during said administration, it appears there were moneys to the credit of said estate not deposited at interest in bank, as provided by the order of court, but interest was returned thereon, as above shown. The executor testified that he returned interest every year on all moneys to the credit of the estate not deposited in bank at interest at rates as high as the banks paid on deposits, and at no time less than 8 per cent, even after the banks reduced the rate below 8 per cent. This testimony is not inconsistent with the other facts shown, for, from the testimony of the bankers called in the hearing, it appears that the rate of interest paid by the banks on time deposits was reduced below 8 per cent about the year 1883, and so continued thenceforward. This may account for the fact that, on the whole, the interest returned on the estate funds falls a fraction below 8 per cent. The rate of interest paid by the banks during said administration appears to have varied from 12 per cent on a descending scale, to 6 per cent. The rate of 12 per cent prevailed for only a brief period after said estate came into the hands of the executor, when it was reduced to 10 per cent, which rate was allowed until about the year 1880, when 8 per cent was fixed upon, and prevailed until 1883; in 1883 and 1884, 7 per cent was allowed, and thereafter 6 per cent.

not affect the right to charge his estate with compound interest for failure to obey a direction in the testator's will to accumulate. Dornford v. Dornford, 12 Ves. Jr. 127 (1806).

But the fact that interest was not paid at the time it was made payable by a will creating a trust for the investment of legacies and the application and payment of the interest thereon, will not justify compounding the interest against the trustee. Ackerman v. Emott, 4 Barb. 626 (1848).

And an administratrix acting in good faith will not be charged with compound interest where the next of kin have acquiesced in her acts for more than fifteen years. *Re* Kennedy, 30 N. Y. S. R. 215 (1890).

The main case, *Re* RICKER'S ESTATE, also seems to regard the executor as relieved from further liability by his annual accountings, which were acquiesced in.

IX. *Effect of allowance on compensation.*

While there is a decided conflict of authority on the effect of the allowance of compound interest against executors, trustees, etc., on their right to compensation, and many phases of the question seem to be totally unsettled, it is thought to be the general rule that they should be denied compensation where the grounds for the imposition of the charge amount to a total failure in the performance of their duty, though there are cases which are inconsistent even with this proposition.

This rule was laid down in State v. Richardson, 29 Mo. App. 595 (1888), in which commissions were refused a guardian who had been subjected to a charge of compound interest upon moneys of his ward found due him.

And in Walker v. Beal, 76 U. S. 9 Wall. 742, 19 L. ed. 814 (1869), it was held that a trustee who does nothing in the execution of his trust but treats the trust moneys as his own and uses them for his own benefit, thus rendering himself answerable to a charge of compound interest thereon, should not be allowed compensation for his services.

So in Cook v. Lowry, 95 N. Y. 103 (1884), reversing 29 Hun, 20 (1883), it was held that such gross neglect and unfaithfulness as will render an executor and trustee under a will chargeable with compound interest on the funds in his hands is a proper ground for the disallowance of commissions.

And that an administrator is entitled to no commission when he has neglected to invest funds remaining in his hands or has converted them to his own use, was held in Frey v. Demarest, 17 N. J. Eq. 71 (1864).

So in *Re* Hodges' Estate, 66 Vt. 70 (1894), and McCloskey v. Gleason, 56 Vt. 264, 48 Am. Rep. 770 (1883), it was held that an administrator who mingles the trust moneys with his own is chargeable with the highest legal rate of interest, and can be allowed nothing for his services in caring for them.

And in Lathrop v. Smalley, 23 N. J. Eq. 192 (1872), a trustee who failed to invest the trust fund as directed by the will creating the trust was denied compensation. But there was nothing in the three cases last set forth to show whether or not compound interest was allowed.

So a trustee having the trust fund in his hands, as a loan, at the time of the creation of the trust, who fails to invest it, but continues it in his business, is not entitled to an allowance of his commissions out of the compound interest charged against him for such use of the fund. McKnight v. Walsh, 24 N. J. Eq. 498 (1873), 23 N. J. Eq. 136 (1872).

And an executor will not be allowed commissions on compound or other interest with which he is charged. Cannon v. Apperson, 14 Lea, 553 (1885); Diffenderffer v. Winder, 3 Gill & J. 311 (1831).

And a guardian, who charges himself with interest on annual balances in his hands, will be allowed no commissions on the income of his ward's estate received by him, when he refuses to disclose what use he has made of it. Blake v. Pegram, 109 Mass. 541 (1872).

In Winder v. Diffenderffer, 2 Bland, Ch. 166 (1829), however, it was held that commissions allowed to a trustee for the execution of his trust are not to be lessened or withheld because of conduct in respect to which he has been charged with interest, simple or compound.

And in Tucker v. McDermott, 2 Redf. 312 (1876), it was held that full commissions will not be denied a trustee on an accounting merely because without an order of court or requirement of statute, rests have been made for the purpose of charging the trustee with interest.

And in Vanderheyden v. Vanderheyden, 2 Paige, 287 (1830), and Morgan v. Hannas, 13 Abb. Pr. N. S. 361 (1872), it was held that where the court makes annual rests in stating the accounts of an executor or guardian, for the purpose of charging him with interest on the annual balances remaining in his hands, his commissions on the amounts received and disbursed during each year may be deducted at each rest.

So in Cannon v. Apperson, 14 Lea, 553 (1885), an executor was allowed half commissions where he had loaned trust funds to a firm of which he was a member, but had duly accounted and acted in good faith.

And in Frost v. Winston, 32 Mo. 489 (1862), it was held that a guardian who was charged with the

In addition to the substitution of the executor as debtor to the estate in place of the People's National Bank for said $6,500, he charged himself with $1,500 in favor of the estate, under the following circumstances: It appears a debt was owing the estate in the sum of $1,950, by Guthrie & Norris, bearing interest at 2 per cent per month, and another debt owing by the same Guthrie, in the sum of $3,000, bearing interest at 1½ per cent per month, through transactions had between the decedent and said debtors; that, after the estate came into the charge of the executor, said debtors were unable to make payment, and their property affairs were not in such condition that payment could be enforced. The executor says in his testimony that, under the circumstances, he thought it best to "nurse the matter along," and try to get payments from time to time, which it appears he did, and succeeded, in the course of time, in getting payments of principal and interest, altogether amounting to $5,225.98, on said $3,000 note, and payments of principal and interest on the $1,950 note, amounting to $3,137.12. It appears the debtors, for a time, conducted a butcher business, and considerable of said collection was obtained by the executor taking supplies from them for his household, and also for Mrs. Ricker and her family, and crediting the amount due for such supplies on said notes. But, as the time approached when the eldest child arrived at the age of majority, and required her distributive share of the estate, as provided in the will, there was more than $1,500 of principal and interest together due on said debts; and, in the meantime, Norris, as the evidence shows, had failed altogether financially. This balance the executor agreed to compromise with Guthrie—the only one of the debtors from whom there was any prospect of obtaining payment—at $1,500 if he would then raise and pay that amount, so that the executor could ascertain what amount of such collection could be counted on for such distribution. Guthrie testified in this hearing that he endeavored to raise said sum agreed upon as a compromise of said debt, but could not; that he then arranged with the executor to assume said sum as paid, and credit the estate therewith, promising to pay said sum shortly thereafter; that the executor made such credit accordingly, and thereby put to the credit of said estate $1,500, which he had not actually collected, and of which, according to the evidence, the executor never received more than $700 from said debtors, yet the executor accounted for said $1,500 as collected, with interest thereon, along with the other funds, as heretofore shown. The petitioner, in his appeal, insists, notwithstanding these facts, that the executor should be charged with the amount he rebated from said claim by way of compromise. This demand is based upon the showing, from the public records of Lewis and Clarke county, that in March, 1880, there was conveyed to said Guthrie and John H. Ming, jointly, for a consideration of $2,400, stated in the deed, "the S. ½ of the S. ½ of the N. W. ¼ of sec. 29, Tp. 10 N., R. 3 W., less four acres;" that the title to said property so remained until April, 1883, when, it appears from the record, Guthrie executed a mort-

rate of interest at which he might have loaned the moneys of his ward, with annual rests, should be allowed a reasonable commission as a guarantor of payment.

So in King v. Talbot, 40 N. Y. 76 (1869), it was said that even in cases of misconduct or gross negligence it is doubtful whether the settled rule in this state would not require the allowance of commissions to an executor or trustee.

And in Diffenderffer v. Winder, 3 Gill & J. 341 (1831), commissions at half rate were allowed a trustee who had kept a full and fair account of his receipts and expenditures, though he had employed the trust funds in trade and speculation for his own benefit and made inconsistent claims as to their ownership, and resisted and eluded all efforts to require him to account and disclose the use made by him of the funds, for which he was charged with compound interest thereon.

And Morgan v. Morgan, 4 Dem. 353 (1886), holds that the trustees, who had negligently failed to invest the trust fund, did not thereby forfeit their right to commissions, distinguishing Cook v. Lowry, 95 N. Y. 103 (1884), reversing 29 Hun, 20 (1883), upon the ground that that was a case in which the trustees had been guilty of the grossest dereliction of duty.

The appropriation by an administrator of the funds of the estate during the latter part of the administration thereof is not a ground for the disallowance of compensation for moneys and attorney's fees and expenses paid by him in the earlier part of the administration, during which his services were faithful. Foster v. Stone (Vt.) 31 Atl. Rep. 841 (1895).

And where the account of a receiver or other trustee is made up without a direction from the court to make periodical rests, his commission for receiving and paying must be computed on the aggregate amount of his receipts and expenditures for the whole time of accounting. *Re* Bank of Niagara, 6 Paige, 213 (1836).

X. *Effect of allowance on costs.*

The rule has been laid down that where interest is given against a trustee as remedy for a breach of trust, costs against him must follow as of course. Seers v. Hind, 1 Ves. Jr. 294 (1791); Frey v. Demarest, 17 N. J. Eq. 71 (1864).

So in Pocock v. Reddington, 5 Ves. Jr. 794 (1801), it was held that where executors and trustees have violated their trust the beneficiaries are entitled to recover the cost occasioned by their misconduct.

And in Franklin v. Frith, 3 Bro. Ch. 434 (1799), and Piety v. Stace, 4 Ves. Jr. 620 (1799), it was held that an executor who keeps the funds of the estate in his hands, using them for his own benefit, is chargeable with interest and costs.

So in Jones v. Foxall, 15 Beav. 388, 21 L. J. Ch. 73 (1852), costs were charged against a trustee, who had been charged with increased interest for disobeying a positive direction to call in and invest the trust fund.

And in Byrne v. Norcott, 13 Beav. 336 (1851), the costs of accounting were charged against a trustee who was required to make good an accumulation, where he had neglected to call in the fund and invest it, and became insolvent.

And in Treves v. Townshend, 1 Bro. Ch. 385, 1 Cox, Ch. Cas. 50 (1784), the costs of the proceeding for an accounting were charged against an assignee in bankruptcy, who kept money of the assigned estate in his hands for several years, making no dividends.

gage of his interest to said Ming to secure the sum of $6,000; and that in December, 1883, as shown by such record, Guthrie devested himself of the legal title to one half interest in said land, by absolute conveyance, for a stated consideration of $5,500.

From this showing of the record, the petitioner contends that it appears said claim could have been enforced in full from Guthrie by seizure of said land, and therefore the executor should be charged the full amount of said claim, and interest, for failing to make such seizure. The executor testifies that, during all the time said indebtedness of Guthrie & Norris was owing to the estate, said debtors were insolvent, according to the information gained by the executor on diligent inquiry; that he did not bring suit against them, for the reason that he thought it more prudent to proceed as aforesaid in trying to collect said debts; that, in his view, to attempt to enforce payment by suit might have driven the debtors into such a condition that they could pay nothing, while, by the course the executor pursued, he was obtaining some payments. The executor also answered, in his testimony, that he could not say positively whether he searched the records to find whether the debtors had real estate, or interests therein, subject to attachment. The testimony of Mr. Hershfield, a banker, is also to the effect that, during all the time in question, claims against said debtors were not considered good; that their paper was not negotiable, and they were not regarded as financially responsible. We think the court, under the circumstances shown, justly refused to charge the executor any more than he had returned on account of said demands against Guthrie & Norris. The mere fact that the legal title to a piece of land comes into the name of an individual is not conclusive evidence that such property is subject to execution against such individual. *Vaughn* v. *Schmalsle*, 10 Mont. 186, 10 L. R. A. 411. Nor is the record of such transaction, in relation to a piece of real estate, evidence that the amount set down in the conveyances represents the value thereof. Such proof alone, without showing the real value of the land, scarcely rises to any showing inconsistent with the testimony of the other witnesses, to the effect that said debts were not enforceable because of the insolvency of the debtors. Guthrie says in his testimony that he does not think a judgment could have been enforced against him, and he appears to have been the most responsible, as well as the most active, of the two debtors, in trying to pay said debts. It is our opinion that the court below, not only was justified in refusing to charge the executor with any more than he had returned on account of said claims against Guthrie & Norris, but the court should have also refused to require the executor to pay further interest on said $1,500, inasmuch as it was clearly shown that in giving credit therefor, before the actual collection of that amount, the executor involved himself in a personal loss of $800, besides having returned interest on said $1,500 from the time it was so credited to the estate, as above shown.

Regarding the rate of interest which ought

And in Mosely v. Ward, 11 Ves. Jr. 581 (1805), costs were charged against an executor in trust for infants, who was charged 5 per cent interest for unnecessarily calling in the trust fund, which was invested at that rate.

So in Raphael v. Boehm, 13 Ves. Jr. 590 (1807), executors, who were charged with compound interest at 5 per cent with half-yearly rests, for not having attempted to execute a trust to accumulate, in which no loss happened, and which if executed would not have produced as much, were allowed costs arising principally from a necessary investigation as to the rule by which they ought to be charged, and as to those parts of the proceeding which were consequential upon those upon which they had costs by the former decree, but as to the inquiries and accounts relating to the breach of trust, no costs were allowed.

And in Tebbs v. Carpenter, 1 Madd. 290 (1806), the costs of a suit for the construction of a will and to compel an executor to account for moneys which he had failed to invest for accumulation as directed by the will were charged to the executor so far as they were made necessary by the proceeding to compel the accounting, but not the costs of appeal and those of the proceeding for construction of the will.

And in Elliott v. Sparrell, 114 Mass. 404 (1874), executors directed to take a legacy from the personal estate before dividing it and invest it for the benefit of the legatee, who charged themselves with the amount of the legacy, were held not entitled to any allowance for taxes paid.

In Mousley v. Carr, 4 Beav. 49, 10 L. J. Ch. N. S. 360 (1841), however, costs against a life tenant and trustee were denied, where he was charged with ordinary interest only, for neglect to make a proper investment.

And in Ashburnham v. Thompson, 13 Ves. Jr. 402 (1807), costs were allowed against executors upon an accounting for a balance in their hands, but the allowance was made upon the circumstances of the case, the court refusing to accede to the holding, in Seers v. Hind, 1 Ves. Jr. 294 (1791), that when interest is given against executors for breach of trust, costs should follow of course.

And Tebbs v. Carpenter, *supra*, disapproved Seers v. Hind, *supra*, so far as it holds that executors who are charged with interest should pay costs of course.

So, in Sammes v. Rickman, 2 Ves. Jr. 36 (1792), it was held that trustees will not be charged with costs for slight misconduct, with respect to which they are charged with interest.

And in Dunscomb v. Dunscomb, 1 Johns. Ch. 508, 7 Am. Dec. 504 (1815), the general rule that executors required to pay interest must pay costs was held not to apply when the devisee or *cestui que trust* demands more than he is entitled to receive and the executor properly submits to the direction of the court.

The practical importance of the question as to the liability of an executor or other fiduciary to be charged with compound interest on his accounting has probably never before appeared so great as it does in the case of RE RICKER'S ESTATE, where the amount of compound interest allowed by the lower court was more than $50,000, in addition to the interest compounded at a lower rate, which had already been actually paid by the executor. The case presents no new principles of law on the subject, but the court clearly accepts the doctrine that an executor should be dealt with on equitable principles in accordance with the particular facts of each case. F. H. B.

to be imposed on the executor, the court below so ordered the accounting that he should be required to pay compound interest on all funds to the credit of the estate, not deposited at interest in bank, at the rates of 18, 15, and 12 per cent per annum compound, during stated periods of the administration. The sum so accruing by those rates was compounded by annual rests to carry the interest over as principal. The rates required are, according to the evidence, near the maximum rates shown to have been obtainable on loans by banks during the periods stated, there being no restriction by law on the rate of interest which might be agreed upon between borrower and lender. The legal rate provided by statute, enforceable on demands, in the absence of an agreed rate, during the same period, was, and still is, 10 per cent per annum. The statute in force since 1872 on this subject reads as follows: "Creditors shall be allowed to collect and receive interest, when there is no agreement as to the rate thereof, at the rate of ten per cent per annum for all moneys after they become due, on any bond, bill, promissory note, or any other instrument of writing, and on any judgment rendered before any court or magistrate authorized to enter up the same, within the territory, from the day of entering up such judgment, until satisfaction of the same be made; likewise on money lent, or money due on the settling of accounts, from the day of such settlement of accounts, between the parties, and ascertaining the balance due; on money received to the use of another, and retained without the owner's knowledge, and on money withheld by an unreasonable and vexatious delay." Comp. Stat. div. 5, § 1287. We have been unable to find authority to support the proposition that a court has jurisdiction to impose arbitrary rates of interest, above the statutory rate, in an equitable accounting with a trustee, although courts of equity frequently require a lower rate in such accountings, as an equitable rate. In England there appears to have been a rule of equity requiring what is called an "equitable" rate of interest, in accounting with trustees; and this rate is uniformly lower than the legal rate. The legal rate there being 5 per cent, equity usually required 4 per cent in such accountings, under the name of "equitable interest in mitigation of legal rates." Fonblanque, Eq. 443, *note*. Mr. Spence, the standard English authority on Equity Jurisprudence, says: "Where it appears that the trustee or executor has improperly or unnecessarily kept balances or any considerable portion of trust moneys in his hands, he will be charged with interest on what he has so retained, generally at 4 per cent, but, under special circumstances, at 5 per cent." 2 Spence, Eq. Jur. 920. From a passage in the opinion delivered by *Lord Chancellor* Brougham in 1834, in *Docker* v. *Somes*, 2 Myl. & K. 666, it appears conclusively that English courts of chancery did not feel at liberty to impose arbitrary rates of interest upon trustees, in such accountings, exceeding the legal rate. As to the rule in the United States, Mr. Perry, in his examination of the subject, says: "In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is, whether simple or compound interest shall be imposed." Further along, in summing up his examination, he says: "The rate established by law as the legal rate, in the absence of special arrangements," governs courts of equity in accounting with trustees in this country. 1 Perry, Tr. § 468. Mr. Story expresses the same view, saying: "And the trustee, by mixing trust money with his own, at his banker's or otherwise, will become responsible for the replacing of the money, and lawful interest during the intervening period. . . . So, too, when the trustee makes an improper investment of trust funds, he becomes responsible for the same, with interest." 2 Story, Eq. Jur. § 1277*g*. The same conclusion is reached by Mr. Page in his recent research on Executors and Administrators, found in 7 Am. & Eng. Encyclop. Law, pp. 426–429, with copious citations. In *Schieffelin* v. *Stewart*, 1 Johns. Ch. 620, 7 Am. Dec. 507, although one of the severest cases in this country in its exaction from the trustee, there appears to have been no thought of imposing rates higher than the legal rate of 7 per cent. See also *Clarkson* v. *De Peyster*, Hopk. Ch. 426. In California we find it held that the legal rate of interest should not be exceeded in such accountings. *Clark's Estate*, 53 Cal. 355; *Merrifield* v. *Longmire*, 66 Cal. 180; *Re Eschrich's Estate*, 85 Cal. 98. There is a passage in *Cruce* v. *Cruce*, 81 Mo. 676, relied on by respondent to sanction the requirement of interest above the rates fixed by statute; and, while it may be so construed, we do not think such was intended to be held, for in that case only the legal rate of 10 per cent was allowed; and under the passage relied on is cited *Frost* v. *Winston*, 32 Mo. 489, where it appears the rate charged was that prescribed by law. In the examination of a great many cases on this subject, and especially all of those cited by respondent, we fail to find any authority contradicting the text of Mr. Perry,—that the legal rate is not exceeded, unless a lawful contract provides for a higher rate.

We now pass to a brief examination of the question of compounding interest in accounting with trustees. Near the close of the last century the remedy of compounding interest in such cases appears to have come into vogue in the courts of equity of England and the United States, as a convenient and potent remedy to draw from delinquent trustees the actual or presumed profits derived from the use of trust funds, although prior to that time it appears to be acknowledged that the law was administered with great laxity in that regard. In 1805 we find *Lord* Eldon, in his examination of the question of compounding interest in such accountings (*Raphael* v. *Boehm*, 11 Ves. Jr. 92), so much in doubt as to the proper practice that he postponed the consideration to give time to make special inquiry on the subject, observing that it was a matter of great importance. And for his information, it appears, he went, not to reports or treatises, but caused inquiry to be made of the masters in chancery as to their

understanding of the correct practice. See also, an examination of this subject, from an historical, as well as legal, point of view, by *Lord Chancellor* Brougham in *Docker* v. *Somes*, *supra;* by *Chancellor* Kent in *Schieffelin* v. *Stewart*, *supra;* by *Chancellor* Sanford in *Clarkson* v. *De Peyster*, *supra;* by *Mr. Justice* Grier in *Barney* v. *Saunders*, 57 U. S. 16 How. 543, 14 L. ed. 1051; Perry, Tr. and cases cited under section 468; *Cruce* v. *Cruce*, *supra;* the monograph by Mr. Page, of the Pennsylvania Bar, on Executors and Administrators, 7 Am. & Eng. Encyclop. Law, pp. 425 *et seq.;* and the elaborate *note* to *Walls* v. *Walker*, 99 Am. Dec. 296. There is no doubt the doctrine has been applied during the present century, where circumstances appeared to warrant, as shown by an examination of the cases; but as to the special conditions to which it ought to be applied, and as to the rate of compound interest considered equitable, there seems to be much diversity of opinion. Sometimes the rule has been exerted with extreme rigor against a trustee guilty of fraud in respect to the trust funds, whereby he sought to enrich himself therefrom, as was done by *Lord Chancellor* Loughborough, in 1798, in *Raphael* v. *Boehm*, *supra*. Of this case, *Lord Chancellor* Brougham says (see *Docker* v. *Somes*, *supra*) it was the strongest instance of compounding interest against a trustee in England; but it was a case where "a gross breach of trust had been committed; for the large sum of £30,000 was expressly directed to be laid out for accumulation; and the executor having thought proper to employ it in his own trade, the court ordered him to be charged with interest at 5 per cent from the time of the executor's death, with half-yearly rests, and interest for the intermediate times. All the judges who have mentioned this decree have considered it severe." And he adds that, in this "most remarkable case, which indeed is always cited to be doubted, if not disapproved, the compound interest was given with a view to the culpability of the trustee's conduct, and not upon any estimate of the profits he had made by it." As has been mentioned, the case of *Schieffelin* v. *Stewart*, *supra*, before *Chancellor* Kent in 1815, is considered one that applied the rule with great severity. Therein it appears that the executor had retained in his hands constantly, for some ten years, $33,000 of trust funds, "without producing any benefit or advantage to the estate;" and the chancellor approved the report of the master charging the executor the legal rate of 7 per cent interest, with annual rests for compounding the same. One of the cases relied on by *Chancellor* Kent in support of that judgment was *Raphael* v. *Boehm*, *supra*, but, of course, without knowledge of the estimate in which it was held by the English bench, as appeared by later comments and the case of *Schieffelin* v. *Stewart*, notwithstanding the great weight of authority it carried by reason of the acknowledged learning and judicial ability of the chancellor who delivered the opinion, in its turn, seems to have been shaken by subsequent adjudications in New York, at least as to the rigor with which it applied the rule of compounding interest. *Clarkson* v. *De Peyster*, *supra;* *De Peyster* v. *Clarkson*, 2 Wend. 78. Mr. Perry states, as his deduction from the authorities, that "it is difficult to lay down any general rule that is equitable and applicable to all cases, as to the interest that trustees shall pay upon trust funds in their hands. In England, if trustees suffer money to remain in their own hands, or in the hands of third persons, or in bank for an unreasonable time, in addition to their liability for its loss during such delay, they will be charged with interest at the rate of 4 per cent; but if the trustees are grossly negligent or corrupt, or improperly call in the money from a proper investment, and suffer it to lie idle, or if they use it in trade or speculation, or invest it in improper places, the court will charge them with interest at the rate of 5 per cent; and, in certain special cases of misconduct, the court will order annual or semiannual rests, for the purpose of charging them with compound interest. In the United States there is no law by which different rates of interest can be applied to different degrees of negligence or misconduct; and the only question here is, whether simple or compound interest shall be imposed. The general rules, so far as they can be drawn from all the cases, are as follows: (1) If a trustee retains balances in his hands which he ought to have invested, or delays for an unreasonable time to invest, or if he mingles the money with his own, or uses it in his private business, or deposits it in bank in his own name, or in the name of the firm of which he was a member, or neglects to settle his account for a long time, or to distribute or pay over the money when he ought to do so, he will be liable to pay simple interest at the rate established by law as the legal rate, in the absence of special agreements. This rule is subject to the qualification that trustees cannot make any advantage to themselves out of the trust fund; and if they make more than legal interest, they shall pay more, as, if they make usurious loans, they shall be charged with all their gains from the use of the money. If the trustee cannot show what amount of interest he has received, he shall be charged with legal interest from the time when the regular investment ought to have been made. There may be an exception to the rule that a deposit of the trust money in bank in the name of the trustee, or a mixing of the trust fund with his own, will impose a liability of legal interest. There must be some element of a breach of trust in the transaction, or a breach of duty." 1 Perry, Tr. § 468.

There are cases of comparatively recent date, however, in which compound interest has been held proper by the supreme court of one state, and refused by that of another, where the cases appear to be surrounded by quite similar circumstances. This will be seen by a comparison of *Clark's Estate*, *Merrifield's Estate*, and *Re Eschrich's Estate*, *supra*, with the case of *Cruce* v. *Cruce*, *supra*, where, apparently under very similar facts, the California court allowed 7 per cent, compounded by annual rests, while the supreme court of Missouri allowed only simple interest at the

legal rate of 10 per cent. But in the treatment of the latter case, after referring to the fact that "the rule of exacting interest from delinquent trustees has nowhere been enforced more rigorously" than in Missouri, it was said that if the interest had been compounded by annual rests, "at the low rate of 6 per cent," it would have been allowed to pass. "But, as every case must be determined according to the facts and circumstances peculiar to it, I am satisfied," says the author of that opinion, "that it would be inequitable to order interest compounded at the high rate of 10 per cent per annum against the respondent. My reasons for this conclusion are as follows: First, the account extends through fifteen years. The result of the computation, like all such arithmetical results, would be surprising and excessive. It would, in my judgment, exceed what could be expected from any prudent and careful administration of the estate under ordinary circumstances. I think it would be a marvelous achievement for any trustee of ordinary skill and prudence to keep a fund of $5,000 or $6,000 so constantly and securely invested for a period of fifteen years as to produce the net result of compound interest at 10 per cent per annum. In the ordinary course of events, there would necessarily be intervals of irregular length between investments, not to say anything of possible loss and depreciation of security. The ability of investing the interest annually, as soon as collected, may well be doubted when we consider its moderate volume, and the frequency with which it would have to be put out. The exaction of compound interest at such a high rate for so long a period of time would, in my judgment, be a departure from the leading principle, which requires the chancellor to approximate, as near as possible, the actual or presumed gains and profits of the fund." *Cruce* v. *Cruce*, *supra*.

The theory upon which the court exacted such extraordinary rates of compound interest from the executor in the case at bar was that, according to the testimony of the bankers, money could have been loaned, at the time in question, at such rates. Nowhere in the record is there shown any proof as to the net result of loaning money during a given period, even by such experienced financiers as bankers, after deducting expenses and losses, in order to ascertain the net profits which could be derived from the use of money by way of interest. Without any such inquiry, the rates of 18, 15, and 12 per cent were designated by the court for stated periods of the administration, and the referee was directed to compute at those rates, during such periods, compounding by annual rests. Would it not be somewhat analogous if, in a given case, it was found a bailee of another's carriage horse had kept and used it for the period of, say, five years, and, in order to charge the bailee with the profit of such use, the court should take proof of the price for a livery animal, of like quality, for one day, and without further inquiry as to expense of feeding or care, or as to the time such animal would ordinarily lie idle, the court should order the case to a referee to cast the aggregate for the whole period at the price stated for a day, and enter judgment accordingly? If liverymen could so reckon profit, their prosperity would no doubt be far different than practical experience demonstrates. So, if loans of money were always promptly returned at maturity with the stipulated interest, and the gross rate was never diminished by loss or delay through deterioration of securities, death, disaster, or fraud, or by the expense of constant attention to such affairs, the employment of professional services, of litigation, and so forth, even then it would not be possible, in practice, to make the gain compound along the line of the highest rates attainable, because, in practice, it would not be possible to reloan the money and the accumulated interest the instant it was due. If the debtor, through stubborn neglect or misfortune, is delinquent in payment, the law must be resorted to, and for such delay it will not require from the delinquent debtor compound interest; so that in demanding return of compound interest, at the loaning rate, in such instances (which are not infrequent in experience), the law would demand on the one hand, of the trustee, what it would not allow him to collect on the other. The problem of compound interest, when set in motion, moves on for its allotted period with the certainty of time and mathematics. All other conditions are assumed. It considers no delay, no failure, no expense; its assumed creditors, forever, with the regularity of perpetual motion, obey an assumed demand; and the gain in turn is presumed to be reloaned the instant of its payment. The problem contemplates constant accretion by a composite process, but no diminution; it omits no farthing, nor allows any to escape when gathered—not even so much as the expense of postage, or the wear of shoe leather, to make a demand. The thriftiest management and most fortunate consummation in practice cannot hope to reach the quotient gathered by the problem in the long run, unless odds are given, in fixing the rate to be compounded, to offset the expenses, delays, and failures met with in practical experience. But with allowance for such contingencies, in fixing such rate, no doubt common experience will admit that it is practical to gain compound interest; and it has been, no doubt justly, held equitable, in accounting with trustees, where they have in their hands money for accumulation, or which was made to accumulate, or has been used for the trustee's profit, to require compound interest. But the rate must be fixed with due consideration, or the result will be found out of all proportion to what could have been accomplished in the field of practical affairs. We are suggesting here nothing new, for these conditions have undoubtedly been considered, if not mentioned in detail, by courts of equity, as shown in the fact that they have, in general, gauged their requirements accordingly. But sometimes, as might have been expected in the application of an abstract mathematical rule, the exact relation of which to practical results is not easily detected, some hardship may have been worked.

There is evidence in the record to the effect that, from time to time during the period in question, banking institutions contracted to pay, for the use of funds left with them for a stated time, a certain rate of interest per annum. That is the only evidence in the record which approaches a safe criterion from which there might have been found the measure of net profits, or, in other words, the net earnings which could be counted on for the use of money by way of interest. While this testimony did not take that form of inquiry exactly, it is evidence of what money could have earned, placed in such institutions; they insuring the safety thereof, so far as their own responsibility went, and bearing the expense and loss incident to its use. The tendency of this evidence, more than any other in the record, is to show what such financial institutions could afford to pay for the use of money, and insure its safety, and bear the expense and loss incurred in handling. Who are more likely to get greater profit from the use of money, under fairly safe and conservative conditions of handling, than bankers? If there are other financiers or business men who can do better, is it not likely bankers would learn the way and adopt it? But, if we measure this executor's returns by that criterion, a balance is found in his favor; for, when the rate in the banks went below 8 per cent, the evidence is that he kept on returning, at that rate, on moneys to the credit of the estate not in bank. If we look to the precedents in the books, we find, too, that the returns of this executor, made without delinquency or any suspicion of fraud, rise above the exactions from trustees, by way of compound interest, in cases where their accounts were delinquent and conduct culpable. Shall a judgment of greater severity be pronounced in this case than in such? It appears from numerous precedents from all sections of the country that this case would, in those courts, be dismissed, because the executor has voluntarily and promptly made returns of income double what could have been obtained by the course contemplated by the testator's will, and more than the banks would have allowed during a considerable portion of the time, and more than the courts have found equitable to exact in accountings with trustees whose conduct was found grossly detrimental to the interests of the estate. This must be admitted. And, even granting the worst that has been asserted against the executor in the case at bar,—the temporary use of certain of the trust funds in private affairs, which is made the occasion for exacting compound interest in several cases, as we have seen,—still it appears, and is not disputed, that this executor has seen to it that the estate in no way suffered detriment therefrom, and gained considerably thereby. If a man's foot slip, or if he stumbles, and then, regathering himself, walks uprightly, and delivers his burden in advance of all others, without one whit missing, shall he be turned upon, and scourged with a severity exceeding that laid upon one who refuses to proceed with the discharge of his duty altogether? It may be answered that, if one who wavers is allowed to go without punishment, others will walk unsteadily. This answer does not meet the situation. If he was found delinquent it would be time to consider of his punishment, but if, not finding him delinquent in any respect, more is exacted than for entire neglect, absolute default would be encouraged by such unjust judgment.

But, laying aside all figures of speech, as not much to be indulged in judicial investigations, and viewing all phases of this case in the plainest fashion, it appears that, if heavier judgment is laid on such a case as this, the court will thereby designate the plane of its exactions much higher than any court has attempted to maintain, so far as we have been able to discover. With the carefulest investigation of the law and facts, our deliberate judgment is drawn to a negative conclusion on every vital point in this case. There is no hardship in this, for the executor must have managed the affairs of the estate with solicitude for the welfare of the heirs, and that his management has been largely fruitful of benefits to them is frankly admitted. Such results do not come from indifference or neglect. In rendering the extraordinary judgment in this case, we think the learned judge of the court below must, without the deliberation usually manifested, have adopted views urged by the forceful eloquence of petitioner's counsel; but things only assumed, in whatsoever eloquent phrase, or forms only painted, however real they seem at first impression, cannot support the judgment of a court.

An order will therefore be entered, reversing the judgment in this proceeding, and remanding the case, with directions to enter judgment in the court below dismissing this proceeding, at the cost of petitioner.

Pemberton, *Ch. J.*, and **De Witt,** *J.*, concur.

A rehearing was subsequently granted, after which, on March 12, 1894, the following opinion was handed down:

Per Curiam:

Since the determination of this appeal, motion for rehearing has been presented and given careful consideration, besides allowing counsel the unusual privilege of argument to more fully expound the grounds on which rehearing is demanded. Nevertheless, there has been no exposition of points wherein the court overlooked or erroneously applied any pertinent or controlling authorities or material facts in the original determination. On the contrary, this retrospection of the case, in the light of motion for rehearing, tends to confirm the views of the court heretofore expressed, as fully in accord with the authorities and facts, and that a just and proper determination was reached. The same will therefore be allowed to stand as originally announced.

This motion for rehearing, however, raises a new point in the case, which hitherto was neither presented in the brief nor in the argument on appeal; nor does it appear that consid-

eration thereof was had in the trial court,—namely, that in certain years the probate court of Lewis and Clarke county, then having jurisdiction of said estate, allowed the executor a higher rate of commission by 1 per cent than the statute then provided; in other words, it is asserted that, at certain times when 5 per cent commission was allowed the executor, the statute prescribed only 4 per cent. It is obvious, this being a court of review, and not of original inquiry in these matters, it should not enter upon an investigation, or make any order, touching this question, for the reason already mentioned,—that no inquiry or determination on that feature of the case appears to have been made by the trial court. Therefore, there is no order or determination of the trial court to review on that point. The trial court denied the executor all commissions, on grounds which did not touch the question of his having been allowed by the probate court a rate exceeding that provided by statute. That particular question seems not to have been adjudicated. But whatever inquiry or order concerning the readjustment of said commission on the ground alleged may be pertinent, it should, in the first instance, be proceeded with in the trial court.

The motion for rehearing will therefore be denied.

OREGON SUPREME COURT.

J. F. FERCHEN, *Respt.*,
v.
Samuel ARNDT.

E. W. BLISS COMPANY, Intervener, *Appt.*

(26 Or. 121.)

Consignors cannot impress funds of the consignees in the hands of a receiver with a trust lien for the proceeds of goods sold, if the consignees dissipated such proceeds in paying current expenses of their business, although the claims against the funds in the receiver's hands were thereby diminished.

(July 5, 1894.)

APPEAL by intervener, the E. W. Bliss Company, from a decree of the Circuit Court for Clatsop County denying its claim to a preferred lien upon the assets of the partnership of Arndt & Ferchen to settle the affairs of which the suit was brought. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **Snow & McCamant,** for appellant:

The court erred in holding that the equitable lien of a principal, whose funds have been misappropriated, is enforceable only against the specific property into which the agent has converted it.

An agent or trustee, who mingles the property of his principal with his individual property, does not thereby constitute the relation of creditor and debtor between himself and his principal, but makes the trust fund a charge on all the assets of his estate.

Knatchbull v. *Hallett*, L. R. 13 Ch. Div. 696, 36 Moak, Eng. Rep. 779, and cases there cited; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Union Stock Yards Nat. Bank* v. *Gillespie*, 137 U. S. 411, 34 L. ed. 724; *San Diego County* v. *California Nat. Bank*, 52 Fed. Rep. 59; *Thompson* v. *Gloucester City Sav. Inst.* (N. J.) 6 Cent. Rep. 328; *Smith* v. *Combs*, 49 N. J. Eq. 420; *McLeod* v. *Evans*, 66 Wis. 401, 57 Am. Rep. 287; *Francis* v. *Evans*, 69 Wis. 115; *Bowers* v. *Evans*, 71 Wis. 133; *Independent Dist.* v. *King*, 80 Iowa, 497; *Davenport Plow Co.* v. *Lamp*, 80 Iowa, 722; *Harrison* v. *Smith*, 83 Mo. 217, 53 Am. Rep. 571; *Stoller* v. *Coates*, 88 Mo. 520; *Myers* v. *Board of Education*, 51 Kan. 87; *Peak* v. *Ellicott*, 30 Kan. 156, 46 Am. Rep. 90; *Ingraham* v. *Ellicott*, 30 Kan. 163; *First Nat. Bank* v. *Hummel*, 14 Colo. 259, 8 L. R. A. 788; *Continental Nat. Bank* v. *Weems*, 69 Tex. 489; *Brocchus* v. *Morgan* (Tenn.) 5 Cent. L. J. 53; 2 Lewin, Tr. 894 *et seq.*; Mechem, Agency, 536.

Messrs. **Fulton Brothers,** for respondent:

The facts stated in the petition do not entitle appellant to a lien upon any property in the hands of the receiver or to priority in the order of payment.

It is incumbent upon the party asserting the lien to trace the funds he seeks to have impressed with a trust character into the receiver's possession, either in their original form or some specific property or fund, and the burden of identification is upon him.

Perry, Tr. 3d ed. § 128; *Re Cavin's Petition* v. *Gleason*, 105 N. Y. 256; *Northern Dakota Elev. Co.* v. *Clark*, 3 N. Dak. 26; *Commercial Nat. Bank* v. *Armstrong*, 39 Fed. Rep. 684; *Ellison* v. *Moses*, 95 Ala. 221; *Thompson's App.* 22 Pa. 16; Story, Eq. Jur. 1257, 1259; *Hopkins' App.* (Pa.) 8 Cent. Rep. 860; *Farmers & M. Nat. Bank* v. *King*, 57 Pa. 208; 2 Pom. Eq. Jur. §§ 1051–1058; *Union Nat. Bank* v. *Goetz*, 138 Ill. 127; *Englar* v. *Offutt*, 70 Md. 78; *Philadelphia Nat. Bank* v. *Dowd*, 38 Fed. Rep. 172, 2 L. R. A. 480; *Lathrop* v. *Bampton*, 31 Cal. 23, 89 Am. Dec. 141; *Goldthwaite* v. *Ellison*, 99 Ala. 497; *School Trustees* v. *Kirwin*, 25 Ill. 73.

Lord, *Ch. J.*, delivered the opinion of the court:

This is a suit to establish a preference and a lien upon the assets of the partnership of Arndt & Ferchen, in the hands of B. W. Robinson as receiver, for certain moneys alleged to have been received in trust by said firm. The facts are substantially these: The

NOTE.—In connection with the present case on the subject of tracing a trust into the proceeds of trust property, see the case next following, Muhlenberg v. Northwest Loan & T. Co. *post*, 667; also *notes* to First Nat. Bank v. Hummel (Colo.), 8 L. R. A. 788, Little v. Chadwick (Mass.) 7 L. R. A. 570, and Philadelphia Nat. Bank v. Dowd (C. C. E. D. N. C.) 2 L. R. A. 480.

See also 29 L. R. A. 667; 40 L. R. A. 552.

plaintiff and defendant were partners engaged in the foundry business under the firm name of Arndt & Ferchen, and, not being able to agree in regard to the management of the business, the plaintiff instituted a suit praying for an accounting, and for a dissolution of the partnership, and that in the interim the property of the partnership be turned over to a receiver, who should manage the same subject to the orders of the court. The receiver, having been appointed, took charge of the property and business of the firm, and, after managing it several months, he was directed by the court to sell the property of the partnership in his hands, and turn into court the proceeds of such sale, together with such collections as he might make of partnership accounts. Under this order about $2,000 was paid into court for distribution among the creditors of the firm. In the meantime the E. W. Bliss Company was permitted by the court to intervene in the suit, whereupon it filed its petition, praying for the allowance of a claim against the partnership for the sum of $2,114, together with interest thereon from July 15, 1892; that it be decreed to have a preferred lien on all assets of the partnership for said sum, and that the receiver be directed to pay the same to the petitioner. The facts upon which the intervener bases its claim are, substantially, that the firm of Arndt & Ferchen had represented the Bliss Company as its agents in the sale of its goods on commission; that accounts were rendered from time to time to said company, but that, without its knowledge, it had been the custom of the firm to mingle the sums received from sales made for such company with other moneys of the firm; that the moneys so received were deposited in the bank to the credit of such partnership, and that the firm" checked against it to pay the running expenses of the partnership, to purchase new machinery, to purchase merchandise afterwards sold by the partnership, to pay the salaries and wages of employés, . . . and that the moneys of your petitioner so received by said Arndt & Ferchen have been so mingled with the funds of said Arndt & Ferchen that it is impossible to follow them into any specific property." The petition was attacked by demurrer, on the ground that it did not state facts sufficient to constitute a cause of suit, which demurrer was overruled, the court holding that the intervener was entitled to have any specific property or fund of the partnership into which it could trace its money impressed with a lien in its favor. The court then referred the case to C. E. Runyon, Esq., for the purpose of ascertaining whether the firm had received any money from the sale of the goods or wares of the company as its factor, and, if so, what disposition was made of it. Thereafter the receiver filed an answer denying that the firm of Arndt & Ferchen, since the year 1884, or at any time, has been employed by the petitioner as its factor, or sold any goods or wares for or on its account, etc. This answer was deemed insufficient to constitute a defense, and, no other answer being interposed, and the intervener having failed to avail itself of the opportunity afforded by the court to show by evidence that its money was in the partnership fund, the court proceeded to pass upon the question raised by the petition, and held that the amount claimed therein should be allowed, but denied the preference sought by the petitioner. From this decree the company has brought this appeal.

The facts show that, if the claim of the Bliss Company is preferred, it will absorb the entire assets of the firm, leaving nothing for its other creditors. The case is rendered important by the nature of the question involved and the number of other cases dependent upon its decision. Upon the admitted facts there is no pretense that the money derived from the sale of the intervener's goods forms any part of the fund now awaiting distribution at the hands of the court. It is conceded that the money so collected has been appropriated to the payment of debts, the purchase of stock, and the payment of the running expenses of the partnership while the firm was conducting its business. But it is claimed that, where an agent or trustee has wrongfully used or appropriated the property or funds of another, it creates an equitable charge upon his whole estate, or a preferred lien upon his assets. This is put on the ground that such estate is thereby increased, or that his assets would have been less but for the wrongful use or appropriation of the trust fund, and consequently that it cannot be supposed that such fund is wholly lost, but that it exists in a substituted form as a part of such estate or assets, although it cannot be pointed out, or directly traced. That there may be cases to which such argument is applicable may be conceded,—as, where the trust fund has gone into and remains in the assets which are sought to be charged,—but its force is not perceived where such fund is dissipated, or used in the payment of debts or the expenses of business. The equitable right to follow and retake from the possession of a trustee property wrongfully appropriated by him, or from those in privity with him, who are not bona fide purchasers for value, so long as it can be traced, whether it remains in its original or in a substituted form, upon the ground that such property, in whatever form, is subject to the trust in favor of the owner, is well established. "Formerly," *Mr. Justice* Bradley says, "the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried." *Freling-*

deposit with the bank in the sense that they stood on the books of the concern, to the credit of the plaintiff and his assignors. This seems to us manifest when it is remembered that the complaint alleges, and the answer admits, that the bank placed the moneys of plaintiff "in its treasury, for use in connection with its banking business, and that, having been so placed in the treasury aforesaid, they were paid out in the course of its business affairs as a banking institution; that thereupon the defendant wholly destroyed the identity of plaintiff's said remittance, and the identity of the moneys of the other parties, paid over to it in trust as aforesaid;" and "that, by reason of the wrongful mingling of the moneys of plaintiff and the other parties aforesaid, it is impossible to follow the moneys so paid to the defendant company, and that the same are wholly incapable of identification." The complaint seems to have been drawn and the case was tried on the theory that plaintiff could not trace his money, or the proceeds thereof, into the hands of the receiver. This position is, in our opinion, fully warranted by the record. No allusion is made by appellant in his brief to the alleged admissions of the answer, nor was his contention in this court that he was entitled to a lien because his money, or the proceeds thereof, were actually in the possession of the receiver, but on the doctrine that (quoting from the brief) "where funds come into the hands of a trustee, impressed with a trust in favor of the principal, and are wrongfully mingled by the trustee with his own funds, so as to be incapable of identification, the *cestui que trust* has an equitable lien on all the assets of the defaulting trustee to the amount of the fund so misappropriated." In our opinion, therefore, there is nothing in the record in this case to exempt it from the rule announced in *Ferchen* v. *Arndt* and applied in the *Sharpe Case*, the facts of which appellant states in his brief are "substantially identical" with those in the case under consideration.

The petition for rehearing is therefore denied.

MASSACHUSETTS SUPREME JUDICIAL COURT.

James W. COLE
v.
George TUCKER *et al.*

(.....Mass.....)

1. **A statute requiring the use of an official ballot** may properly be deemed necessary by the legislature in order to secure to the voters a full and fair election and an accurate and honest count, and does not impair the constitutional rights of the voters.

2. **A statute making an official ballot compulsory in the election of city officers,** but optional in the election of town officers, is not void as partial and unequal in its operation upon the rights of voters.

(October 12, 1895.)

EXCEPTIONS by plaintiff to a ruling of the Superior Court for Hampshire County directing a verdict for defendants in an action brought to recover damages for defendants' refusal to accept a ballot offered at a recent election at which defendants were election officers. *Overruled.*

The material portions of the statute under which defendants acted were as follows:

Acts of 1893, chap. 417, § 129: "All ballots for use in elections of city officers in a city shall be prepared and furnished by the city clerk of such city."

SEC. 130: "On the back and outside, when folded, of each ballot, shall be printed the words 'Official Ballot for,' followed by the designation of the voting precinct or town for which the ballot is prepared, the date of the election, and a fac-simile of the signature of . . . the city clerk . . . , who has caused the ballot to be prepared."

SEC. 168: "No ballot without the official indorsement . . . shall be allowed to be deposited in the ballot box."

SEC. 178: "No ballot shall be counted in any election for which ballots are by law provided at the expense of the commonwealth or of the city or town, unless they have been provided in accordance with the provisions of this act."

Further facts appear in the opinion.

Mr. **Charles G. Delano,** for plaintiff:

The plaintiff had qualifications prescribed by the constitution and had the right to bring in his own ballot in accordance with the ancient law and custom.

Colo. Act 1647; Pub. Stat. chap. 7; *Ashby* v. *White*, 1 Smith, Lead. Cas. 8th. ed. 484; *Lincoln* v. *Hapgood*, 11 Mass. 350.

By the provision of an official ballot the state has taken away the general ballot of nomination from the assembly where it properly resides, and by certifying the nomination of the dominant party only compels all others to act without a candidate.

The law is unequal, giving a great advantage to the party whose ballot is printed over the written ballot of its opponent.

1 Adams' Works, 474; Gov. Message, Acts 1895.

The law is an unnecessary restraint and destructive of liberty.

1 Bl. Com. 126.

The compulsory use of the ballot and confinement of the person is duress of imprisonment, and should avoid the vote as it does a bond.

1 Bl. Com. 136.

The tranquillity of the New England election has never required this supervision.

1 Kent, Com 232.

If a partisan ballot should be printed at the

NOTE.—On the question, how far the right to vote is absolute, see *note* to State v. Blake (N. J.) 25 L. R. A. 480.

See also 29 L. R. A. 670.

public expense elections are not free. There is undue influence.

1 Bl. Com. 178.

The right to cast a private ballot in municipal affairs was early conferred upon the citizens of towns as freemen and members of a corporation, and is a franchise of which they cannot be deprived.

Ashby v. *White*, *supra*; *Dartmouth College Trustees* v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629.

Mr. **Albert E. Addis**, for defendants:

The right of suffrage is not a natural right, nor is it an absolute, unqualified personal right. It is a right derived in this country from constitutions and statutes.

McCrary, Elections, § 11; *State* v. *Dillon*, 32 Fla. 545, 22 L. R. A. 124; *Kinneen* v. *Wells*, 144 Mass. 497, 59 Am. Rep. 105; *Capen* v. *Foster*, 12 Pick. 488, 23 Am. Dec. 632.

It is within the just and constitutional limits of the legislative power to require the use of an official ballot in this election.

Capen v. *Foster*, 12 Pick. 489, 23 Am. Dec. 632.

The power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can, conscientiously and with due regard to duty and official oath, decline the responsibility.

Cooley, Const. Lim. 159.

In passing upon the validity of this act we are to be guided by the rule that a deliberate act of the legislature must be upheld if it can be done without doing violence to the fundamental law. Its reasonableness or justice, so long as it does not contravene some portion of the organic law, is a matter for legislative consideration, and not subject to our control.

State v. *Dillon*, *supra*.

The statute is an important one, general in its application, and passed by the legislature as the guardian of the public interests, and is to be upheld unless it clearly exceeds its powers.

Sewall v. *Roberts*, 115 Mass. 277.

Field, Ch. J., delivered the opinion of the court:

It is necessary in this case to determine the constitutionality of Stat. 1893, chap. 417. This question was discussed in *Miner* v. *Olin*, 159 Mass. 487, but the court there expressed no opinion upon it. The defendants in the present case were election officers at an annual election for city officers in the city of Northampton, and refused to allow the ballot offered by the plaintiff to be deposited in the ballot box; and the ballot was not deposited, and was not counted in the election. It was a printed ballot, designated in print at the head of it as the "Regular Prohibition Ticket." The official ballot provided for use at the election had on it the names of the candidates of the Republican and the Democratic parties for office, but no other names, and the plaintiff wished to vote for the candidates of the Prohibition party. The plaintiff was a duly qualified voter, whose name was upon the check list.

The qualifications of voters for town and city officers are not prescribed by the constitution, but by statute; but we do not think it necessary to consider whether, so far as the question in this case is concerned, a distinction can be made between the powers of the general court to prescribe the manner of casting ballots at elections for city and town officers, and at elections for state officers or for state representatives or senators. Article 9 of the Declaration of Rights of the Constitution is as follows: "All elections ought to be free; and all the inhabitants of this commonwealth having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and to be elected, for public employments." This, in terms, relates to inhabitants having such qualifications as are established by the frame of government, but we assume that the same principles apply to electors whose qualifications are established by statute. In regard to the right of voting for state officers, where the qualifications are prescribed by the constitution, the court, in *Capen* v. *Foster*, 12 Pick. 485, 23 Am. Dec. 632, says: "And this court is of opinion that in all cases where the constitution has conferred a political right or privilege, and where the constitution has not particularly designated the manner in which the right is to be exercised, it is clearly within the just and constitutional limits of the legislative power to adopt any reasonable and uniform regulations, in regard to the time and mode of exercising that right, which are designed to secure and facilitate the exercise of such right in a prompt, orderly, and convenient manner. Such a construction would afford no warrant for such an exercise of legislative power as, under the pretense and color of regulating, should subvert or injuriously restrain the right itself." See *Kinneen* v. *Wells*, 144 Mass. 497, 59 Am. Rep. 105.

The principal question, then, is whether Stat. 1893, chap. 417, is a reasonable regulation of the manner in which the right to vote shall be exercised, or whether it subverts or injuriously restrains the exercise of this right. The provisions of the statute requiring the use of an official ballot do not touch the qualifications of the voters, but they relate to the manner in which the election shall be held. In general, it may be said that the so-called "Australian Ballot Acts," in the various forms in which they have been enacted in many of the states of this country, have been sustained by the courts, provided the acts permit the voter to vote for such persons as he please, by leaving blank spaces on the official ballot, in which he may write, or insert in any other proper manner, the names of such persons, and by giving him the means, and a reasonable opportunity, to write in or insert such names. *State* v. *McMillan*, 108 Mo. 153; *Detroit* v. *Rush*, 82 Mich. 532, 10 L. R. A. 171; *Atty-Gen.* v. *May*, 99 Mich. 588, 25 L. R. A. 325; *De Walt* v. *Bartley*, 146 Pa. 529, 15 L. R. A. 771; *State* v. *Black*, 54 N. J. L. 446, 16 L. R. A. 769; *State* v. *Dillon*, 32 Fla. 545, 22 L. R. A. 124; *Slaymaker* v. *Phillips* (Wyo.) 40 Pac. Rep. 971; *People* v. *Wappinger's Falls*, 144 N. Y. 616; *Sego* v. *Stoddard*, 136 Ind. 297, 22 L. R. A. 468; *Taylor* v. *Bleakley* (Kan.) 28 L. R. A. 683; *Curran*

v. *Clayton*, 86 Me. 42; *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 57; *Bowers* v. *Smith*, 111 Mo. 45, 16 L. R. A. 754.

Without reciting in detail the provisions of Stat. 1893, chap. 417, the material portions of which, relevant to the present case, are referred to in the opinion in *Miner* v. *Olin*, *supra*, we are of opinion that, for the reasons given in the cases cited above, the provisions of the statute requiring the use of an official ballot cannot be declared unconstitutional. The provisions are such as may properly be deemed necessary by the legislature, in order to secure to the voters a full and fair election, and an accurate and honest count of the ballots; and they do not impair the rights of the voters to such an extent as to warrant a court in holding them to be void on the ground that they are beyond the constitutional power of the general court.

The remaining contention of the plaintiff is that the use of the official ballot is made compulsory in the election of city officers, and optional in the election of town officers, and that, therefore, the statute is void, as partial and unequal in its operation upon the rights of voters. See Stat. 1893, chap. 417, §§ 129, 143, 173. There is nothing in the constitution which requires that the laws regulating elections for city and town officers shall be uniform throughout the commonwealth, and in some respects the laws regulating elections in cities for city officers have always been different from those regulating elections in towns for town officers. See Pub. Stat. chap. 7. As the provisions of the statute we are considering do not affect the qualifications of the voters, but merely regulate the form of voting by ballot, it may well be that in small towns it is not always desirable or necessary that all the precautions be taken against mistake, force, fraud, or intimidation in elections which ought to be taken in cities and large towns, where there are many voters. There are many provisions of the statutes concerning elections which require cities to do certain things which towns are not required to do; and some provisions concerning cities and towns are made to take effect only upon a vote of the city council, or of the inhabitants, adopting the provisions. One or two illustrations are sufficient: By article 2 of the Amendments of the Constitution, the general court is empowered to constitute city governments, and "to prescribe the manner of calling and holding public meetings of the inhabitants in wards or otherwise, for the election of officers under the constitution, and the manner of returning the votes given at such meetings." Rev. Stat. chap. 4, § 12, contains the general provisions in force at the time these statutes took effect, concerning the manner of conducting elections, but section 12 of the chapter is as follows: "In the city of Boston the several elections provided for in this chapter shall be conducted according to the provisions of the act establishing the city of Boston, and of the several acts in addition thereto." Rev. Stat. chap. 15, § 84, is as follows: "The election of town clerks, selectmen, assessors, school committees, and town treasurer, and also of the moderator of the meetings held for the choice of town officers, shall be by written ballots, and the election of all other town officers shall be in such mode as the meeting shall determine." See Pub. Stat. chap. 27, § 80. In matters which concern the form of holding elections, in the absence of anything in the constitution prescribing the manner in which the elections shall be held, we are of opinion that the provisions need not be the same for all the cities and towns of the commonwealth.

Judgment for the defendants.

WASHINGTON SUPREME COURT.

William H. MOYER, *Appt.*,
v.
Aaron T. VAN DE VANTER, *Respt.*

(.....Wash.....)

1. **A general exception "to these findings of fact and conclusions of law** and to each of them" is not sufficient to raise any question for review by the supreme court.

2. **Ballots will not be vitiated,** in the absence of fraud, by the fact that the official stamp required by statute to be placed on them was not so placed until they were returned by the electors to be placed in the box, having gone into the possession of the electors unstamped.

3. **A law forbidding the counting of ballots upon which the election officers have not placed their initials** cannot be sustained where the constitution provides that persons possessing certain qualifications "shall be entitled to vote at all elections."

4. **Failure of election officers** to provide booths which comply with the law is a mere irregularity which will not render void the votes cast in that precinct.

(July 28, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for King County in favor of defendant in an action brought to contest the title of defendant to the office of sheriff of King County. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Winsor, Bush & Morris, John B. Hart,** and **White & Munday,** for appellant:

The court below erred in its first conclusion of law, that the ballots having no initials of election officers thereon were legal votes, and that the provision of law requiring such indorsement, and declaring that unless so indorsed they should be void, and no officer should count them, was directory merely.

Cook v. *State*, 90 Tenn. 407, 18 L. R. A. 163; *Ackers* v. *Howard*, L. R. 16 Q. B. Div. 740;

NOTE.—As to constitutional right to vote, see State v. Blake (N. J.) 25 L. R. A. 480, and *note*; also Cole v. Tucker (Mass.) *ante*, 668.

See also 32 L. R. A. 656.

Pearse v. *Morrice*, 2 Ad. & El. 96; *Contested Election of Owen Ousick*, 186 Pa. 459; *De Walt* v. *Bartley*, 146 Pa. 529, 15 L. R. A. 771; *People* v. *Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624; *People* v. *Dutchess County Supvrs.* 135 N. Y. 522; *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775; *Bechtel* v. *Albin*, 134 Ind. 198; *Sego* v. *Stoddard*, 136 Ind. 297, 22 L. R. A. 468; *State* v. *Gay* (Minn.) 60 N. W. Rep. 677; *Atty-Gen.* v. *May*, 99 Mich. 588, 25 L. R. A. 325; *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 58; *State* v. *Hagen* (Iowa) 60 N. W. Rep. 110; *Spurgin* v. *Thompson*, 37 Neb. 39.

The elector takes his right to vote under such regulations for secrecy and purity as the legislature may make, not inconsistent with the fundamental law.

State v. *Connor*, 86 Tex. 133; *Atty-Gen.* v. *May*, *supra*; *Londoner* v. *People*, 15 Colo. 557; *Parvin* v. *Wimberg*, *supra*; *Woodward* v. *Sarsons*, L. R. 10 C. P. 747; *Phillips* v. *Goff*, L. R. 17 Q. B. Div. 812; *Ackers* v. *Howard*, L. R. 16 Q. B. Div. 753; *Kearns* v. *Edwards* (N. J.) 28 Atl. Rep. 725; *Talcott* v. *Philbrick*, 59 Conn. 472, 10 L. R. A. 150.

The mandatory provisions of the law in regard to securing the purity and secrecy of elections are not to be disregarded by election officers, nor by the courts in an election contest.

Atty-Gen. v. *McQuade*, 94 Mich. 439; *State* v. *Connor*, *supra*; *Jones* v. *Glidewell*, 53 Ark. 161, 7 L. R. A. 831; *State* v. *Taylor*, 108 N. C. 196, 12 L. R. A. 202; *State* v. *McElroy*, 44 La. Ann. 796, 16 L. R. A. 278; *Gaston* v. *Lamkin*, 115 Mo. 20; *State* v. *Seibert*, 116 Mo. 416; *State* v. *Stein*, 35 Neb. 848; *State* v. *Gay*, *Woodward* v. *Sarsons*, and *Phillips* v. *Goff*, *supra*; *Hawes* v. *Miller*, 56 Iowa, 395; *Kearns* v. *Edwards*, *supra*.

Even where the statute uses the word "may" in prescribing the duties of officers, if the doing of the thing is for the sake of justice, or for the public good, the word "may" is to be construed as "shall."

Rex and Reg. v. *Barlow*, 2 Salk. 609; *Reg.* v. *Tithe Comrs.* 14 Q. B. 459; Sutherland, Stat. Constr. § 461.

Messrs. **Donworth & Howe**, in addition to the other counsel for appellant, in support of petition for rehearing:

Holding section 391, 1 Hill's Code, in conflict with the constitution in effect wipes out the possibility of enforcing the Australian ballot system in the state of Washington; and is in conflict with the construction given to like statutes under like constitutional provisions by the court of last resort in every state in this Union, which had handed down an opinion upon the question.

People v. *Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624; *People* v. *Person*, 64 Hun, 327, affirmed 135 N. Y. 613; *State* v. *Gay* (Minn.) 60 N. W. Rep. 677; *State* v. *Russell*, 34 Neb. 116, 15 L. R. A. 740; *State* v. *Stein*, 35 Neb. 878; *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775; *Tebbe* v. *Smith* (Cal.) *post*, 673; *Slaymaker* v. *Phillips* (Wyo.) 40 Pac. Rep. 971.

Messrs. **Brady, Gay & McBride, Andrew F. Burleigh**, and **Struve, Allen, Hughes & McMicken**, for respondent:

The statutes respecting the exercise of the elective franchise by the individual voter should be strictly construed and the same held to be mandatory.

Brown v. *McCollum*, 76 Iowa, 479; *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 57; *Curran* v. *Clayton*, 86 Me. 42; *Kearns* v. *Edwards* (N. J.) 28 Atl. Rep. 723; *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775; *Ellis* v. *Glaser*, 102 Mich. 396.

The rule of construction of statutes governing the conduct of election officers in absence of fraud is always liberal.

Ellis v. *Glaser*, *supra*; *Pennington* v. *Hare* (Minn.) 62 N. W. Rep. 116; *State* v. *Gay* (Minn.) 60 N. W. Rep. 676; *People* v. *Avery*, 102 Mich. 572; *Boyd* v. *Mills*, 53 Kan. 594, 25 L. R. A. 486; *Lindstrom* v. *Manistee County Canvassers*, 94 Mich. 467, 19 L. R. A. 171; *Blankinship* v. *Israel*, 132 Ill. 514; *Stinson* v. *Sweeney*, 17 Nev. 309; *Miller* v. *Pennoyer*, 23 Or. 364; *Wilds* v. *State Board of Canvassers*, 50 Kan. 144.

Scott, J., delivered the opinion of the court:

The parties hereto were rival candidates at the last general election for the office of sheriff of King county. The county canvassing board found that respondent was entitled to the office, and declared him elected thereto, whereupon a certificate of election was issued to him. Within a few days thereafter, appellant filed a statement of contest, alleging matters to show that he had received the greatest number of legal votes and was entitled to the office. Issue was taken by the respondent upon certain of the material matters alleged, and a trial was had, which resulted in favor of the respondent, and this appeal was taken therefrom. A number of findings of fact were made by the lower court, which, with certain conclusions of law based thereon, were duly reduced to writing and made a part of the case. Whereupon appellant excepted as follows: "To these findings of fact and conclusions of law, and to each of them, the contestant excepts." An objection was made by the respondent to a consideration of any of the evidence introduced, or errors alleged with reference thereto, on the ground that no sufficient exception was taken to any fact found by the lower court; and, under repeated holdings of this court heretofore, this objection must be sustained. As a consequence thereof, the case presented upon appeal is much abbreviated; many of the questions sought to be raised by the appellant are eliminated; and the only question left for our consideration is whether the facts so found by the lower court are antagonistic to the conclusions of law and judgment. Appellant's main contention in this respect is based upon the seventh finding, which is as follows: "I find that in Franklin precinct there were 194 votes cast and counted for Aaron T. Van de Vanter, the defendant and contestee, and seventeen votes for William H. Moyer, the plaintiff and contestant, for said office of sheriff, which said votes entered into and formed a part of the total legal votes hereinbefore found by me to be cast for each of the said contestant and contestee, to wit: on the part of Van de Vanter,

entered into and made a part of the 4,380 votes so counted; on the part of Moyer, entered into and became a part of the 4,378 so counted for him. I further find that the election officers of Franklin precinct failed to place upon any of said ballots the initials of the inspector or any judge thereof before the said ballot was deposited in the ballot box. And I further find that a blank ballot was given to each and every elector, without either the official stamp or the initials of an election officer thereon; and said elector took said ballot, and the same was marked by said elector and returned by him to the election officers, when, in the presence of the elector, the inspector of said election placed upon said ballot the official stamp, furnished for that purpose by the county auditor, in pursuance of law, after which the said ballot was folded and placed within the ballot box, wherein it was kept until, at the time of the counting by the election officers, and at the close of the polls, all of the ballots of said precinct were counted, and returned, in a sealed box, by a special messenger, to the county auditor, in the manner directed by law. I further find, from the evidence and stipulations in this case, that the ballots voted by the electors, in each and every instance, were placed in the said box, and that the said ballots had been safely kept, and were produced into this court as an original exhibit, as evidence of the said recount. I further find that the election officers of Franklin precinct were in close and watchful attendance at the polls and of the ballot box and ballots during the entire election; that no ballots were used except those received from the election judges, or taken under their direction; that the election was held in an orderly manner; that the votes were counted and returned to the county auditor as required by law; and that the votes so returned were the votes actually cast at Franklin precinct at said election." The important question to be determined is, whether the vote cast in this precinct could be counted, the initials of no one of the election officers having been written on any of the ballots. The law provides that there shall be printed on the back of the ballots, with the rubber or other stamp provided for that purpose, the designation "official ballot," the name or number of the election precinct, the name of the county, the date of the election, the name and official designation of the clerk who furnishes the tickets to the judges of election, and that the inspector or one of the judges shall also write his initials thereon. Gen. Stat. §§ 382, 384. The ballots bore the proper stamp, and the fact that it was not placed thereon before they were delivered to the electors, but was done when they were returned to be deposited in the ballot box, was but an irregularity which could not vitiate them in the absence of any fraud. Section 391 is as follows: "In the canvass of the votes, any ballot which is not indorsed, as provided in this chapter, by the official stamp and initials, shall be void, and shall not be counted, and any ballot or parts of a ballot from which it is impossible to determine the elector's choice shall be void, and shall not be counted; provided that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention, it shall be the duty of the judges of election to count such part." If the language of this section can be given its full force, all the ballots cast in this precinct were rendered void by the failure of the election officers to comply therewith, in not having one of their number write his initials thereon; and the effect of it would be to disfranchise all voters in that precinct for that election. The Constitution (sec. 1, art. 6) provides that all male persons of the age of twenty-one years or over, possessing certain qualifications specified, "shall be entitled to vote at all elections;" and section 6 reads as follows: "All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot." Can the legislature enact a law whereby election officers can practically disfranchise all the electors of a precinct, where the electors themselves are not at fault? If so, the constitutional guaranty is of small consequence. Legislation going to promote the honesty of elections is most beneficial in character, and as a means of securing this end the general policy of the law is that the ballot shall be a secret one, that it may not be known for which candidate any particular voter voted, in order that bribery may be prevented. Provision is also made as to the duties of election officers, to the end that a fraudulent canvass of the votes cast may be prevented. There is good ground for recognizing a distinction between the obligations placed upon the individual voter and those matters which relate to the duties of election officers. Great care should be taken to distinguish between those requirements designed to prevent fraud, and which are necessary to the purity of elections, and those which, while designed for the same purpose, are not essential thereto, or we may overreach the salutary effect sought to be obtained from provisions of the character first mentioned, by going so far, in construing as valid and mandatory provisions of the second class, as to open the very door to fraud that was sought to be closed thereby. The individual voter may well be called upon to see that the requirements of the law applying to himself are complied with before casting his ballot; and, if he should wilfully or carelessly violate the same, there would be no hardship or injustice in depriving him of his vote; but if, on the other hand, he should in good faith comply with the law, upon his part, it would be a great hardship were he deprived of his ballot through some fault or mistake of an election officer in failing to comply with a provision of the law over which the voter had no control. It is also a question in which the public has a direct and important interest; for the loss of such vote may have a controlling effect upon a public matter. The constitutional provision aforesaid guarantees the right to vote, and this, of necessity, carries with it the right to have the vote counted. Of course, the manner of voting and canvassing votes must be subject to all reasonable legislative requirements. Many cases

have been cited by counsel as supporting the positions taken by them, respectively, and many of these involve a consideration of various phases of the law commonly known as the "Australian Ballot Law," in force here, but which is a comparatively new thing in this country. These cases cannot all be harmonized, but the general trend thereof has been to recognize a clear distinction between those things required of the individual voter and those imposed upon election officers. There is a disposition to hold the former valid and mandatory; but, where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear that there has been in fact an honest expression of the popular will, there is a well-defined tendency to sustain the same, although there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers, or some of them. Language may have been employed in some of the cases in conflict with this position; but, when such cases are examined with reference to the specific facts decided, it will appear that this distinction has been adhered to, and it may truly be said to be the one great underlying principle of all the cases. In case of a violation of the law on the part of an election officer, punishment may be provided therefor, and in this way the law can be rendered effectual without going to the extent of depriving the voter of his right to have his vote counted, in consequence of such violation. In this connection, it may be well to note that, while there is a punishment provided for depositing an unstamped ballot in the ballot box by an election officer, there is none provided for failing to write his initials thereon. Section 389, Gen. Stat., is as follows: "No inspector or judge of election shall deposit in any ballot box any ballot upon which the official stamp as hereinbefore provided for does not appear. Every person violating the provisions of this section shall be deemed guilty of a misdemeanor." He can deposit a ballot properly stamped, but without the initials, without incurring any penal liability. This may be an omission due to inadvertence upon the part of the lawmakers; but it is the law, nevertheless; and, if a ballot so deposited cannot be counted, a door is open whereby great frauds may be committed with impunity, the voters of an entire precinct, as in this case, practically disfranchised, and the popular will nullified. It appears, from the facts found, that the vote of this precinct was honestly and fairly cast and counted, and that there was nothing upon the face of the ballots to indicate how any particular voter voted, and that the objections raised thereto apply to all the ballots cast for each of the candidates. The failure to comply with the law appears to have been due to ignorance of its provisions on the part of the election officers. That the prohibition aforesaid against the counting of these votes, under the above circumstances, is an unreasonable one, and in conflict with the right guaranteed by the constitution, seems to us a clear proposition. Were we authorized to hold otherwise, such a holding would be subversive of the best interests of society, and might result in great peril to our governmental structure. Such a holding is not necessary to preserve the purity of elections; for provision can be made for an investigation of charges of actual fraud upon the part of electors and election officers. It would be an interminable task to refer to each of the cases cited in detail, and we content ourselves with giving our conclusions drawn from all of them. No decision cited has gone to the extent that we are asked to go by the appellant in this case; and, to accord with the general holdings of the courts, as we understand them, in the light of what has actually been decided in the cases, we are compelled to hold that the provision aforesaid against counting ballots where no initials are placed thereon cannot be sustained, and the decision of that question sets this controversy at rest. The finding in question by the lower court supports the conclusions of law based thereon, and the judgment rendered. The fact that the election officers failed to have booths erected which complied with the law, found in the eighth finding, was also but an irregularity which would not vitiate the election. None of the other questions raised by appellant, in the present aspect of the case, are material to this controversy, as they relate to defects in particular votes cast in the various precincts and included in the other findings; and, in case any of these votes were improperly counted, the court in each instance found a greater number were counted for the appellant than for the respondent, and the findings must be accepted as a whole. It follows that *the judgment must be affirmed.*

Hoyt, *Ch. J.*, and **Anders, Dunbar, and Gordon**, *JJ.*, concur.

Rehearing denied.

CALIFORNIA SUPREME COURT.

George A. TEBBE, *Respt.*,
v.
Clarence S. SMITH, *Appt.*

(.....Cal.....)

1. The burden of proof to show that, notwithstanding a substantial compliance with the California statutes as to the care of ballots, they have been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place, resting upon

NOTE.—For distinguishing marks on ballots, see Rutledge v. Crawford (Cal.) 12 L. R. A. 761, and *note;* also Sego v. Stoddard (Ind.) 22 L. R. A. 466, and cases cited in *footnote* thereto; also Ellis v. May (Mich.) 25 L. R. A. 825; Taylor v. Bleakley (Kan.) 28 L. R. A. 662.

See also 29 L. R. A. 731; 30 L. R. A. 227; 34 L. R. A. 45.

one objecting to their admission as evidence, is not discharged by the simple showing that it was possible for a person to have molested them.

2. **A cross in the marginal space at the right of the name of a candidate and outside of the square** is not a distinguishing mark, within Pol. Code, § 1215, as the code does not expressly require the mark to be placed within such square, although it requires the clerk in printing the ticket to place upon it the words, "To vote for a person, stamp a cross (X) in the square at the right of the name."

3. **An initial in a space left in a ballot** for the insertion of the name of a candidate, although made with the intention of writing a name, which was abandoned, is a distinguishing mark making the ballot void.

4. **The opening of the polls three hours later than the time prescribed by statute,** and the removal of the ballot box from the polls in violation of Pol. Code, §§ 1160, 1162, invalidate the election in the precinct, although the misconduct is prompted merely by ignorance and lack of appreciation by the election officers of the responsibility of their positions.

5. **The ballots cast at a precinct will be excluded from the count** where all of them bear in the same writing the name of a person followed by the name of a party, and there was but one person in the precinct lawfully assisted in the marking of his ballot, as provided by Pol. Code, § 1208, where it does not appear who did the writing or whether it was upon the tickets when they were put into the voters' hands, under Pol. Code, § 1211, providing that any ballot which is not made as provided in the act shall be void, and shall not be counted.

(July 13, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Siskiyou County in favor of plaintiff in an action to contest defendant's election to the office of county superintendent of schools. *Reversed.*

The facts are stated in the opinion.

Messrs. **Warren & Taylor** and **L. F. Coburn,** for appellant:

It was incumbent upon contestant to show by positive proof, beyond any reasonable doubt, that the ballots were the identical ballots cast; that they had been safely kept by their proper custodian; that they had not been exposed to the public, nor within the reach of unauthorized persons, and that there had been no opportunity given for tampering with them, before the ballots can be received as evidence. McCrary, Elections, 291–298; *Coglan* v. *Beard*, 67 Cal. 303; *Ex parte Brown*, 97 Cal. 89; *Kreitz* v. *Behrensmeyer*, 125 Ill. 141; *Fenton* v. *Scott*, 17 Or. 189; *Hartman* v. *Young*, 17 Or. 150, 2 L. R. A. 596; *Albert* v. *Twohig*, 35 Neb. 563; *Powell* v. *Holman*, 50 Ark. 85.

The provisions as to marking are mandatory, and ballots are void unless the × mark is in the margin. *Bechtel* v. *Albin*, 134 Ind. 193; *Kirk* v. *Rhoads*, 46 Cal. 398; *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 61; *Re East Coventry Election*, 8 Pa. Dist. Rep. 877; *Loucks' Case*, Id. 127; *Sego* v. *Stoddard*, 136 Ind. 297, 22 L. R. A. 468.

The manner in which the elector must express his intention is prescribed in the act, and to depart from the prescriptions of the act would be to repeal it. *Kearns* v. *Edwards* (N. J.) 28 Atl. Rep. 723; *Lay* v. *Parsons*, 104 Cal. 661.

The ballots were marked in violation of law. *State* v. *Walsh*, 62 Conn. 260, 17 L. R. A. 364; *Kearns* v. *Edwards* (N. J.) 28 Atl. Rep. 723; *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 61; *Spurgin* v. *Thompson*, 37 Neb. 39.

Section 1162, Pol. Code, provides that the ballot box must not be removed from the polling place or presence of the bystanders until all the ballots are counted.

These provisions of the statute are mandatory. *People* v. *Seals*, 52 Cal. 71; *Russell* v. *McDowell*, 88 Cal. 70.

The court erred in denying contestee's motion to reject all the ballots of Cecilville precinct. *State* v. *Walsh*, *supra*; *Atty-Gen.* v. *May*, 98 Mich. 588, 25 L. R. A. 825; *Atty-Gen.* v. *McQuade*, 94 Mich. 439; *People* v. *Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624.

Messrs. **Gillis & Tapscott** and **James F. Farraher,** for respondent:

Provisions of the statute for the safe keeping of ballots are treated by the courts as directory, and when it is shown that the ballots have been securely kept and preserved inviolate, they will not be excluded as evidence on account of some omission to comply with their directions. *Hartman* v. *Young*, 17 Or. 150, 2 L. R. A. 596; *People* v. *Livingston*, 79 N. Y. 286; *O'Gorman* v. *Richter*, 31 Minn. 25; 6 Am. & Eng. Encyclop. Law, p. 495; *People* v. *Holden*, 28 Cal. 133; *Dorey* v. *Lynn*, 31 Kan. 758; *Coglan* v. *Beard*, 67 Cal. 306; *Blankinship* v. *Israel*, 132 Ill. 514; McCrary, Elections, 291–293; *People* v. *Burden*, 45 Cal. 241.

The court did not err in counting for contestant the nine ballots on which the cross (X) was stamped on the right-hand side of his name, about one inch inside the dotted line of the margin and between said line and contestant's name. *Bowers* v. *Smith*, 111 Mo. 45, 16 L. R. A. 754; *Re Vote Marks*, 17 R. I. 812; *Re Sharon Hill Election*, 8 Lack. Jur. 286; *Lay* v. *Parsons*, 104 Cal. 661; *Spurgin* v. *Thompson*, 37 Neb. 39; *State* v. *Russell*, 34 Neb. 116, 15 L. R. A. 740; *Sego* v. *Stoddard*, 136 Ind. 297, 22 L. R. A. 468; *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775; *Inglis* v. *Shepherd*, 67 Cal. 469; *Bechtel* v. *Albin*, 134 Ind. 193.

The letter "J" in the blank space for justice of the peace, in the absence of all suspicious circumstances, did not constitute a distinguishing mark. *Rutledge* v. *Crawford*, 91 Cal. 536, 13 L. R. A. 761; *Coffey* v. *Lyman*, 92 Cal. 137; *Coffey* v. *Edmonds*, 58 Cal. 521; *Wyman* v. *Lemon*, 51 Cal. 273; *People* v. *Dutchess County Supr.* 135 N. Y. 522; *Kreitz* v. *Behrensmeyer*, 125 Ill. 141; *State* v. *Saxon*, 30 Fla. 668, 18 L. R. A. 721; *Bowers* v. *Smith*, *supra*.

The slight irregularity on the part of the election officers in Lake election precinct is no ground for disfranchising the voter of that precinct. *Sprague* v. *Norway*, 31 Cal. 174; *Miner* v. *Kidder*, 43 Cal. 237; *Preston* v. *Culbertson*, 99

Cal. 209; *Coffey* v. *Edmonds*, Id. 531; *People* v. *Seals*, 52 Cal. 71; *Russell* v. *McDowell*, 83 Cal. 70; *People* v. *Cook*, 8 N. Y. 67, 59 Am. Dec. 468; *Cleland* v. *Porter*, 74 Ill. 76, 24 Am. Rep. 278; *Piatt* v. *People*, 29 Ill. 54; *Du Page County Supvrs.* v. *People*, 65 Ill. 360; *Fry* v. *Booth*, 19 Ohio St. 25; *Soper* v. *Sibley County*, 46 Minn. 274; *Farrington* v. *Turner*, 53 Mich. 27, 51 Am. Rep. 88; *Whipley* v. *McKune*, 12 Cal. 360; *DeBerry* v. *Nicholson*, 102 N. C. 465; McCrary, Elections, § 123; *Finlay* v. *Walls*, 4 Cong. Elect. Cas. 378.

The Cecilville ballots were regular and should have been counted.

Bragdon v. *Navarre*, 103 Mich. 259; *Lindstrom* v. *Manistee County Canvassers*, 94 Mich. 467, 19 L. R. A. 171; *Allen* v. *Glynn*, 17 Colo. 338, 15 L. R. A. 743; *Bowers* v. *Smith*, 111 Mo. 45, 16 L. R. A. 754; *Atty-Gen.* v. *May*, 99 Mich. 538, 25 L. R. A. 325; *Atty-Gen.* v. *McQuade*, 94 Mich. 489; *People* v. *Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624.

Henshaw, J., delivered the opinion of the court:

Appeal from the judgment, taken within sixty days after its rendition. The evidence is brought up for review by bill of exceptions. By the official canvass of the supervisors, Smith was declared elected over Tebbe to the office of county superintendent of schools of Siskiyou county at the last general election, by a plurality of one vote. Tebbe then instituted this contest. The result of the judicial count was to increase contestant's total vote by three, no change being made in the number of votes accredited to contestee, and accordingly the judgment of the court declared contestant to be duly elected.

1. The first point urged is that the court erred in overruling contestee's objection to receiving the ballots in evidence. The evidence showed that the ballots and returns reached the county clerk through the proper channels. The sealing wax on some of the packages was broken when they were received from the express office. Other seals were broken in handling. The packages were placed on top of a large case in the clerk's office, and there remained, in the condition in which they had arrived, until the completion of the canvass by the supervisors, when they were put into three gunny sacks, each sack securely bound and sealed, and placed under the clerk's desk, where they remained until produced in court. Upon being opened, they were found to be in the same condition as when they were sealed by the clerk. There had been no opportunity for any one to tamper with the ballots, and in fact they had not been disturbed. They were left alone only when the office was closed and locked. During office hours they were never left alone, excepting upon one occasion, when the deputy stepped out for "a minute and a half," leaving one Robertson in the office. At that time the ballots were in the gunny sacks, and neither the sacks nor the ballots had been disturbed. Tebbe, the contestant, was a deputy clerk during this time; but he was never left alone in the office, and was given no key to it. We cannot see anything suspicious in this last circumstance. Upon the contrary, it reflects credit upon the prudence of the clerk, and the fair dealing of all concerned. Knowing of the impending contest, they took all reasonable precautions to avoid exposing either the ballots, or contestant's connection with them, to any suspicion. The principles of law and the rules of evidence governing cases such as this have been so often declared that a review of the many authorities is unnecessary. Those curious or interested in pursuing the subject will find in the reporter's notes, preceding, many instructive cases collated by the industry of counsel. Suffice it here to say that while the ballots are the best evidence of the manner in which the electors have voted, being silent witnesses, which can neither err nor lie, they are the best evidence only when their integrity can be satisfactorily established. One who relies, therefore, upon overcoming the prima facie correctness of the official canvass by a resort to the ballots, must first show that the ballots, as presented to the court, are intact and genuine. Where a mode of preservation is enjoined by the statute, proof must be made of a substantial compliance with the requirements of that mode. But such requirements are construed as directory, merely, the object looked to being the preservation inviolate of the ballots. If this is established, it would be manifestly unjust to reject them merely because the precise mode of reaching it had not been followed. So, too, when a substantial compliance with the provisions of the statute has been shown, the burden of proof shifts to the contestee, of establishing that, notwithstanding this compliance, the ballots have in fact been tampered with, or that they have been exposed under such circumstances that a violation of them might have taken place. But this proof is not made by a naked showing that it was possible for one to have molested them. The law cannot guard against a mere possibility, and no judgment of any of its courts is ever rendered upon one. When all this has been said, it remains to be added that the question is one of fact, to be determined in the first instance by the jury or trial judge; and, while the ballots should be admitted only after clear and satisfactory evidence of their integrity, yet, when they have been admitted this court will not disturb the ruling unless we, in turn, are as well satisfied that the evidence does not warrant it. In this case we do not think the ruling was erroneous.

2. Nine ballots were received and counted by the court for contestant, which were marked with a cross, not in the square at the right of his name, but in the marginal space to the right, thus:

120	George A. Tebbe....X....Democrat	

It is urged against the ruling that the ballots were not marked as required by statute, and that the marks so placed served as distinguishing marks, and rendered the ballot void. Pol. Code, §§ 1211, 1215. The provisions as to the marking of ballots are, in their nature, mandatory. *Atty-Gen.* v. *Mc-*

Quads, 94 Mich. 439; *People* v. *Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624; *Taylor* v. *Bleakley* (Kan.) 28 L. R. A. 683; *Atty-Gen.* v. *May*, 99 Mich. 538, 25 L. R. A. 325; *Lay* v. *Parsons*, 104 Cal. 661; *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 57. But as is said in *Bowers* v. *Smith*, 111 Mo. 45, 16 L. R. A. 754, "all statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor." If we should find a provision in our statutes requiring the voter to mark the cross in the square to the right of the candidate's name, we would feel constrained to adopt the rule and reasoning of the supreme court of Indiana, where such a provision exists, construing which, the court said: "If we hold this statute to be directory only, and not mandatory, we are left without a fixed rule by which the officers of election are to be guided in counting the ballots." *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775. But our statutes contain no such mandatory provision. So far as they are pertinent to this discussion, the provisions are that "there shall be a margin on the right hand side of the names, at least one half of an inch wide, so that the voter may clearly indicate, in the way hereafter to be pointed out, the candidate and candidates for whom he wishes to cast his ballot." The clerk is, in printing the ticket, to place upon it the following: "To vote for a person, stamp a cross (X) in the square at the right of the name." Pol. Code, § 1197. The mandatory provisions as to voters are found in sections 1205 and 1215 of the same Code: "He shall prepare his ballot by marking a cross after the name of the person or persons for whom he intends to vote . . . and, in case of a constitutional amendment or other question submitted to the vote of the people, by marking in the appropriate margin a cross (X) against the answer he desires to give." Pol. Code, § 1205. "No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him." Id. § 1215. It will be noted that these sections make no mention of the square, and that there is not even an express direction to the clerk to place a square opposite the names of the candidates. The voter is only commanded to place the cross in the marginal space to the right of the candidate's name, and when he has done this he has complied with the mandatory provisions of the law. True, the statute contemplates, at least inferentially, the making of a square, and that the square is the proper place for the marking of the cross; but it has not made the doing of this a prerequisite to the casting of a legal ballot. The intention of the voter is as plainly indicated by the one marking as by the other, and, as was said by the supreme court of Rhode Island in construing a similar law: "Our opinion is that a cross placed in the margin of the ballot on the right of the names of the candidates, opposite a candidate's name, should be counted as a vote for the candidate opposite whose name it is placed, whether the margin have any square in it, or not, and, if there be a square in it, even though the cross is without, or partly without, the square. All that chapter 731 [Laws 1889] requires, to make the cross effective as a vote, is that it shall be inscribed in the right-hand margin, opposite the name of the person intended to be voted for." *Re Vote Marks*, 17 R. I. 812. As to the last contention upon this point, that the marks served to distinguish the ballots, it need but be suggested that it would not require much ingenuity or intelligence to place the cross, even within the square, in such a manner as would enable the ballot to be distinguished. When a legal mark is placed upon the ballot in a legal place, the ballot cannot be rejected because the mark, as placed, may serve some ulterior purpose. Section 1215 of the Political Code, in forbidding marks, does not include the cross legally placed. The ballots were, therefore, properly received.

3. The ballot from Sawyer's Bar precinct (Exhibit F) should have been rejected. It bore upon it the letter "J," written in pencil in the blank space left for the insertion of the name for justice of the peace. Doubtless, it may have been the intention of the voter to write a name, and he may have abandoned his intent after setting down the initial letter; but doubtless, also, the mark could serve as a distinguishing mark, and, being one having no lawful right upon the ballot, it renders it void. The case differs from *Rutledge* v. *Crawford*, 91 Cal. 526, 13 L. R. A. 761, where this court held that the impression (of printer's ink) upon the back of the ballot was as attributable to accident as design. Here the writing of the letter was an affirmative act of the voter. He had his remedy, having improperly marked his ballot, by calling for the issuance to him of a fresh ticket. Pol. Code, § 1207.

4. The account of the election at Lake precinct is a breeze from Arcady. The polls should have opened at 6:31 A. M. Smith received thirteen votes in this precinct; Tebbe, twenty. William Otey, called for contestant, testified: "On November 6th, last, I was at the polls of Lake election precinct, on the Fairchild ranch. . . . I got there between 8 and 9 o'clock in the morning. Served on the election board in my father's place. When I got there, Fairchild, Henry Seale, and the hands working on the ranch were there. I do not remember any one else. The polls were opened, I should judge, some time near 10 o'clock. We took an adjournment when we went to dinner. Took the ballot box with us. Fairchild, the old gentleman, carried it. He was one of the election officers. . . . The other materials—ballots and everything—we left in the poll room when we went to dinner. We left the ballot box on the table while eating dinner,—on same table. That ballot box did not pass into the hands of other persons. I think there were bystanders around the polls at the time we went to dinner. . . . The house is about 100 yards from the polling place. Between the house and schoolhouse there were some men. Some had voted, and some were working on the ranch. I think some other people took dinner with the board. When we were through, Fairchild carried

the box back. No person was deprived of voting because the polls were not opened earlier. I know that no one came there without voting that was entitled to vote." The law provides that the polls must open at sunrise, and be kept open until 5 P. M., and that the ballot box must not be removed from the polling place, or presence of the bystanders. Pol. Code, §§ 1160, 1162. It is the rule that mandatory provisions for the holding of an election must be followed, or the failure will vitiate it, while a departure from the terms of a directory provision will not render it void in the absence of a further showing that the result of the election has been changed, or the rights of the voters injuriously affected, thereby. Code Civ. Proc. § 1112; *Russell* v. *McDowell*, 88 Cal. 70. But the rule as to directory provisions applies only to minor and unsubstantial departures therefrom. There may be such radical omissions and failures to comply with the essential terms of a directory provision as will lead to the conclusive presumption that the injury must have followed. A substantial compliance with the terms of directory provisions is, after all, required. And such a substantial compliance is not had by strictly following some provisions, while essentially failing to observe others. There must be a reasonable observance of all the prescribed conditions. It is the duty of the courts so far to adhere to the substantial requirements of the law in regard to elections as to preserve them from abuses subversive of the rights of the electors. And, under this view, the question becomes a broader one than can be disposed of by answering that in the individual case no harm resulted. Thus, in *Knowles* v. *Yeates*, 31 Cal. 82, the contention of appellants was that, admitting that there was no fraud, and that the votes were cast by qualified electors, still the fact that in certain precincts the polls were opened, without reason, at long distances from the appointed places, was enough in itself to call for the rejection of the votes; and this court so held. Likewise, in the case of *People* v. *Seale*, 52 Cal. 71, where no question of fraud or injury was involved, but where, at an election called for voting a school tax, the polls were opened at 1 o'clock P. M., and closed at 6, instead of being opened at one hour after sunrise and kept open until sunset, as the law then required, this court, without hesitation, declared the election invalid. In this case we are quite willing to believe that the misconduct of the officers of Lake precinct was prompted by nothing worse than ignorance, and lack of appreciation of the responsibilities of their positions, and we may say, further,—for such is the evidence,—that no harm is shown to have resulted from their conduct; but, looking to the purity of elections and integrity of the ballot box, we are constrained to hold that conduct like this amounts, in itself, to such a failure to observe the substantial requirements of the law as must invalidate the election. And, while reluctant so to hold in this instance, we are confirmed in the opinion by consideration of the fact that any other interpretation would add grave perils to the safe conduct of our elections, which are already harassed by dangers enough. The votes of Lake precinct should, therefore, have been rejected.

5. Upon all the ballots cast in Cecilville precinct there appeared the following, written in the blank space under the office of justice of the peace: "G. G. Brown—Republican." The evidence discloses that this writing was all done by the same person, and, further, that there was but one person in the precinct lawfully assisted in the marking of his ballot, under the provisions of the code. Pol. Code, § 1208. The record, unfortunately, does not disclose who did the writing, nor whether it was upon the tickets when they were put into the voters' hands. Left, then, to the presumption of the performance of duty by public officers, it must be held that the officers put legal tickets into the hands of the electors, and that the writing was afterwards put upon them. But an elector unable to write can, under our present laws, have a name inscribed upon his ballot in only one legal way, and that is by pursuing the method prescribed by section 1208 of the Political Code. This requirement is clearly mandatory, since it is further declared that "any ballot which is not made as provided in this act shall be void, and shall not be counted." Pol. Code, § 1211. In *Atty-Gen.* v. *May*, 99 Mich. 538, 25 L. R. A. 325, the supreme court of Michigan, construing a similar statute, held that inspectors of election had no right to assist in the marking of ballots, except in the manner provided by law, and that ballots marked in any other than the prescribed manner were void. In the present state of the evidence, only the ballot of the voter lawfully assisted should be counted. It must be held, therefore, that the other ballots of Cecilville precinct should not have been counted. What is here said is addressed to the evidence as it appears in the record. It may be that, upon a new trial, additional evidence will remove the objections now found.

The other points do not require consideration. They are either covered by what has been said, or do not involve error. But for the foregoing reasons *the judgment is reversed*, and the cause remanded.

We concur: **Temple, *J.*; Van Fleet, *J.*; Harrison, *J.***

McFarland, *J.*, concurring:

I concur in the judgment, and also in the opinion of *Mr. Justice* Henshaw, except as to the Cecilville precinct. It will be observed that there is no evidence tending to show when "G. G. Brown—Republican," was written on the ballots. If there be a distinguishing mark on a ballot when it is voted, the ballot should not be counted; but, if the mark be placed on the ballot after it had been properly voted, then, at the trial of a contest, it should be counted. Now, upon the trial in court of an election contest, if a marked ballot be found, and there is no evidence as to the time of the marking, must the court presume that it was marked before it was voted? Such a rule would afford an evil-disposed

person, who could get temporary access to the ballots after they had been counted, an easy and safe method of changing the result in a close contest by simply marking—and thus invalidating—a few ballots in which the votes were for the prevailing party. Of course, fraud should be carefully guarded against; but it seems to me that the rule contended for would be much like closing a wicket and leaving open a barn door. I do not see that there are any presumptions upon which the problem can be solved. If we presume that the ticket was not marked when the election officers gave it to the voter, we must also presume that it was not marked when those officers counted it; and, if we are also to presume that the ballots were afterwards so securely kept that no one could get access to them, it is evident that all the presumptions, taken together, afford no aid in the solution of the question. In the case at bar it is not contended that there was any actual fraud committed, even in the matter of voting for justice of the peace; and, before throwing out votes honestly cast for superintendent of schools, I am inclined to think that there should have been some evidence tending to show that the marking of the votes for justice of the peace was done before the ballots were voted. And it is quite probable that such evidence could readily have been obtained. The returns should show whether or not the said ballots were counted for Brown, and the election officers ought to be able to throw some light upon the question whether the ballots were marked when they were examined during the process of counting.

I concur: **Garoutte, J.**

OHIO SUPREME COURT.

William FULTON, *Plff. in Err.*,
v.
Rebecca FULTON.

(51 Ohio St. —.)

***Where a divorce a vinculo has been granted to a husband** on account of the aggression of the wife, and the minor children of the parties assigned to the custody of the divorced wife, without an order respecting their maintenance, and while so in her custody she has furnished to them necessaries, she cannot recover against her former husband, their father, for her expenditures in this behalf, in the absence of proof of a promise by him to pay for such necessaries, or of a request that they should be furnished to the children.

(February 5, 1895.)

ERROR to the Circuit Court for Cuyahoga County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover compensation for the support of defendant's children. *Reversed.*

Statement by **Bradbury, J.**:

The plaintiff and defendant were at one time husband and wife, but had been divorced on the application of the husband on account of the extreme cruelty of the wife. In these proceedings the wife was allowed $1,500 allmony, and awarded the custody of two small children, the fruit of the marriage, for the maintenance of whom the decree made no provision; the two children continued to reside with their mother, and were maintained by her, from the time the divorce was granted until the commencement of this action in the court of common pleas, a period of about eighteen months. By this action she sought to recover against the father the sum of $390, for boarding the two children seventy-eight weeks, at the rate of $2.50 per child per week, and the sum of $56.20 for clothing and medical attendance, etc., furnished to them by her and for which she had paid. The father answered that he had been at all times willing, able, and ready to support the children himself at home, in his own family, but was denied the right by the order of the court in the proceedings for a divorce made necessary by the aggression of the defendant in error; and denies that she cared for and supported the children at his request, but, instead, avers that she did so against objection and protest. She recovered, in the court of common pleas, a judgment for the value that the jury set upon the support she had given to the children, which judgment was affirmed by the circuit court. Whereupon proceedings were begun in this court to reverse both judgments.

***Mr.* W. A. Babcock,** with ***Mr.* W. B. Higby,** for plaintiff in error:

It is only when a man abandons his child and casts it upon the public that he becomes liable for its support.

Fitler v. *Fitler*, 33 Pa. 57.

After divorce the relations of the husband and wife are as that of third persons, or rather of single persons.

Burritt v. *Burritt*, 29 Barb. 124; *Pretzinger* v. *Pretzinger*, 45 Ohio St. 460; *Stanton* v. *Wilson*, 3 Day, 37, 3 Am. Dec. 255.

The father being ready, willing, and able to support his minor children, and there being no decree of any court of competent jurisdiction deciding that he was an improper person to sustain such relation, and having by the consent of the mother the custody of the children in his own home, and they being removed against his protest, he is no longer liable for their maintenance and support, even though furnished by the mother or his former wife.

Finch v. *Finch*, 22 Conn. 411; *Johnson* v. *Onsted*, 74 Mich. 497; *Husband* v. *Husband*, 67

*Headnote by the COURT.

NOTE.—For the general doctrine as to the obligation of a parent to support a child, see Porter v. Powell (Iowa) 7 L. R. A. 176, and *note*.

See also 30 L. R. A. 680; 37 L. R. A. 589; 40 L. R. A. 579; 47 L. R. A. 391.

Ind. 588, 33 Am. Rep. 107; *Burritt* v. *Burritt*, *supra*; *Harris* v. *Harris*, 5 Kan. 46; *Hancock* v. *Merrick*, 10 Cush. 41; *Fitler* v. *Fitler*, 33 Pa. 50; *Baldwin* v. *Foster*, 138 Mass. 449; *Brow* v. *Brightman*, 136 Mass. 187.

If the amount paid and awarded by the court was, in the estimation of said court, sufficient for the care of the children, then this plaintiff in error was absolved from all future obligation.

Harris v. *Harris*, 5 Kan. 47; Bishop, Mar. & Div. §§ 401, 552, 556.

Mr. **L. A. Willson**, for defendant in error:

While the parties were divorced for the aggressions of the defendant in error, it is not true that the minor children were separated from the plaintiff and given to the defendant on account of defendant's aggressions.

Pretzinger v. *Pretzinger*, 45 Ohio St. 452.

The father can never be divorced from his children.

Upon the establishment of new relations, a promise may be implied, on the part of the father, to pay the mother, as well as a third person, who has supplied the necessary wants of his infant child.

Stanton v. *Willson*, 3 Day, 37, 3 Am. Dec. 255; *Finch* v. *Finch*, 22 Conn. 421.

Bradbury, *J.*, delivered the opinion of the court:

The defendant in error was divorced from the plaintiff in error in a suit brought by him for her aggression. She was awarded $1,500 for alimony, and two small children, the fruit of the marriage, were, by the decree, placed in her custody, but no order was made respecting their maintenance.

She, living apart from the defendant in error, supported the two children, and the question to be determined is, whether she can maintain an action against him for board, clothing, etc., which she has furnished to them, in the absence of any proof of a request by him that the support should be provided or of a promise to pay for it when provided. Upon this subject the court of common pleas charged the jury as follows:

"It is conceded that at the September term, 1886, the defendant obtained a decree of divorce from the plaintiff for cruelty to him; that the court gave her alimony in the sum of $1,500 and the custody of the children till its further order, and that she has ever since had the children and boarded and clothed them. This casts upon the defendant the legal obligation to pay her what that board and clothing is reasonably worth.

"It makes no difference whether it was done with the defendant's consent or not, or at his instance and request. Plaintiff's right to recover is not founded in the defendant's promise to pay, either expressed or implied, but upon his legal duty to provide for his children; and the order of the court, giving her the custody of the children and the caring for them thereafter by the plaintiff, makes the defendant liable to pay the plaintiff what that board and clothing is fairly and reasonably worth."

To this portion of the charge the defendant excepted, and the question in issue between the parties was thus brought into the record.

The defendant in error contends that this question is settled in her favor by the case of *Pretzinger* v. *Pretzinger*, 45 Ohio St. 452. In that case this court held that "the obligation of the father to provide reasonably for the support of a minor child, until the latter is in a condition to provide for his own support, is not impaired by a decree which divorces the wife *a vinculo*, on account of the husband's misconduct, gives to her the custody, care, and nurture of the child, and allows her a sum of money as alimony, but with no provision for the child's support." In that case, as in the one under consideration, no question arose respecting the rights of the child to reasonable support. In both instances the necessaries had already been furnished by the divorced mother, and she was seeking reimbursement from the father. The contention, therefore, related solely to the relative duties of the father and mother of minor children where the parents are living separate in consequence of a divorce *a vinculo* had between them, and the children had been awarded to the custody of the mother.

Where separation and divorce result from the misconduct of the husband, the *Pretzinger Case*, *supra*, asserts the primary liability of the father, in a contest between him and the mother, and in such case the right of the mother to recover against the father for such reasonable necessaries as she has furnished, is established. That case is grounded in the principle that as the primary liability rests upon the father he cannot, by his own misconduct, shift it to the mother. Dickman, *J.*, saying, in reference to the natural duty resting on parents to support their children, that "this natural duty is not to be evaded by the husband's so conducting himself as to render it necessary to dissolve the bonds of matrimony. . . . It is not the policy of the law to deprive children of their rights on account of the dissensions of their parents, . . . or to enable the father to convert his own misconduct into a shield against parental liability." *Pretzinger* v. *Pretzinger*, 45 Ohio St. 458. Again, "there is evidently no satisfactory reason for changing the rule of liability, when, through ill-treatment, or other breach of marital obligation, the husband renders it necessary for a court of justice to divorce the wife, and commit to her the custody of her minor children." Id. 459.

In the case before the court, however, the wife was the aggressor, and it is this feature by which it is to be distinguished from the *Pretzinger Case*, *supra*, for, in that case the husband was in fault. It does not necessarily follow that, because a father cannot by his own misconduct shift from himself to the mother his primary liability to support his minor children, the mother cannot, by her misconduct, produce that result, at least to the extent of denying to her a right to recover against him for expenses she has incurred for necessaries for their support, in the absence of a request or promise by him in the premises.

The contest is between the parents. By the law of nature, the responsibility of each for the birth of children is equal; the moral

obligation of nurture, protection, and reasonable support bears upon each according to his or her capacity to afford it. Schouler, in referring to this obligation, says: "This is said to rest upon a principle of common law; but perhaps it may be more reasonably referred to the implied obligations which parents assume in entering into wedlock and bringing children into the world." Schouler, Dom. Rel. § —.

The common law, in an earlier stage of its development, stripped the wife of her personal property, transferred to the husband the income of her real estate, vested in him the right to her earnings, denied to her the power of contracting, and merged her legal entity into his; and to compensate her for these disabilities, it absolved her from nearly every legal obligation and duty, including that of maintaining her children. Nor had she any legal control over them or right to their services. Even her widowhood did not restore this control or right, and this harsh doctrine was at one time recognized and applied by courts of deservedly high authority in this country. Thus, as late as 1812, it was held in *Com.* v. *Murray*, 4 Binn. 487, 5 Am. Dec. 412, in respect of a widowed mother, that "an infant owes reverence and respect to his mother, but she has no legal authority over him, nor any legal right to his services."

Within the last half century, however, the harsh rules of the common law respecting the property and domestic rights of married women have gradually yielded to more enlightened and humane notions, and consequently they have been greatly modified and ameliorated. The modifications and ameliorations which affect her property rights are chiefly the result of legislation, but those affecting her domestic relations are as much due to those enlightened views, which led to a more humane application of the rules of common law to that relation, as to direct legislative action, and in many instances legislative action enlarging her property and personal rights has gradually led to the imposition of correlative duties, by the application of recognized principles of the common law.

The husband and father, while living with his family as its head, is entitled to the services of his minor children, and is liable for their reasonable support. Rev. Stat. §§ 3108–3110, 3113; *Sharp* v. *Cropsey*, 11 Barb. 224.

Where, however, the husband is dead, the modern and better rule is that the mother is the head of the family and entitled to the earnings and obedience of her minor children. *Harford County Comrs.* v. *Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *State* v. *Baltimore & O. R. Co.* 24 Md. 84, 87 Am. Dec. 600; *Kennedy* v. *New York C. & H. R. R. Co.* 35 Hun, 186; *Natchez, J. & C. R. Co.* v. *Cook*, 63 Miss. 38; *Ohio & M. R. Co.* v. *Tindall*, 13 Ind. 366, 74 Am. Dec. 259; *Furman* v. *Van Sise*, 56 N. Y. 435, 15 Am. Rep. 441; *Matthewson* v. *Perry*, 37 Conn. 435, 9 Am. Rep. 339; *Hammond* v. *Corbett*, 50 N. H. 501, 9 Am. Rep. 288; *Gray* v. *Durland*, 50 Barb. 100.

And whenever the mother is entitled to the obedience and services of her minor children, it would seem to follow, necessarily, that she should maintain them. Harsh and anomalous, indeed, a rule of law must be that would give the earnings and custody of a minor child to a parent who was under no reciprocal obligation of maintenance. The duty of maintenance by the mother is asserted by Schouler on Domestic Relations, § 293; *Mowbry* v. *Mowbry*, 64 Ill. 383. In *Dedham* v. *Natick*, 16 Mass. 140, the court says: "The mother, after the death of the father, remains the head of the family. She has the like control over the minor children, as he had when living. She is bound to support them, if of sufficient ability; and they cannot, by law, be separated from her."

The cases, indeed, are rare, where a mother, having the ability, has declined to administer to the wants of her minor child. The law of nature is usually strong enough to secure this, and an appeal to municipal law is therefore seldom necessary. But, if a widowed mother with ample possessions should decline to administer to the necessities of her destitute minor child, a rule of law that would allow this, and suffer her to abandon it to private or public charity, would be a reproach to any system of jurisprudence.

If she is not bound to maintain her child, then she should not be permitted to keep it in subjection to her authority, or receive the wages of its labor. The right to keep her minor children together under her roof, and to control their persons, implies the obligation to feed and clothe them; and the great weight of modern authority, as well as of reason, clothes her with those rights. It may be that the authorities do not speak with equal emphasis upon the question of her duty of support, as they do in reference to her right to the custody and services of her children, but this should be attributed to the want of an occasion, and not to the existence of any rule of law by which she can be vested with the control without the duty of maintaining her minor children.

Where a divorce *a vinculo* is decreed, the bonds of matrimony are dissolved, and the former husband and wife become as strangers to each other, and the former wife is relieved from all the disabilities and duties incident to coverture. If children were born of the marriage, the paternal relation remains, and the duties pertaining to it continue. The primary obligation of maintaining the children was on the husband and father, the foundation of this superior obligation rests upon the general fact that he is most capable of discharging it. His right, however, is to maintain his children in his own way and at his own fireside, where he can have the comfort of their society and the aid of their services. If, by his own misconduct the family relation is destroyed, and the welfare of the children renders it necessary that they should be placed in the custody of the mother, he has no just ground to complain if he is compelled to maintain them in her home. However, even under these circumstances, if the mother has an ample fortune, and the resources of the father are

comparatively limited, justice might require a modification of a rule founded upon the assumption of conditions which, in the particular case, did not exist.

And although the separation and divorce were caused by the misconduct of the mother, it may nevertheless be true that the obligation of the father to reasonably provide for his children will follow them into the custody of the delinquent mother, when circumstances require them to be placed in her custody. If, however, under such circumstances it does so follow them, the reason and limit of this obligation of the father should be found in the necessities of the children. As to them, the natural obligation of protection, nurture, and maintenance, press with equal force upon the parents. By the divorce *a vinculo* the mother is as completely absolved from the marital relation as she would be by death, and if, in the course of the proceedings which end in an absolute divorce, the minor children are put under her control, by her procurement or in response to her wishes, her direct obligation towards them, so long as she retains them, would seem to be founded upon as substantial considerations as if she were a widow. Their daily wants must be satisfied. Constant supervision may be necessary. Can their divorced mother, who has received them into her custody, abandon them in the one case and not in the other? We think not. By receiving them into her custody she should be held, as to them, to assume the obligations incident to that custody. If under these circumstances, where her own misconduct has destroyed the family relation, and deprived the father of the custody and society of his children, she has in fact maintained her children, she has no claim, legal or moral, to demand reimbursement from the father. She has simply discharged a duty cast upon her by the plainest principles of natural justice, for the reason that the necessity for it arose from her own misconduct.

Judgment reversed.

MISSOURI SUPREME COURT (In Banc).

Re ASSIGNED ESTATE OF EDWARDS & WIGGINTON.

GODDARD-PECK GROCERY CO., *Respt.*,
v.
John J. McCUNE, *Appt.*

(122 Mo. 426.)

1. The giving of firm paper for individual debts of the partners for money borrowed and contributed by them individually to the firm capital cannot be declared fraudulent merely because the firm was at the time insolvent, or was made so by the act of making the notes.

2. Individual debts of partners may, in the absence of fraud, be converted into firm debts which will share equally with other firm debts in case of dissolution, by an agreement between the partners to that effect and the execution of firm paper for them.

(June 4, 1894.)

NOTE.—*Assumption by a partnership of the individual debts of the partners.*

I. *The general rule.*
II. *The question of insolvency.*
III. *The question of fraud.*
IV. *Assumption held sufficient.*
V. *Insufficient assumption.*
VI. *By mortgage of firm property.*
VII. *By new firm of debts of old firm.*
VIII. *Assumption of debt originally incurred for firm benefit.*

The subject of this note is confined to the consideration of the assumption by a firm of the individual debts of one of its members considered purely in the abstract, and does not include that class of cases which determine the question *how far*, independent of any assumption, a firm is bound by the act or debt of a partner incurred by him individually, either for the firm benefit or not, or debts for which he may have given the firm's note or otherwise attempted to bind the firm, and in which the question of the authority of such partner and of the ratification of his act, as well as the question of notice, form essential elements.

Neither does the note cover that class of cases wherein a surviving or continuing partner has paid or preferred his own individual indebtedness to that of the firm, out of firm assets, inasmuch as such cases cannot strictly be said to come within the doctrine of assumption.

The question as to the rights of partners to deal with the individual debts of a partner, whether such debt was incurred for the firm benefit or not, in an assignment by the firm for the benefit of its creditors, will also form the subject of a separate note.

I. *The general rule.*

The general doctrine with respect to the assumption by a partnership of the individual debts of a partner, deducible from the decisions, would seem to be that, although a firm is not liable for the private debts of one of its members, nor is there any liability resting upon the other members in respect to such debts, yet a partnership, so long as it remains in a solvent position and its assets are under its control, and before it is brought within the jurisdiction of the court, may, with the assent of all the partners, rightfully assume the payment of the individual debts of one of its members, and may either sell, assign, or mortgage such property for that purpose, even though such assumption decreases the firm assets and is a detriment to the firm creditors, if the debts are bona fide, the transaction free from fraud and not made with the intent to defraud, hinder, or delay creditors, is supported by a sufficient consideration, and is for the benefit of the partnership beyond all controversy, since the creditors of the firm have no lien except such as they can work out through the partners, so that if such equity or lien is extinguished their rights are extinguished also, the partner's rights over the partnership property or assets existing as between themselves alone.

The following cases in order of states declare this doctrine: Pierce v. Pass, 1 Port. (Ala.) 232 (1834); Reynolds v. Johnson, 54 Ark. 449 (1891); Embry v. Lewis (Ark.) 18 S. W. Rep. 372 (1892); Sick-

See also 30 L. R. A. 604; 31 L. R. A. 470; 34 L. R. A. 604; 40 L. R. A. 297.

CASE certified by the St. Louis Court of Appeals for the opinion of the Supreme Court in an appeal by claimant from a judgment of the Circuit Court for Pike County disallowing a claim filed against the assets of the insolvent firm of Edwards & Wigginton, in the hands of an assignee for creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. **Fagg & Ball**, for appellant:

The execution of the note to McCune, and also the note to Calvin Wigginton, on the first of July, 1889, was in each case a "novation," and in the absence of any fraudulent intent stands upon the same footing exactly as if these two debts had been actually paid with money or property belonging to the firm.

Sexton v. *Anderson*, 95 Mo. 373.

Messrs. **J. D. Hostetter, E. W. Major, and Eben Richards**, for respondents:

Creditors of an insolvent partnership have an equitable right to, or a quasi lien upon, the assets of the firm as against creditors of the individual partners.

Dunnica v. *Clinkscales*, 78 Mo. 500; *Sexton* v. *Anderson*, 95 Mo. 373; *Phelps* v. *McNeely*, 66 Mo. 554, 27 Am. Rep. 378; *Hundley* v. *Farris*, 103 Mo. 78, 12 L. R. A. 254.

The making of these firm notes amounted to withdrawing firm property from firm creditors to the use of members of the firm, which can only be done when ample property is left to satisfy firm liabilities.

Goodbar v. *Cary*, 4 Woods, C. C. 663; *Wilson* v. *Robertson*, 21 N. Y. 587; *Menagh* v.

man v. Abernathy, 14 Colo. 174 (1889); Veal v. The Keely Co. 86 Ga. 120 (1890); Ellison v. Lucas, 87 Ga. 223 (1891); Ladd v. Griswold, 9 Ill. 25, 46 Am. Dec. 446 (1847); Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516 (1868); Keith v. Fink, 47 Ill. 272, 276 (1868); Young v. Clapp, 147 Ill. 176 (1893); Purple v. Farrington, 119 Ind. 164, 170, 4 L. R. A. 535 (1889); Dunham v. Hanna, 18 Ind. 270 (1862); Case v. Ellis, 4 Ind. App. 224 (1892); Winslow v. Wallace, 116 Ind. 317, 1 L. R. A. 179 (1888); Fisher v. Syfers, 109 Ind. 514, 517 (1887); Goudy v. Werbe, 117 Ind. 154, 165, 3 L. R. A. 114 (1889); Kistner v. Sindlinger, 33 Ind. 114, 117 (1870); Schaeffer v. Fithian, 17 Ind. 463, 468 (1861); Holland v. Fuller, 13 Ind. 195 (1859); Weyer v. Thornburgh, 15 Ind. 124 (1860); McDonald v. Beach, 2 Blackf. 55, 58 (1827); Frank v. Peters, 9 Ind. 343 (1857); Jewett v. Meech, 101 Ind. 259 (1885); Maquoketa v. Willey, 35 Iowa, 323, 330 (1872); George v. Wamsley, 64 Iowa, 175 (1884); Smith v. Smith, 87 Iowa, 93 (1893); Poole v. Seney, 66 Iowa, 502 (1885); Woodmansie v. Holcomb, 34 Kan. 35, 37 (1885); Jones v. Lusk, 2 Met. (Ky.) 356, 361 (1859); Hamilton v. Hodges, 30 La. Ann. 1290 (1878); Coakley v. Weil, 47 Md. 277 (1877); Sanderson v. Stockdale, 11 Md. 572, 573 (1857); Heineman v. Hart, 55 Mich. 64 (1884); Hanover Nat. Bank v. Klein, 64 Miss. 141 (1886); Schmidlapp v. Currie, 55 Miss. 597, 600, 30 Am. Rep. 530 (1878); Reyburn v. Mitchell, 106 Mo. 365, 378, 374, 375 (1891); Tilford v. Ramsey, 37 Mo. 563, 565 (1866); Noble v. Miley, 20 Mo. App. 360 (1886); Sexton v. Anderson, 95 Mo. 373, 381 (1888); National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13, 30 (1869); Menagh v. Whitwell, 52 N. Y. 146, 153, 11 Am. Rep. 683 (1873); Kirby v. Schoonmaker, 3 Barb. Ch. 46, 49 Am. Dec. 160 (1848); Wilson v. Robertson, 21 N. Y. 587 (1860); Heye v. Bolles, 33 How. Pr. 266, 2 Daly, 231 (1867); Bernheimer v. Rindskopf, 116 N. Y. 428, 438 (1889); Ransom v. Van Deventer, 41 Barb. 307 (1863); Smith v. Howard, 20 How. Pr. 121 (1859); Burtus v. Tisdall, 4 Barb. 571, 588 (1848); O'Neil v. Salmon, 25 How. Pr. 246, 251 (1863); Nordlinger v Anderson, 128 N. Y. 544, 548 (1890); Van Rossum v. Walker, 11 Barb. 237 (1851); Sigler v. Knox County Bank, 8 Ohio St. 511, 514 (1858); Miller v. Estill, 5 Ohio St. 508, 67 Am. Dec. 305 (1856); Wilcox v. Kellogg, 11 Ohio St. 394 (1842); Siegel v. Chidsey, 28 Pa. 279, 285, 70 Am. Dec. 124 (1857); Donnally v. Ryan, 41 Pa. 306, 310 (1862); Todd v. Lorah, 75 Pa. 155 (1874); Brooke v. Evans, 5 Watts, 200 (1836); Noble v. McClintock, 2 Watts & S. 152 (1841); Purdy v. Powers, 6 Pa. 491 (1847); Graeff v. Hitchman, 5 Watts, 454 (1836); Gallagher v. First Nat. Bank (Pa.) 5 Cent. Rep. 725, 728 (1886); Tanner v. Hall, 1 Pa. 417 (1845); Pepper v. Peck, 17 R. I. 55 (1890); Jones' Case, 1 Overt. 455 (1809); Carver Gin & Mach. Co. v. Brannon, 85 Tenn. 712 (1887); Tompkins v. Woodyard, 5 W. Va. 216, 220 (1872); Haben v. Harshaw, 49 Wis. 379 (1880); *Re* Kahley, 2 Biss. 383, 4 Nat. Bankr. Reg. 378, 379 (1870); Goodbar v. Cary, 16 Fed. Rep. 816, 4 Woods, C. C. 663 (1882); Coffin v. Day, 34 Fed. Rep. 657 (1888); Huiskamp v. Moline Wagon Co. 121 U. S. 310, 30 L. ed. 971 (1887); Case v. Beauregard, 99 U. S. 124, 25 L. ed. 371 (1879); *Re* Lane, 2 Low. Dec. 332, 10 Nat. Bankr. Reg. 135 (1874); *Re* Caton, 26 U. C. C. P. 308, 311 (1876); *Ex parte* Peele, 6 Ves. Jr. 601 (1802).

It would appear that the decisions have gone even further, and although not unanimous, the weight of authority would seem to be that mere insolvency, where no actual fraud intervenes, will not deprive the partners of their legal control over the property and their right to dispose of the same as they may choose, and that, where the separate creditors purchase from the firm in good faith, and the individual indebtedness is a fair price for the property purchased, such purchase cannot of itself be held fraudulent as against the general creditors of the firm. Ellison v. Lucas, 87 Ga. 223 (1891); Woodmansie v. Holcomb, 34 Kan. 35 (1885). And see Bernheimer v. Rindskopf, 116 N. Y. 428, 438 (1889), *infra*.

The power of partners to dispose of the firm property is unlimited, except as controlled by the statutes against voluntary conveyances in fraud of creditors and the bankrupt laws. Wiggins v. Blackshear (Tex.) 24 S. W. Rep. 918 (1893).

So that such a creditor will take the property discharged of any claim or equity of the partnership creditors. Hapgood v. Cornwell, 48 Ill. 64, 95 Am. Dec. 516 (1868).

This has been held to be so even though the firm may be unable to pay all the partnership debts. Ellison v. Lucas, 87 Ga. 223 (1891); Marks v. Hill, 15 Gratt. 400 (1859).

And though the firm is insolvent at the time it enters into the contract. Bernheimer v. Rindskopf, 116 N. Y. 428, 438 (1889).

If such contract is legal and there is no actual fraud, it is enforceable against the firm, and it cannot therefore be fraudulent if firm property is applied in its payment. *Ibid.*

But before a firm can be held responsible for the individual debts of a partner there must be proof of the authority, or of the adoption or ratification of such indebtedness. Tompkins v. Woodyard, 5 W. Va. 216, 229 (1872).

There must be assent upon the part of the other partners. Edwards v. Entwisle, 2 Mackey, 42, 61 (1882); Carter v. Beaman, 6 Jones, L. 44 (1858).

Knowledge alone, however, will not be sufficient to bind the other member or members of the firm, especially where the individual creditor is being regularly charged on the books of the firm and there is no assumption thereof upon the books by the individual partner. Todd v. Lorah, 75 Pa. 155 (1874).

The power of disposition over their property inherent in every partnership is as unlimited as that of an individual, and the *jus disponendi* in the firm

Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; *Keith* v. *Fink*, 47 Ill. 272; *Pritchett* v. *Pollock*, 62 Ala. 169.

Burgess, *J.*, delivered the opinion of the court:

This case was certified to this court from the St. Louis court of appeals for the reason that one of the judges of that court was of the opinion that the decision filed in that court was in conflict with the decision in the case of *Sexton* v. *Anderson*, 95 Mo. 373.

The opinion of the court of appeals is reported in 47 Mo. App. 307. The statement of Thompson, *J.*, of said court, is as follows:

"John McCune presented, for allowance against the assigned estate of the partnership firm of Edwards & Wigginton, a promissory note made by said firm on the first day of July, 1889, for $2,000, payable one day after date to his order, and bearing interest from date at the rate of 8 per cent per annum. Calvin Wigginton also presented a note of the same date and tenor, for the sum of $1,926. The assignee allowed both of these notes, and certain other creditors of the firm appealed to the circuit court. The circuit court disallowed the notes, and from its judgment disallowing the note in favor of McCune this appeal is prosecuted. The case was by consent of parties submitted to the court without a jury, and no declarations of law were asked or given.

It appeared in evidence that the partner-

all the members co-operating, can only be controlled by the same considerations that impose a liability upon the acts of an individual owner, namely, that it shall not be used for fraudulent purposes. Schmidlapp v. Currie, 55 Miss. 597, 600, 30 Am. Rep. 530 (1878).

The honesty of the transaction must be strictly proved; the valuable consideration and the benefit to the partnership must be shown. Keith v. Fink, 47 Ill. 272 (1868).

The individual indebtedness is a sufficient consideration to support the payment, and the creditor becomes vested with the money or property so appropriated to him. Coffin v. Day, 34 Fed. Rep. 687 (1888).

The fact that a creditor surrendered a demand note which he might have enforced at any time, and took in its place, with the consent of all the parties, the note of the firm not due until the end of the year, would, in the absence of a finding that the firm was, at the time of giving the new note, insolvent, or that the change was made for a fraudulent purpose, constitue a good consideration for the note of the firm. Nordlinger v. Anderson, 128 N. Y. 544, 548 (1890); National Bank v. Place, 86 N. Y. 444 (1881).

Money loaned to the partners individually, and by them put in the business as part of the capital, constitutes a valid consideration to support a judgment confessed by them, and therefore a sufficient assumption of the debt, the bona fides of the transaction being a question of fact for the jury. Rose v. Keystone Shoe Co. 18 W. N. C. 565, 568 (1886).

The assumption of the payment of the debt of a partner who had a peculiar experience in the business and who desired to retire upon consideration of his continuing in the firm, is upon a sufficient consideration. George v. Wamsley, 64 Iowa, 175 (1884).

In Turner v. Jaycox, 40 N. Y. 470 (1869), the firm, prior to its assignment, had, upon good consideration, agreed and assumed liability of the debt which originally was not a firm liability, and the court therefore distinguished it from the case of Schiele v. Healy, 10 Daly, 92 (1881), as in the latter case there was no assumption outside of the preference given by the firm assignment.

A bill given by the firm constitutes such a promise, and is an express undertaking on the part of the firm upon sufficient consideration to pay out of the partnership assets, and from such time the debt becomes a partnership one. Siegel v. Chidsey, 28 Pa. 279, 285, 70 Am. Dec. 124 (1857).

In the above case, however, the court did not consider the case as one of the application of partnership effects to the private debt of one partner of the firm, but as the honest and fair assumption by the firm of a debt created for its benefit. See this case, *infra*, head II.

But in Goodenow v. Jones, 75 Ill. 48 (1874), no action lay by the creditors of such partner against the firm, upon an agreement made by the partners *inter se*, to assume a contract made by one of them prior to the partnership, such creditor not being a party to the agreement, and for the further reason that before such creditor can sue thereon he must show a new consideration and a release of the original debtor.

So the burden is upon the creditor to prove that the firm assumed the responsibility or liability of the partner's debts. Farwell v. St. Paul Trust Co. 45 Minn. 495 (1891); Mauldin v. Branch Bank, 2 Ala. 502 (1841).

The promise of a firm to pay the debt may, however, be proved by parol evidence. Hamilton v. Hodges, 30 La. Ann. 1290 (1878).

Yet, upon an action to subject a firm to the individual debts of a partner, upon the ground that they had been assumed by the firm under written articles of partnership, it is not permissible for a surviving partner to testify to an alleged oral understanding between himself and his deceased partner that the firm's assumption of such debt was limited to a particular demand, the same being plainly in violation of the general principle of law that a written instrument cannot be varied by parol evidence, although the rule does not apply between the parties to the instrument and a stranger, such exception being so only when the latter asserts a right independent of, and not growing out of, the instrument, or when the right asserted does not originate in the relations established by the instrument. Spingarn v. Rosenfeld, 4 Misc. 523 (1893).

The rule that the separate debt of a partner cannot be paid out of the partnership estate until all the debts of the firm are discharged, does not apply until the partners cease to have a legal right to dispose of their property as they please, and is applicable only when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors, such principles operating, not only on the property remaining in the possession of the partners, but embracing all that has been fraudulently disposed of, not extending, however, to such as have been previously transferred in good faith. McDonald v. Beach, 2 Blackf. 55, 58 (1827); Schaeffer v. Fithian, 17 Ind. 463, 468 (1861); Holland v. Fuller, 13 Ind. 195 (1859); Weyer v. Thornburgh, 15 Ind. 124 (1860); Frank v. Peters, 9 Ind. 343 (1857).

As the equity of the firm creditors is a derivative one arising out of the principles of subrogation, entitling them to enforce the equities subsisting between the partners so long only as the right of any of the partners has not been waived. Purple v. Farrington, 119 Ind. 164, 170, 4 L. R. A. 585 (1889).

So the members of a firm may estop themselves, by their conduct, from claiming that an indebtedness to the firm has not been satisfied by payment

ship firm of Edwards & Wigginton was founded in March, 1889, and made an assignment for the benefit of its creditors in July, 1890. The business was a retail grocery store. The basis of the business was a stock in trade owned by the appellant, McCune, which McCune sold to Edwards, in 1887, for $2,600. When Edwards took Wigginton in as a partner, in March, 1889, the stock was invoiced at between $3,300 and $3,400. They were to be equal partners, and the arrangement was such that Wigginton purchased a half interest in the stock in trade and business for $1,626, and then each partner put into the business in cash the sum of $300. The indebtedness of Edwards to McCune was originally evidenced by three unsecured promissory notes, maturing respectively in six, twelve, and eighteen months from date. Edwards had borrowed other money of McCune, and had made such payments that, on the first of July, 1889, the indebtedness of Edwards to McCune stood at $2,000. The $1,926 that Wigginton put into the firm, as above stated, was entirely borrowed from his father, Calvin Wigginton. Of this, $900 was in a note, due one day after date and bearing interest at the rate of 1 per cent per annum; $500 was in a like note, and the rest not evidenced by any note. Thus it was that the interest of each partner consisted entirely of borrowed capital; that Edwards still owed this claimant, McCune, $2,000 for his interest in the partnership capital and business, and that Wigginton for his interest therein owed his father $1,926. We

of a debt due from one of the members. Noble v. Miley, 20 Mo. App. 360 (1886).

A subsequent expression by a partner that the money ought to be paid, and a suggestion as to the ways and means of raising the money for that purpose, are evidence that the debt of one partner has been assumed by the firm. Nichols v. English, 3 Brewst. (Pa.) 260 (1869).

The assumption of such debts may form the subject of a valid set-off against the firm claim, for, however foreign to the concerns of the partnership the subject of the account may be, if it is established that, by the consent of a partner, it is agreed to be paid out of the effects of the firm, or that the goods in the account sued upon were delivered by the assent of the partner, either express or implied, in either event such an account would be the subject of a set-off. Pierce v. Pass, 1 Port. (Ala.) 232 (1834).

Demands against individual members of a firm may be set off against demands of the firm, if the course of dealing of the firm in receiving such demands in payment is uniform, and so notorious that individuals dealing with them must be supposed to have had reference to it in their transactions with the firm. Everunghim v. Ensworth, 7 Wend. 326 (1831).

And if the agreement to set off a debt due to the firm against a debt due from one of the copartners is executed, an action cannot be maintained in the name of the firm for the debt, even if it has been fraudulently discharged by one of the copartners. Pepper v. Peck, 17 R. I. 55 (1890); Williams v. Brimhall, 13 Gray, 462 (1859); Homer v. Wood, 11 Cush. 62 (1853).

It has, however, been held that the individual debt of a partner ought not to be paid out of the property of the firm by the process of set-off. Pierce v. Pass, *supra*. See also, as to set-off, Churchill v. Bowman, 39 Vt. 518 (1869), *infra*, head IV.

That the disposition results in the payment of one bona fide debt to the exclusion of another creditor, whose demand is equally meritorious, is of no consequence. Winslow v. Wallace, 116 Ind. 317, 327, 1 L. R. A. 179 (1888).

No legal or equitable right of the joint creditors is violated thereby. Sigler v. Knox County Bank, 8 Ohio St. 511, 518 (1858).

Unless it appears that there is not enough partnership property to satisfy both the firm and individual creditors, copartnership creditors will not be heard to complain of the application of firm assets to the payment of the individual debts of the members of the concern. De Caussey v. Baily, 57 Tex. 665, 669 (1882); Rogers v. Nichols, 20 Tex. 726 (1858); Washburn v. Bank of Bellows Falls, 19 Vt. 278 (1847); Hubbard v. Curtis, 8 Iowa, 1, 74 Am. Dec. 289 (1859); Stout v. Fortner, 7 Iowa, 128 (1858); Griffith v. Buck, 13 Md. 102 (1859).

The power of a firm to so dispose of the property has been held not limited to cases wherein it is shown that their assets for the time being are insufficient to discharge their liabilities. Sigler v. Knox County Bank, *supra*.

For the reason that the question is merely one of power in the partners to dispose of and appropriate their joint assets. *Ibid.*

So a note given with the express assent of all the partners, and with the understanding that the loan, although an individual one, is made on the credit of the firm, becomes a partnership debt as effectually as if the money were applied to the purposes of the firm. Tilford v. Ramsey, 37 Mo. 563, 565 (1866).

And a note given in renewal thereof will bind the firm, the giving of the new note being but another mode of payment, the time gained thereby being to the advantage of the firm rather than to the private use and benefit of the individual partner. *Ibid.*

So the exchange by the separate creditor of one partner of some of such partner's notes for notes of the firm more than four months before the firm's bankruptcy will bind the firm creditors when not made in contemplation of bankruptcy. *Re* Lane, 2 Low. Dec. 333, 10 Nat. Bankr. Reg. 125 (1874).

In Hamilton v. Hodges, 30 La. Ann. 1290 (1878), the note purported to be signed by the firm, and also by one of the members. The executor of the deceased partner contended that the note was signed by the deceased's brother without his knowledge or consent, for an old indebtedness, accruing partly before and partly after the partnership, not inuring to the benefit of the partnership, the contracting of the indebtedness being unauthorized. The court held that ordinarily a partnership could not be held responsible for the individual debts of a partner merely by reason of an agreement between the partner and his creditor, where there was no authority shown, or the agreement was not ratified by the partner, or the partnership was not benefited by the transaction.

The books of the firm containing entries of such a transaction of the partners are evidence against the firm. Perry v. Butt, 14 Ga. 699, 708 (1854).

By such assumption the individual liability of a partner for the firm debts is not increased. Bogereau v. Gueringer, 14 La. Ann. 483 (1859).

Yet the courts have intimated a dissent from a doctrine which would prove that, when partnership assets are diverted to the payment of the separate debts of an individual partner by a concurrent act of all the partners, the partnership creditors are without remedy in law or in equity, although such doctrine has derived much support from the language of text-writers and in some

proceed on the view that what each partner had thus severally borrowed to purchase his interest in the business was an individual, and not a partnership, debt.

"The firm seems to have lost money almost from the start, and McCune, becoming uneasy, requested Edwards to take up the individual notes of Edwards, held by McCune with the note of the firm. At the same time Wigginton, Sr., thought that, if McCune was going to have firm paper for the individual note of Edwards, he, Wigginton, Sr., ought to have firm paper for what was due him from his son, as already stated. It was accordingly arranged between the partners and these individual creditors respectively, that the two creditors should have firm paper; and on the first day of July, 1889, the firm executed its note to McCune in settlement of the individual notes of Edwards, and also its note to Wigginton, Sr., in settlement of the individual debt of Wigginton, Jr., to him.

"The testimony leaves no room to doubt that this was done in contemplation of a possible suspension, and the avowed purpose of it was to put these individual creditors, in the event of a suspension, on an even footing with firm creditors. Edwards testified: 'It was this way: I had a great deal of sickness and had lost on grain I had bought, and McCune insisted on some plan of securing him. He was willing to aid us, tide over our difficulties, if in any way to make himself safe—to take joint note for the firm's note. I spoke to Wigginton, my partner,

cases of judges, but is in principle inconsistent with numerous cases. Nicholson v. Leavitt, 4 Sandf. 253, 306, 307 (1850).

The firm must be solvent and have sufficient property remaining to pay partnership debts. Clements v. Jessup, 36 N. J. Eq. 569, 572 (1883). But see Ellison v. Lucas, 87 Ga. 223 (1891).

And a proposition made by a partner trying to collect a firm debt, in the form of an agreement made by his copartner for payment of his individual debt, will not amount to an assumption of such debt or a ratification of such partner's act, unless accepted. Hurt v. Clarke, 56 Ala. 19, 28 Am. Rep. 751 (1876).

If a member of a firm borrows money on his own account and credit is given to him, the fact that the money is afterwards applied to the purposes of the firm will not render the firm liable, neither will a subsequent admission by one of the members, after dissolution, bind the others. National Bank of Commerce v. Meader, 40 Minn. 325 (1889).

Under the Pennsylvania Statute of March 21, 1836 (Pamphlet Laws, 143), in the case of a limited partnership, it is unlawful for a general partner to assume the debt created by a special partner for money which he pays into the firm as his contribution, such transaction being without consideration, against public policy, and contrary to the provisions of the statute. Coffin's App. 106 Pa. 280, 286 (1884).

And therefore in such cases judgments and executions issued upon notes so given by the partners will be void. *Ibid.*

When a firm claim is bona fide settled by payment of the individual debt of one of the partners, it operates as an accord and satisfaction of the claim of the firm, and is in substance the same as though the debtor paid his debt to the firm in money which the individual partner, with the consent of his partners, then drew out on his own account and applied to the payment of his own debt. Pepper v. Peck, 17 R. I. 55 (1890).

The question, whether or not a copartner has given his consent or authority to the application of partnership funds to the payment of the private debts of a partner, is for the jury. Johnson v. Crichton, 56 Md. 108, 118 (1881).

And the contract and the extent of it are a matter exclusively for the consideration of the jury. Noble v. M'Clintock, 2 Watts & S. 153 (1841).

The fact that other transactions of the same kind have been approved of by the objecting partner, that he knew of the contract and made no objection; that he indicated his approbation by words or actions and failed, within a reasonable time, to make known to the persons interested that the firm were not responsible,—are proper questions to go to the jury on the question of the assent on the part of the partner. Ferguson v. Shepherd, 1 Sneed, 254 (1853).

29 L. R. A.

II. *The question of insolvency.*

The validity of the transaction depends upon the question of the solvency or insolvency of the firm at the time of the assumption of such debt, no matter whether it be in the ordinary manner by agreement, by provision in a deed of assignment executed by the firm, or by any other means.

As a general rule, if the firm is insolvent the partnership property cannot be taken for the payment of the individual debt of a partner, to the exclusion of the firm creditors. Roop v. Herron, 15 Neb. 73 (1883); Caldwell v. Bloomington Mfg. Co. 17 Neb. 499 (1885); Walsh v. Kelly, 42 Barb. 98, 27 How. Pr. 359 (1864).

Such an appropriation will not relieve the property, while in the hands of the partners themselves, from the equitable priority of the liens of the joint creditors. Burtus v. Tisdall, 4 Barb. 571, 589, 591 (1848); Fuller Electrical Co. v. Lewis, 101 N. Y. 674 (1886).

The rule is that it is a fraud upon the firm creditors for an insolvent firm to apply firm property to the payment of the debts of any individual partner. Bernheimer v. Rindskopf, 116 N. Y. 428, 438 (1889); Goodbar v. Cary, 16 Fed. Rep. 316, 4 Woods, C. C. 663 (1883); Knauth v. Bassett, 34 Barb. 31, 35 (1861); Nordlinger v. Anderson, 123 N. Y. 544, 548 (1890); Saunders v. Reilly, 105 N. Y. 12, 18, 59 Am. Rep. 472 (1887); Ransom v. Van Deventer, 41 Barb. 307 (1863); Hurlbert v. Dean, 2 Keyes, 97 (1865); Kirby v. Schoonmaker, 3 Barb. Ch. 46, 49 Am. Dec. 160 (1848); Wilson v. Robertson, 21 N. Y. 587 (1860); Schiele v. Healy, 10 Daly, 93, 61 How. Pr. 73 (1881); O'Neil v. Salmon, 25 How. Pr. 246, 253 (1863).

And will avoid the transaction. *Re* Sauthoff & Olson, 16 Nat. Bankr. Reg. 181, 184 (1877).

A transfer of partnership property by a firm to an individual creditor in payment of an antecedent debt with a knowledge of such design will not enable such creditor to hold the property discharged from the equitable lien of the partnership creditors. Burtus v. Tisdall, 4 Barb. 571, 588, 591 (1848).

For insolvent partners must be considered as holding their joint property for the payment of their joint creditors, and a misappropriation thereof is deemed in fraud of the implied trust. *Ibid.*

It is in effect a gift from the firm to the partner, a reservation for the benefit of such partner or his creditors to the direct injury of the firm creditors. Wilson v. Robertson, 21 N. Y. 587 (1860).

An insolvent copartner, who is unable to pay the debts which the firm owes, is guilty of a fraud upon the joint creditors, if he authorizes his share of the property of the firm to be applied to the payment of a debt for which neither he nor his property is liable, at law or in equity. *Ibid.*; Kirby v. Schoonmaker, 3 Barb. Ch. 46, 49 Am. Dec. 160 (1848); Buchan v. Sumner, 2 Barb. Ch. 165, 47 Am. Dec. 305 (1847).

about it. He at the same time owed his father a like amount or very near it. He insisted that he would want to secure his father as well as John McCune; so we mutually agreed to give them the firm's note for the amount of each claim. Both of these notes were given at the same time.' Further on Edwards testified: 'We gave a firm note so that, in case of death or failure, they should share and fare like other creditors.' On the same point the other partner, Wigginton, testifies: 'We saw the business was losing money—saw no prospect of times getting better, owing to competition on each side of us, and we did not care to favor one person and not others. We wanted to treat everybody alike.' When the firm failed some six months later, its liabilities, including these notes, footed up to about $5,600; its assets were inventoried at $3,149.95; but the assignee realized only the sum of $770 from the sale of the entire stock of goods under order of the court at public auction, and had succeeded in collecting only $70 of the $626 due the firm from its customers. Of these liabilities about $1,500 were due to merchants from whom it had bought goods."

1. No principle of law is better settled than that, in the administration of an insolvent partnership estate, the assets of the firm must be applied to the satisfaction of the firm creditors to the exclusion of the creditors of the individual partners. *Hundley* v. *Farris*, 103 Mo. 78, 12 L. R. A. 254; *First Nat. Bank* v. *Brenneisen*, 97 Mo. 148, and cases cited in each.

It makes no difference whether the sale of the whole of the effects of an insolvent copartnership upon credit, or the application of the partnership effects to the payment of the individual debts of a partner, is accomplished by the creation of a trust or by a direct sale to the purchaser, the effect in both cases being the same, namely to hinder and delay the creditors, that which would be fraudulent in the one form being equally so in the other. Buhl v. Phillips, 2 Daly, 45, 49 (1866).

As a partnership has no greater right to use its property to secure debts not its own, when it is insolvent or when such payment or giving such security will leave it insolvent, or hinder or delay existing creditors, than an individual has of his own separate property. Wiggins v. Blackabear (Tex.) 24 S. W. Rep. 918 (1893); Wilson v. Robertson, *supra*; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 668 (1873).

The equity of the firm creditors cannot be defeated by an attempted conversion of the assets of the firm into the individual assets of one of the partners through a transfer by one partner of his interest therein to the other; in either case they will remain as much the firm creditors' assets, which can be followed and taken in execution by firm creditors until they fall into the hands of a bona fide purchaser. Bulger v. Rose, 119 N. Y. 459, 465 (1890), affirming 53 Hun, 289 (1889).

But where the debts are fully due by the partners individually, the mere preference of individual debts over partnership debts is not such a fraud upon the latter as equity will relieve against, where the firm is not insolvent, or the act is not done in contemplation of insolvency in order to give an improper preference. National Bank of the Metropolis v. Sprague, 20 N. J. Eq. 13, 20 (1869).

In Snyder v. Lunsford, 9 W. Va. 223, 228 (1876), it was said to be doubtful whether, the partnership being insolvent at the time of the disposition, and each of the partners members of the firm, and such fact being known to the creditor of the individual partner, the disposition of such property made with the consent of all the partners in satisfaction of a debt of one of the partners would be held valid against the partnership creditors.

The purchase by a creditor of the firm and of one individual partner, with the consent of the other partners, bona fide and at a fair price, of property to the amount of such joint and separate indebtedness, is not *per se* fraudulent as against the firm creditors, even though such purchaser has knowledge of the insolvency of the firm, in the popular sense of the term. Sigler v. Knox County Bank, 8 Ohio St. 511, 516 (1858).

It has been held, however, that mere insolvency as commonly understood, no fraud in fact intervening, will not deprive the partners of their legal control over the property and their right to sell and dispose of it as to them shall seem just and proper. *Ibid.*

And this is so so long as they have a reasonable expectation of extricating themselves. McKinney v. Rosenband, 23 Fed. Rep. 785 (1885).

And where the separate creditors purchase from the firm in good faith, and the individual indebtedness is a fair price for the property purchased, such purchase cannot, of itself, be held fraudulent as against the general creditors of the firm. Pepper v. Peck, 17 R. I. 55 (1890); Woodmansie v. Holcomb, 34 Kan. 35, 37 (1885).

If it only appears that a partnership is embarrassed, that fact alone will not be sufficient to avoid a conveyance of partnership property made by such firm to secure a particular indebtedness. Day v. Wetherby, 29 Wis. 363 (1872).

Simple insolvency without stoppage of payment, without an assignment or any judicial process, does not work a dissolution of the partnership nor devest the partners of their dominion over the partnership property; and although they may not make a fraudulent disposition of it, they may confess judgments to a bona fide creditor, even though it may have the effect of giving him a preference over other creditors. Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124, 127 (1857), in which case the debt assumed was originally that of one partner.

A rule which would hold that the power of the partners over their joint property is to cease whenever it can be shown that the assets for the time being are insufficient to discharge their liabilities, would be productive of inconvenience, injustice, and uncertainty. The true rule is that the power of partners to make such disposition should cease upon the issuing of a commission of insolvency, but not from the mere inability at the time to pay their debts, the simple fact that a man may be insolvent in the particular sense of the word not depriving him of the power of selling his property by a bona fide sale. Sigler v. Knox County Bank, 8 Ohio St. 511, 516 (1858).

Therefore when an act of bankruptcy has been committed or a commission of insolvency has issued against the firm, the partners by force of the statute are devested of all power in and control over the joint assets, and cannot then make any valid sale or appropriation of the joint property, which must thereafter be marshaled on the ordinary rules in equity, and in such a case an appropriation of the property in payment of the private debts of a partner will be void. Sigler v. Knox County Bank, 8 Ohio St. 511, 518 (1858).

After an act of bankruptcy partners cannot pledge their effects to the payment of a debt of one of their members. So stated in Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124 (1857), although the point was not made in that case.

If an individual creditor of one of the members

The principle we think equally well settled by the more recent decisions of this court, as well as by the weight of judicial authority in other jurisdictions, that the assets of an insolvent firm, before dissolution, may, with the consent of all the partners, be applied to the satisfaction of all the individual debts of the members of the firm, when done in good faith. *Sexton* v. *Anderson*, 95 Mo. 380; *Reyburn* v. *Mitchell*, 106 Mo. 365, and cases cited in each; *Seger's Sons* v. *Thomas Bros.* 107 Mo. 635.

As *Phelps* v. *McNeely*, 66 Mo. 555, 27 Am. Rep. 378, is in conflict with the cases last cited, and the great weight of authority, it should not be followed and is overruled. *Jones* v. *Lusk*, 2 Met. (Ky.) 356; *George* v. *Wamsley*, 64 Iowa, 175; *Schaeffer* v. *Fithian*, 17 Ind. 463; *Kirby* v. *Schoonmaker*, 3 Barb. Ch. 46, 49 Am. Dec. 160; *Kennedy* v. *National Union Bank*, 23 Hun, 494; *Re Kahley*, 2 Biss. 383; *Warren* v. *Farmer*, 100 Ind. 593; *Trentman* v. *Swarteell*, 85 Ind. 443; *Case* v. *Beauregard*, 99 U. S. 119, 25 L. ed. 370; *Purple* v. *Farrington*, 119 Ind. 164, 4 L. R. A. 535; *Pepper* v. *Peck*, 17 R. I. 55; *Anderson* v. *Norton*, 15 Lea, 14, 54 Am. Rep. 400; *Huiskamp* v. *Moline Wagon Co.* 121 U. S. 310, 30 L. ed. 971; *Coffin* v. *Day*, 34 Fed. Rep. 687.

In the case at bar the firm notes were given in satisfaction of individual debts long prior to the dissolution of the partnership, and that transaction cannot be declared fraudulent at

of an insolvent firm, knowing of the insolvency, takes a transfer of firm property in payment of his individual debt, his act is not merely a violation of an equitable right of the firm creditors, but it constitutes a fraud under the statute of Elisabeth, the law regarding it as a voluntary transfer made to hinder, delay, defeat, and defraud firm creditors, and therefore void. Bulger v. Ross, 119 N. Y. 459, 465 (1890), affirming 53 Hun, 289 (1889); Wilson v. Robertson, 21 N. Y. 587 (1860); Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683 (1873), and *Ex parte* Mayou, 4 DeG. J. & S. 664 (1865).

The right to the priority in such cases is as it should be, for the benefit of the partnership creditors, and cannot be impaired by any consideration having reference to the interest of the partners or their individual creditors. Burtus v. Tisdall, 4 Barb. 571, 590, 591 (1848).

The purchase from a partnership firm insolvent at the time, partly paid for by canceling an individual debt of one of the partners, diverts the firm property to the payment of the personal debt of such partner, and is an actual fraud upon the creditors of the firm who have the legal right to demand the appropriations of all the firm property to the payment of the firm debts. Patterson v. Seaton, 70 Iowa, 602, 602 (1886).

So in Cron v. Cron's Estate, 56 Mich. 8 (1885), a mortgage by partners to secure individual debts, the partners becoming insolvent directly afterwards, was held not to make the mortgagee a secured creditor over the partnership creditors.

In Cribb v. Morse, 77 Wis. 322 (1890), money was loaned to a partner, a note being taken as security therefor, and also for other moneys previously owing by the firm, a mortgage on the firm property being also taken as further security, the notes and mortgage being signed by the partners individually. The court held that the mortgagee, knowing of the insolvency of the firm at the time, the money being loaned to the one partner for payment of his individual debt, had no claim as against the firm creditors for the money loaned to such partner for his individual purposes.

In Phillips v. Ames, 5 Allen, 183 (1862), the notes upon which the plaintiffs sought to prove against the joint estate of the partnership were originally the private debt of two of the members of the firm, and were not indorsed in the firm name until after it had become insolvent, its condition being known to the plaintiff and to all the copartners, no debt existing from the firm to the plaintiff as a consideration for such indorsement, and there was no condition except a previous agreement with the plaintiff and by one of the members of the firm that the payment of the notes should be guaranteed by the copartnership. The court held that under these circumstances it was not competent for the members of the firm to bind their assets to the payment of the separate debts of the copartners, the contract of the firm having been made when they were insolvent and when the state of affairs was fully known to the partners, the presumption being that it was made in contemplation of insolvency and of a proceeding by which the assets of the firm passed into the hands of the assignees.

In *Ex parte* Snowball, *Re* Douglas, L. R. 7 Ch. 534, 41 L. J. Bankr. 49, 26 L. T. N. S. 894, 20 Week. Rep. 786 (1872), a partner gave a power of attorney authorizing the sale of property including a portion of the partnership property. A mortgage deed was executed later, which, after reciting that the partners were indebted to the mortgagee, conveyed nearly the whole of the partnership assets to him as security for the moneys owing, a bill of sale being given at the same time by one partner, assumedly with the concurrence of the other, over the portion of the partnership property so previously assigned by the one partner subject to incumbrances, the deeds being signed by one partner and by the attorney for the other. Upon the bankruptcy of the partnership, the court held that the mortgage was wholly void as against a trustee in bankruptcy, as the partner knew that the firm was insolvent and attempted to make the partnership property a security for the separate debts of the partners, which was a fraud on the part of the creditors of the partnership, and an act of bankruptcy.

III. *The question of fraud.*

Whether or not the assumption of an individual debt of a partner, either by way of assignment or otherwise, by the firm is a fraud upon the partnership creditors, would not seem to be unanimously settled. It has been held, however, that whether the transaction is or is not fraudulent is a question of fact to be determined according to the circumstances of each particular case. Fisher v. Syfers, 109 Ind. 514, 517 (1887).

In some jurisdictions the appropriation of firm property to such a purpose has been held fraudulent, as, for instance, in New York.

The appropriation, by way of assignment, of firm property to pay the individual debts of the partners, is regarded as fraudulent against the firm creditors, inasmuch as the firm does not owe the individual debts. Becker v. Leonard, 43 Hun, 221, 224 (1886); Wilson v. Robertson, 21 N. Y. 587 (1860).

Yet it has been stated in that state that fraud cannot be presumed but must be proven, and if there is room left for the inference of an honest intention, the proof of fraud is wanting. Bernheimer v. Rindskopf, 116 N. Y. 428, 438 (1889).

In Ferson v. Monroe, 21 N. H. 462 (1850), it was held that the sale of a stock in trade by partners for the purpose of paying the separate debt of one partner was void as against the creditors of the firm, even though such debt were contracted by such partner for firm purposes.

law on the ground simply that the firm was at the time insolvent or was made so by the act of making these notes.

2. If the partners composing the firm of Edwards & Wigginton had by agreement, in good faith, mortgaged or assigned all the assets of the firm, for the purpose of securing or paying the debts owing by them individually to McCune and Wigginton, respectively, though with the intention of giving them a preference over the firm creditors, the transaction could not be impeached. If, on the other hand, they had given these individual creditors a mortgage on the firm property and to secure their individual debts, with the understanding that they should continue in possession of the property and sell and dispose of it in the usual course of business, the mortgage would have been fraudulent and void as to the other creditors.

The object in giving these notes in the name of the firm to McCune and Wigginton was, not to give them a preference over the partnership creditors, but was to put them all on an equal footing so that they might share alike in the distribution of the firm's assets in case of the firm's assignment. So long as a firm exists it has the same right to dispose of the firm assets that an individual has of his own property, providing always that such disposition is bona fide; but if no lien has been created by it on its firm assets, and the firm assigns, as in the case at bar, then the firm creditors must be first paid. That the debts of McCune and Wigginton, when first created, were the individual debts

The burden of showing that an assignment made by a firm for the benefit of firm creditors, which contains a preference for the debt of an individual creditor of one of the partners, is fraudulent either in fact or in law, is upon the plaintiff. Nordlinger v. Anderson, 123 N. Y. 544, 548 (1890).

It has been held that it may be shown in rebuttal of an inference of fraudulent intention arising from provisions for the payment of individual debts, that there were in fact no such debts or individual assets to be affected by such provision. Crook v. Rindskopf, 105 N. Y. 476, 483 (1887); Turner v. Jaycox, 40 N. Y. 470 (1869); Bogert v. Haight, 9 Paige, 297 (1841).

In Weed v. Richardson, 2 Dev. & B. L. 535 (1837), it was held that the security of the firm taken for the payment of a separate debt of a partner was void, where it was not shown that the other partners assented, the same being prima facie fraudulent. Cotton v. Evans, 1 Dev. & B. Eq. 284 (1835), followed.

On the other hand, it has been held that the mere application of partnership property to the payment of the individual debts of the several partners is not of itself a fraud upon the rights of the firm creditors. Jones v. Lusk, 2 Met (Ky.) 356, 361 (1859).

And if the assumption of a private debt by a firm is not a fraud on the firm, it is not a fraud against the creditors of the firm. Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124 (1857).

But a fraudulent collusion, either by partners or individuals, with others for the purpose of cheating or hindering creditors in the collection of their debts, will give the creditors a right to the aid of a court of equity. Jones v. Lusk, *supra*.

IV. *Assumption held sufficient.*

In the following cases the acts of the firm have been held sufficient to amount to a legal assumption of the individual debts of a partner binding upon the firm:

A memorandum signed by a partner to the effect that money borrowed by a partner, and therefore his individual debt, was in fact borrowed for the firm and used by it, is competent evidence to charge the firm in an action upon a note given by such partner therefor. Anderson v. Norton, 15 Lea, 14, 54 Am. Rep. 400 (1885).

Although the item may not be a proper credit against the firm, being the individual liability of one partner, yet the firm may assume it by entering a credit for it in their account, and will be barred from afterwards denying it as a fair credit. Dishon v. Schorr, 19 Ill. 59, 62 (1857).

In Day v. Wetherby, 29 Wis. 363 (1872), upon the dissolution of a firm and the formation of a new partnership, a conveyance of the real estate to secure the debts of the old firm, made bona fide and comprising chiefly property owned by the old firm, was held valid as against the new firm's creditors.

A sufficient assumption may exist where a partner with the consent of his copartner makes a valid arrangement with his individual creditor that a debt due to such creditor by the partner shall be paid by deducting it as a payment from a debt owing by such partner to him. Bates v. Halliday, 3 Ind. 159, 163 (1851).

In Whitney v. Dean, 5 N. H. 249 (1830), assumpsit was brought on a note signed by the principals in their partnership name, the evidence showing that one of the partners, with the consent of the others, delivered goods to be applied in payment of such note without any fraudulent intention, and for the purpose of securing the debt of an individual partner. It was held, upon the subsequent failure of the firm, that the holder of such goods could not be held a trustee for the firm, and that the transaction was not void.

So in Marks v. Hill, 15 Gratt. 400 (1859), a partner borrowed the money to be placed by him in the firm, giving his own note as security, the other partner also borrowing but giving the firm note for the amount, with the consent of the other partner. It was held upon their failure, there being an understanding between them that both notes should be paid out of partnership funds, the assets being conveyed to secure all debts, that the agreement was valid as against partnership creditors.

And in a case in which a firm was charged with the private indebtedness of one of the partners, the partners being informed of such charge and making no dissent therefrom, the partner so indebted subsequently delivered firm property to the creditor in payment, with the knowledge of the partners. The court held in an action brought by the firm against the creditor to recover such property, that the creditor was entitled to an allowance for the charges made by him against the firm. Miller v. Dow, 17 Vt. 235 (1845).

In *Re* Kahley, 4 Nat. Bankr. Reg. 378, 379 (1874), the creditors insisted that the mortgage was void as against partnership creditors because the notes or the debts which it was given to secure were individual debts of the respective partners, and not properly a partnership demand. The court held the mortgage good as against the partnership property, relying on Kirby v. Schoonmaker, 3 Barb Ch. 46, 49 Am. Dec. 160 (1848).

So where the debt was originally incurred by the partner for the use of the firm, the court did not look upon the debt as a private one, but as the fair assumption by the firm of a debt created for their benefit which in equity they were bound to pay. Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124 (1857).

And where the defendant in business on his own

of the members of the firm of McCune and Wigginton seems clear. "Where there is a separate loan of money to one of several joint adventurers for the purpose of founding a partnership or joint adventure, the firm, when formed, will not be liable for the advance, for the case is not distinguishable from one where several persons are to contribute their separate proportions of money towards a common fund for joint purposes, and each is to borrow, and does borrow, his own share upon his own separate account and credit. In short, in all cases of this sort, in order to bind the firm, the intended partner must either have had an original authority to purchase goods, or borrow money upon the joint account, and have exercised that authority by a purchase or loan on their account, and not on his own exclusive credit, or the transaction must have been subsequently ratified and adopted by the firm, as one for which they were originally liable, or for which they now elect to give their joint security. "Story, Partn. 7th ed. § 148. See also *Donnally* v. *Ryan*, 41 Pa. 306; *Wild* v. *Erath*, 27 La. Ann. 171.

The doctrine that firm assets must be first applied to the payment of the firm's debts is a principle of administration adopted by the courts when, from any cause, they are called upon to wind up the firm business, and find that the members have made no disposition or charge upon its assets. This is accomplished by marshaling the assets,—by applying the partnership property to the partnership debts. The right of the firm creditors "is worked out through the partners," the meaning of which is that they may demand

account took in a partner, and assigned the business assets to the firm, which assumed and agreed to pay certain specified debts, the court held that the promise of the firm to pay such claims was to be deemed as made for its benefit, the partnership having assumed and taken possession of the assets. Arnold v. Nichols, 64 N. Y. 119 (1876).

In the above case the assignment was not looked upon as made to exonerate the original debtor from payment of his debts, nor as being primarily or directly for his benefit, as his property was to be taken to pay the debts, and he still remained liable as one of the principals.

Again, where each partner contributed to the capital of the firm at the time of its formation the stock of goods he then had, on which amounts were owing, and the goods were so transferred, the firm assuming and agreeing to pay the balance, the agreement of the firm was held for the benefit of the creditors holding such claim, who could maintain an action against the firm thereon. Hannigan v. Allen, 127 N. Y. 639, 642 (1891).

Where one member of a firm purchases goods or borrows money for the firm on his own credit, giving surety for the payment of the money or for the goods, and such money or goods go into, and are used by, the firm, and the surety has to pay as such, the firm may convey the goods of the firm to such surety in satisfaction of the money thus paid, so that an existing creditor of the firm cannot set aside such conveyance merely because he was such at the time. Gwin v. Selby, 5 Ohio St. 96, 101 (1855).

In *Ex parte* Jackson, 1 Ves. Jr. 131 (1790), a person in trade, indebted upon a bond, took into partnership a nominal partner, and two years afterwards the partnership failed and the separate debt of the partner was permitted to be proved upon joint estate, there being nothing to show that it had been assumed by the firm. The court stated that if the firm had in any way considered the debt as a joint debt, it would so assume it to be, and that if a man having debts took another into partnership with him, very little matter respecting those debts would make them both liable.

So in Bremen Sav. Bank v. Branch-Crookes Saw Co., 104 Mo. 425 (1891), in a suit brought upon a note signed by the defendants as makers and by their president as indorser, the defense was that it was used by the president for his own accommodation in payment for an individual debt, and was without consideration so far as the corporation was concerned, of which facts the plaintiff had knowledge. The court held that if the defendants' conduct induced the plaintiff to believe bona fide that the company had assumed to pay the debt, the defendants were liable even though no such assumption existed.

In Haben v. Harshaw, 49 Wis. 279 (1880), the facts showed that a husband and wife, together with the latter's father, carried on business together, the father furnishing part of the capital, but doing no business personally, merely living, with his wife, with his daughter and son-in-law, paying no board, no accounts being kept between them; the daughter, the wife of the son-in-law, owning separate estate consisting of the store over which they lived and where the goods were kept and sold, all receiving joint support out of the business. The debt in question was incurred for store and family expenses and for the use of the general business. The court held the chattel mortgage of the firm for the debts incurred in such store and for family expenses was a firm indebtedness.

Where a firm at its commencement assumed as partnership debts certain individual liabilities of the partners, and the assets exceeded the indebtedness assumed, and no losses occurred up to the time of one partner's decease, but the surviving partner having possession of the property continued the business until his death at a loss, his executors afterwards having control, it was held that the whole estate put into the firm constituted firm assets, and that the individual creditors of the partner first deceased, payment of whose debts had been assumed by the partnership, had preference over those of the surviving partner or his estate. Killefer v. McLain, 70 Mich. 508 (1888).

In Young v. Clapp, 147 Ill. 176 (1893), a loan was made, as the lender supposed, to a solvent firm, a note signed in the firm name being received as security, but the money was used by the partner for his own private purposes and not for the benefit of the firm; subsequently a new note of the firm was given, and later a judgment note was executed. The evidence showed that the lender knew nothing about the use of the money by such partner, and regarded the partners as his debtors, and that the other partner at no time objected to the assumption of the debt by the firm, although spoken to about it at the time of the renewal of the note. The court held the firm liable, as it had power to part with the right to have the firm property applied to the payment of partnership liabilities.

In Embry v. Lewis (Ark.) 18 S. W. Rep. 372 (1892), suit was brought in equity to enforce a mortgage lien on partnership property, the facts showing a purchase of property subsequently converted into partnership estate, but not paid for, although the purchaser promised to pay for it out of his share of the partnership effects, such promise being subsequently made known to the firm, who charged the debt upon the partnership books as a partnership liability, and included it in an account of the firm liabilities. The court held the debt was assumed by the partnership, and was further corroborated by a statement made by the partners be-

the primary application of the firm assets to the payment of their debts. *Schmidlapp* v. *Currie*, 55 Miss. 597, 30 Am. Rep. 530. As the right of the firm "is worked out through the partners," it necessarily follows that whatever the firm, with the consent of all its members, does in good faith with the partnership property, is binding upon them. If, then, the firm had the right to assume, by and with the consent of both of

fore the giving of a mortgage to the creditor, that neither of the partners could use any of the receipts of the partnership in payment of his individual debts, because the receipts were to be paid on that particular debt until it was satisfied.

Where the note given by one partner in the name of the firm, indorsed for accommodation to the plaintiff by the payee, was drawn and given in renewal of another like note executed by the plaintiff and signed in the name of the firm by the other partner, for money received by the first partner for his own individual use, unconnected with the partnership business, plaintiff's agent refusing to lend directly to the individual partner and requiring the partnership note, the partners understanding that the money was borrowed for the benefit of the individual partner, it was held that in such a case the loan was to be considered as made to the firm, and not to the individual partner, the fact that the money was allowed to go to the individual partner's own private use being a matter solely between the partners. Tilford v. Ramsey, 37 Mo. 563, 565 (1866).

In Veal v. Keely Co., 86 Ga. 130 (1890), a partner borrowed money to put in as part of his share of the capital stock. The other partner having drawn from the assets an amount in excess of his share, upon the first partner proposing to draw out sufficient money to repay the money so borrowed it was agreed to allow the money to remain in the business, the firm executing a mortgage and giving notes to secure its payment. It was held that such act was valid, especially when it appeared that the individual debt had been made, by agreement between the partners, a partnership one, the rule preferring partnership property for the payment of partnership debts being for the benefit of the partners who had a right to waive it.

In Weaver v. White, 46 N. Y. S. R. 467 (1892), the plaintiff, a father, indorsed a note for the purpose of establishing his son in business, and also other notes in connection therewith. The son subsequently took in a partner, no cash, strictly speaking, being contributed by either, but the articles provided that the parties should take all the accounts, debts, and liabilities remaining unsettled and contracted by the party, carrying on such business and incurred for the benefit thereof. The firm later executed a note for partnership purposes, also indorsed by plaintiff, and all the notes were subsequently renewed. The firm, becoming embarrassed, executed a bill of sale to plaintiff to secure all moneys advanced. The court held that the notes given by the firm, or in renewal thereof, or assumed by it, were valid obligations against the partnership, and that, the merchandise in hand at the time of the partnership being liable for the firm debts, there was nothing inequitable, as against subsequent firm creditors, in making such debts obligations of a new firm which took over the merchandise for the purchase of which the debts were contracted, the assumption of the two notes and the execution of the other being for the purpose of procuring firm property with which to transact business, the consideration being ample.

Where, in answer to an action on a promissory note payable to a partnership firm, the defense was, that prior to and at the time of the giving of the note the defendant did work for one of the partners, and from time to time took up goods at their store, under an agreement that the work he did for such partner, as well as that which he did for the firm, should be charged on the store books to the defendant, and that he at the same time was to charge the partners for the work he did for them, but was ultimately, when the account was settled, to be entitled to set off the work that he did, whether for such partner or for the firm, against the amount he owed the firm,—the court held that such an agreement, if made, was binding upon the partners, and that parol evidence was admissible in proof thereof, it being clearly competent for a payee while holding the note to make a binding and operative agreement that it should be satisfied by the work done for one of the partners, and that, if such an agreement were made by one partner and assented to by the other, it became operative as the agreement of both partners. Camp v. Page, 42 Vt. 739 (1870).

So in a somewhat peculiar case in which the facts did not disclose a case in which the partners themselves could be said to have any lien upon the partnership funds for the payment of the partnership debts in priority to the individual debts, the transaction not being a partnership, but rather a universal hotchpot of all present and prospective property, both real and personal effects, except furniture and apparel, being thrown into the common stock with the liabilities of the partners, no provision being made as to future acquisitions or future liabilities,—the court held that the fact that each had devested himself of all present possessions and become bound to apply himself faithfully and diligently to the management of the partnership concern, left little ground to suppose that the parties could have expected any such thing as individual liabilities or property, and that the parties themselves, contemplating a community of goods and of all other interests, became, strictly speaking, tenants in common with respect to present and future possessions, and that it would be unjust to give joint creditors any preference over separate creditors in such a community of goods, the partners keeping no accounts, each purchasing for his individual benefit and paying his individual debts with the common property with the acquiescence of the other. Rice v. Barnard, 20 Vt. 479, 50 Am. Dec. 54 (1848).

And where, in answer to an action for goods sold and delivered, defendants admitted the sale, but alleged as special matter of defense that at the time of the sale and delivery to the defendants one of the plaintiffs was indebted to defendants in the sum then claimed, in respect of articles manufactured by the defendants for such plaintiff, and that the plaintiffs before action agreed to deduct such sum from the amount due the plaintiffs for the goods sold, and that they received of defendants a certain sum in full payment of the goods, which was the balance due, deducting the claim against such one plaintiff; the special defense further alleging that the defendants at the time of payment agreed to pay the plaintiffs the sum so deducted in case they, the plaintiffs, or the one indebted to the defendants, should bring an order from a third party to the defendants directing them to charge the said articles to such third party, otherwise the settlement was complete and final; and further averred that neither the plaintiffs nor the one of them so indebted presented to defendants any such order,—the court held plaintiff not entitled to recover, and that it was competent for the plaintiffs to accept the sum so owing from such one of them to defendants in part payment of their claim. Churchill v. Bowman, 39 Vt. 518 (1867).

In another case the plaintiff had done work for the defendant, and had taken payment in goods

its members, the individual debts due by them respectively to McCune and Wigginton, when this was done and they gave the firm notes and thereby assumed their payment, they became firm debts and should share *pro rata* in the distribution of the proceeds arising from the sale of the partnership assets with the other firm creditors. This is said to be the conversion of debts, so that if they were separate debts of the respective partners

from his store, and afterwards plaintiff took in a partner, and it was mutually agreed that they should continue to do work for the defendant and be paid in the same way, and that the amounts so paid should be charged to the plaintiff's account when the settlement was made. The charge for the work done was entered upon plaintiff's books against the defendant and an account was rendered to him upon a certain date, at which time his bill against the plaintiff was larger than plaintiff's bill against him, the balance being paid by plaintiff in cash, and there was nothing to show whether the firm was at that time solvent or insolvent; no credit was entered on the books of the firm and at the time of the assignment the charge against the defendant appeared as an open account. The action was brought by the assignee of the firm, who claimed the right to a judgment against the defendant, notwithstanding the agreement and settlement, upon the ground that defendant could not apply the debt of an individual partner to the payment of a firm debt. The court held there was no ground of recovery, and that if the parties had a right to settle and did settle their respective claims as stated, the omission of the firm to enter the credit upon its books neither altered the fact nor affected the rights of the parties, and that the settlement so made barred the right of action on the account. Pepper v. Peck, 17 R. I. 55 (1890).

So where the debt, really incurred in the first instance for the use and benefit of the original firm on the credit of one partner, who gave his own note with a third party as surety, was assumed by a new firm under a stipulation that the new firm should assume all the debts and liabilities of the old one, including the note in question, which was entered upon the firm books as payable by them,—the court held it was competent for the persons composing the several successive partnerships to determine what debts they ought to and would undertake to pay, and that there was no presumption, when the payment of such note was made a condition and consideration upon the retirement of certain persons and the coming in of others, that such stipulation was avoided by mistake or fraud, inasmuch as the agreement was made between those constituting the outgoing and incoming members, and that therefore such agreement was founded upon a sufficient consideration out of which arose an assumption and the promise to pay the note in question. Case v. Ellis, 4 Ind. App. 224 (1892).

In Filley v. Phelps, 18 Conn. 294 (1847), parties entering into partnership gave their joint and several promissory notes for property purchased for the conducting of such business. One partner died and the business was continued by the survivors with the partnership capital without any adjustment of the partnership affairs until a later period, during which time two of the notes so given were paid from the partnership effects. The partnership, solvent at the time of the death of the partner, subsequently became insolvent. One of the partners administering to the estate of the deceased partner, under order of the court, sold one undivided third of the property to a third party for his own use and benefit, assuming at the same time the payment of that portion of the note which belonged to the deceased partner to pay, the administration accounts against the deceased partner's estate being subsequently settled. The partner purchasing the share of such deceased partner subsequently mortgaged his interest to certain other creditors to secure his individual debts, he being entirely insolvent, the other partner having no estate except his interest in the partnership property. It was held, upon a bill filed by the heirs of the deceased partner and the attaching creditors and mortgagees of the partner, that the facts given constituted a partnership debt which was dissolved by the death of the partner, and that the property having been purchased by the partner subject to the incumbrance of the notes, it was still liable for the payment thereof.

So a finding that the assignees were in equity trustees of the creditors of the firm, as to a certain portion of the joint assets purchased by them of the firm and paid for by the individual liability of one of the partners of the firm to such creditors, the facts of the case showing that the whole transaction was made with the knowledge and consent of all the partners without actual fraud, the object being only to secure the liabilities in question, the assignee, although apprehensive, having no knowledge that the firm was insolvent desiring a security, was not upheld, the assignees not being mere volunteers but sureties for the firm, the object being to secure themselves. Sigler v. Knox County Bank, 8 Ohio St. 511, 514 (1858).

In Flagg v. Upham, 10 Pick. 147 (1830), assumpsit was brought on the written promise of the defendant to guarantee the payment of a note purporting to be made by the firm of which the defendant was a partner, the note being originally given in the firm name without the knowledge of the defendant for the board of the maker's wife. The court held that, the defendant having knowledge of the consideration of the note at the time he guaranteed it, and supposing that he was liable upon it, his acknowledgments of his own liability and the express obligation to guarantee the payment created a waiver of any objection he might have to the note, and that therefore his guaranty was upon a good consideration and bound him.

In Assignment of Stewart & Aiman, 62 Iowa, 614 (1883), where the assignee's report was objected to on the ground that a portion of a claim paid by him was the individual indebtedness of one of the partners, and the evidence showed that the assignors borrowed the money, securing it by chattel mortgage at the time, giving notes signed by them individually and indorsed by a third person, and other notes signed by the firm, a portion of the money being applied in payment of the individual debt of a partner, with the other's assent, such partner being charged on the firm books, and it was shown that the mortgagees knew the purposes for which the money was to be used, but there was no evidence of the firm's insolvency, and subsequently the notes first given, including the individual notes of the partners, were taken up and firm notes given with like security, the court held that the firm became bound for the amount, the notes executed with the consent of both partners being based upon a sufficient consideration, and there being no fraud, the knowledge possessed by the bank (the mortgagee) of the purposes for which the money was to be applied, in the absence of notice of the firm's insolvency, not affecting their rights.

V. *Insufficient assumption.*

The mere fact of a firm taking notes made by one partner and indorsed by a third person for his accommodation, and selling such notes to a bank without indorsing them, or guaranteeing the same, or becoming a party thereto, or agreeing to pay them, will not render the firm liable thereon nor constitute the debt a firm debt; and the mere fact that such notes were entered in the firm books as

they become by the consent of the members of the firm the joint debts of all the partners, and will thereafter be treated as such. Story, Partn. 7th ed. §§ 368, 369; *Ex parte Peele*, 6 Ves. Jr. 601; *Ex parte Jackson*, 1 Ves. Jr. 131; *Siegel* v. *Chidsey*, 28 Pa. 279, 70 Am. Dec. 124.

That the firm had the right to assume the individual debts of its members and thereby convert them into debts of the firm, in the absence of fraud, and that the individual indebtedness was sufficient consideration for such promise by the firm, the authorities

"Bills payable" will not show an assumption thereof. Willis v. Bremner, 60 Wis. 622, 628 (1884).

In Woodward v. Horst, 10 Iowa, 120 (1859), the action was upon an account brought by the assignee under a general assignment of the partnership firm, part of the account being contracted prior to the assignment and part afterward, the defendant claiming that the goods sued for were sold and delivered to him by virtue of an agreement, under which the owner agreed to let him have the goods to the extent of the indebtedness to him of one partner of the firm, the firm undertaking to look to such partner for payment, the jury in the court below finding for the defendant as charged. The court held that, as to so much of the goods as had been supplied prior to the assignment, the verdict was right, but that with respect to the claim for goods subsequently delivered the agreement could not be set up in defense, the assignee not being bound by the agreement without proof that he concurred therein or sanctioned it.

So where the notes were given by each partner to represent the cash which each advanced as the capital of the partnership, it was held that they were individual debts, neither being responsible for the notes of the other in the absence of an express agreement, and that the fact that interest on such notes was paid by the firm, and charged to the maker of the note, did not make the notes the debts of the firm, neither did the payment of the notes out of the interest of each partner in the partnership have such an effect. Wild v. Erath, 27 La. Ann. 171, 172 (1875).

Again, in Forney v. Adams, 74 Mo. 128 (1881), where the evidence showed a custom on the part of the several members of the firm to deal as individuals with the customers of the firm, and that under such custom, "when a member was indebted his account would be taken in and charged against him on the books of the firm," the court held that, conceding such evidence to be admissible, yet it was not broad enough to cover the transaction then in question, it not appearing that the transaction itself was had by the parties in reliance upon any such custom, and therefore it did not authorise a disposition by one of the partners of the firm's goods in payment of his private debt.

In Kendal v. Wood, L. R. 6 Exch. 243 (1871), the firm had dealings with the defendant, one partner being indebted to the defendant on his own account. At the request of the latter partner the defendant applied a certain portion of the partnership money paid to him, to the liquidation of such private debt, without plaintiff's knowledge or authority, there being no conduct on the part of the plaintiff other than a belief of such authorization, which made it reasonable for the defendant to believe that he had authorized it. Upon a dissolution, the accounts showed that the firm owed defendant a considerable sum and plaintiff accepted bills therefor. Before the bills matured, plaintiff discovered the application by the defendant of the money to the private debt of the partner, but met the bills under protest in order to save the credit of one whose name was on the bills as drawer. The court held that the defendant was not entitled to retain the money as against such private debt, plaintiff never having authorized its appropriation nor conducted himself so as to give reasonable grounds for believing that he had, and that the plaintiff having been ignorant of the real facts of the case when the bills were drawn had not precluded himself from recovering by meeting them at maturity when he had discovered the facts, and his so doing could not be regarded as a voluntary act. See also Dunnica v. Clinkscales, 73 Mo. 500 (1881), *infra*, VII., *by new firm of debts of old firm.*

VI. *By mortgage of firm property.*

The doctrine with reference to the power of a firm to assume the payment of the individual debt of a partner by a mortgage of the partnership property has been expressed as follows:

While the firm is in existence and in full possession of its property, free from any lien, with the right to dispose of the same with the consent of the partners for value, and without any intentional fraud, they may execute a note or mortgage for the assumption of the individual debt of a partner, and thereby waive their right to have the mortgaged property first applied to the satisfaction of the debts of the partnership, if the security is received in good faith and for value, and, the rights being waived, they cannot be invoked on behalf of the creditors of the firm; and therefore such a mortgage will be good as against a subsequent attaching creditor of the firm, even though the firm may be insolvent at the time of the giving of the mortgage. Smith v. Smith, 87 Iowa, 93 (1893).

Where the debts are fairly owing by every partner individually, the mere preference of individual over partnership creditors by the execution of a chattel mortgage in the firm name, or by authority of the partners, upon the property of the firm, is not of itself such a fraud upon the partnership creditors as will authorise the setting aside of the chattel mortgage at the suit of the creditor. Purple v. Farrington, 119 Ind. 164, 170, 4 L. R. A. 595 (1888); Fisher v. Syfers, 109 Ind. 514 (1887).

So it has been held that a mortgage given by the partners to secure the individual debts fairly due was not rendered void by the mere fact that it operated to give individual debts a preference over demands against the firm, and that such a mortgage would not be set aside for that reason in equity, unless created in contemplation of insolvency to give an improper preference, and that the mortgage in question not being found to have been fraudulently made was not invalid, though the partnership was at the time of the conveyance insolvent. Reynolds v. Johnson, 54 Ark. 449 (1891).

If a sale or mortgage is made in good faith to secure a bona fide debt or debts, the transaction cannot be assailed on the ground that the creditors preferred are the individual creditors of the partners. Fisher v. Syfers, 109 Ind. 514, 517 (1887).

In the absence of fraud and collusion no lien exists in favor of partnership creditors over a mortgage by a firm for the private debt of a partner. Anderson v. Norton, 15 Lea, 14, 54 Am. Rep. 400 (1885).

In *Re* Kahley, 2 Biss. 368 (1870), a mortgage given by a partnership firm in payment of notes given by one partner for his individual debts was held binding as against the firm creditors.

In Whitney v. Dean, 5 N. H. 249 (1830), the partners, with the consent of their copartner, assigned partnership property to secure the separate debt of one by way of pledge without any fraudulent intent, and upon the failure of the firm the court held the transfer good and the transferee's sale thereunder valid as against the firm.

In Purple v. Farrington, 119 Ind. 164, 170, 4 L. R.

abundantly show. *Siegel* v. *Chidsey*, *supra*; *Case* v. *Ellis*, 4 Ind. App. 224.

From these considerations we are of the opinion the judgment of *the Court of Appeals should be reversed* and the cause remanded to that court with directions to reverse the judgment of the Circuit Court and remand the cause for a new trial in conformity with the opinion of this court. It is so ordered.

All concur.

A. 535 (1889), a chattel mortgage upon the firm property executed by insolvent partners for the purpose of securing the individual debt of a partner, made bona fide and without intention to defraud partnership creditors, was held valid, the partnership assets remaining under the control of the partners. See also Winslow v. Wallace, 116 Ind. 317, 1 L. R. A. 179 (1888).

A mortgage upon partnership real estate, signed by the members of the firm, gives the mortgagee (the individual creditor of one member of the firm) a lien upon such real estate prior and superior to any claim of partnership creditors against the same property as partnership assets. Carver Gin & Mach. Co. v. Bannon, 85 Tenn. 712 (1887); Anderson v. Norton, 15 Lea, 52, 54 Am. Rep. 400 (1885).

For the reason that if the partners have a right to make absolute sale of partnership assets, they have the same right to pledge or mortgage such assets. Carver Gin & Mach. Co. v. Bannon, *supra*.

Where, in a suit to set aside a decree of foreclosure and sale of a mortgage made to secure a debt of individual stockholders of the company, the facts showed certain mortgages made in the name of certain persons apparently in their individual characters, binding their interests in the corporate property, but the evidence proved that the money borrowed went to the corporate purposes, was applied in the payment of its debts, and also that the corporate authorities recognized it as a corporate debt, and that it was so understood at the time of the loan, and was afterwards so recognized by the company; that the mortgage was made in consideration of a further advance and of such indebtedness, and that there was no fraud or guilty knowledge, the court held the mortgage valid, the company having received full value, the recognition of the debts as those of the company by the stockholders and corporate authorities in the absence of fraud being prima facie sufficient to rebut fraud arising from the original transaction, the money going into the firm and being disposed of by the firm for its members. Head v. Horn, 18 Cal. 211, 216, 217 (1861).

Where the property in question, mortgaged by one partner individually, originally belonged to the firm but was taken by such partner upon the dissolution of the firm as his share, the notes and accounts being taken by the other partner along with the merchandise, such partner assuming to pay the firm debts, the firm being insolvent at the time of the dissolution, although such fact was not known to the partners,—in an action by a judgment creditor against the firm to set aside the mortgages as fraudulent *per se*, the court held that each partner had a right to waive the rule to have the partnership property applied to the payment of the partnership debts, and, having done so, the creditors had no right of complaint, and that therefore the mortgage to secure the individual indebtedness of such partner was valid as against the firm creditors. Poole v. Seney, 66 Iowa, 503 (1885).

The question as to the validity of a mortgage executed by a firm was raised in replevin brought by the mortgagee, a creditor who had attached the firm property, the mortgage being made in trust to secure the mortgagee's debt as well as other firm debts and the individual debt of a partner, the money obtained upon such last-mentioned debt going into the firm as such partner's share of the capital stock. The court held, the mortgagee having knowledge of the facts but no fraudulent intent being shown, that, as to such individual debt, the deed was void as a fraud in law rather than in fact, the mortgagors being insolvent. Walker v. White, 60 Mich. 427, 430 (1886).

The fact that the mortgages were not intended to have the effect of overreaching creditors may be manifested by the conduct of the parties in withholding the instrument from record and taking no steps to foreclose, although the mortgagee is informed that the firm was becoming more and more involved. Reyburn v. Mitchell, 106 Mo. 365, 374, 375 (1891).

Where the claim secured by the plaintiff's mortgage was the private and individual debt of one partner, even though created to furnish his part of the partnership stock, it was held not the debt of the partners, and not entitled to preference for payment out of partnership funds, and therefore the assignment by an ostensible partner of his separate portion of the stock to a dormant partner for the purpose of paying an individual debt is void as to partnership creditors. Elliott v. Stevens, 38 N. H. 311 (1859).

So, a chattel mortgage given to secure the antecedent individual debt of one partner without consideration is fraudulent, the firm being insolvent at the time, and will therefore be set aside in favor of firm creditors. Heineman v. Hart, 55 Mich. 64 (1884).

A mortgage given to secure the individual debt of a partner, even if effectual as to the firm by reason of the concurrence of all the partners giving it, is a fraudulent misapplication of the partnership property and void as to firm creditors, unless the firm was solvent at the time. Menagh v. Whitwell, 52 N. Y. 146, 153, 11 Am. Rep. 683 (1873).

The capital of the business was made up of the money borrowed by the partners from their father and from others, for which the father gave his note as security or as a collateral for the same, a further sum being loaned to one of the partners, for which he gave the firm note, the firm subsequently becoming involved and selling their entire stock in trade to the father, giving a bill of sale which showed that the sum was taken in discharge of the money owing, the assignee agreeing to collect the outstanding accounts and apply the same in discharge of the obligations due. The court held that, while it was lawful for the members of the firm to apply partnership property to the payment of their individual debts, if done in good faith and without a fraudulent design, yet the bill of sale in that case was invalid as to the firm creditors under section 5170 of the Revised Statutes of Missouri relating to fraudulent conveyances, which declares void the sale of property, "made or contrived with the intent to hinder, delay, or defraud creditors of their lawful actions," the bill in question hindering and delaying creditors, there being a surplus in that case after the payment of all the claims of the assignee which the creditors of the firm had an undoubted right to, and which surplus, instead of being handed over to the members of the firm, the assignee gave his note for, the sale of the surplus on credit delaying the creditors and putting it in the power of the members of the firm to dispose of the note, which was negotiable to an innocent purchaser, thereby effectually depriving the creditors of the surplus. Seger's Sons v. Thomas Bros. 107 Mo. 635 (1891).

And see the cases, Cron v. Cron's Estate, 56 Mich. 8 (1885); Cribb v. Morse, 77 Wis. 322 (1890), and *Ex parte* Snowball, *Re* Douglas, L. R. 7 Ch. 534, 41 L. J. Bankr. 49, 26 L. T. N. S. 394, 20 Week. Rep. 786 (1872)

Barclay, J., concurring:

Edwards' original debt to McCune was on account of the purchase price of property which went into the firm assets and constituted the greater part of the capital of the firm of Edwards & Wigginton at the outset

under head, *The question of insolvency, supra*, and also *Re* Kahley, 4 Nat Bankr. Reg. 378, 379 (1870); Embry v. Lewis (Ark.) 18 S. W. Rep. 372 (1892); and Veal v. The Keeley Co. 86 Ga. 120 (1890), under head, *Assumption held sufficient*.

VII. *By new firm of debts of old firm.*

In not a few cases the question has arisen as to whether a firm, in taking in a new partner and constituting itself a new firm, has assumed the debts of such partner or of the firm business previously carried on by him.

In order to charge a partner with a debt contracted by his fellow partner before the partnership, it must be shown that there was a subsequent assumption by the firm of the debt, even though the subject-matter was that the consideration of the debt should be carried into the partnership as stock. Donnally v. Ryan, 41 Pa. 306, 310 (1862); Brooke v. Evans, 5 Watts, 200 (1836); Graeff v. Hitchman, 5 Watts, 454 (1836).

Under a partnership agreement providing for the payment of an existing individual debt of one of the partners by the firm, either of the partners may execute the firm note for the purpose of securing such indebtedness. Randall v. Hunter, 76 Cal. 255 (1888), affirming 66 Cal. 512 (1885).

Thus, facts showing that the debt was owing by a copartner when he entered into the partnership and contributed his stock of merchandise, which included the goods for the price of which the action was brought, the articles of partnership providing that the sum then owing for such merchandise should be paid by the partnership, part of such claim being paid on account before the death of such partner, are sufficient to uphold a judgment of the court below in favor of the plaintiff, the indebtedness of such partner for the merchandise contributed by him to the stock of the firm furnishing ample evidence of a duty owing from the promisee to the persons seeking to avail themselves of the firm's promise, the case not being materially distinguished from that of Arnold v. Nichols, 64 N. Y. 117 (1876); Spingarn v. Rosenfeld, 4 Misc. 523 (1893).

But in Dunnica v. Clinkscales, 73 Mo. 500 (1881), where an appeal was taken from the action of the assignee to whom the partnership property was assigned for the benefit of all creditors, upon the ground that such assignee allowed a claim against the partnership which was not a partnership debt, the facts showed that the agreement between the partners was, that the notes were given in settlement of a partnership business which had previously to that time been conducted in another state, and of which the plaintiff and the assignors were members, but which had ceased to exist, the agreement being that the assignors were to execute their joint notes to the plaintiff in consideration of which they were to get the assets of the firm. The evidence, however, did not show that the assets were carried into the new business, or that they were purchased for such purposes, and therefore the court held that such notes were the individual indebtedness of each partner, and not a firm debt.

See also Day v. Wetherby, 29 Wis. 368 (1872); Arnold v. Nichols, 64 N. Y. 119 (1876); Hannigan v. Allen, 127 N. Y. 639, 642 (1891); *Ex parte* Jackson, 1 Ves. Jr. 131 (1790); Killefer v. McLain, 70 Mich. 508 (1888); Weaver v. White, 46 N. Y. S. R. 467 (1892); Case v. Ellis, 4 Ind. App. 224 (1892), head IV., *supra*.

There is a class of cases wherein the question of the assumption by a new firm of the debts of the old one has arisen in the preference given or the provision made therefor in a deed of assignment for the benefit of creditors, made by the firm. These will be included in a separate note.

VIII. *Assumption of debt originally incurred for firm benefit.*

In a case where money was borrowed by a partner in his own name, and the amount was subsequently put into the business of the firm, it was held that it was not a partnership debt, and that the firm was not liable for it, and that therefore an assignment made by it to secure such debt was void as against attaching creditors, the firm being insolvent at the time of the assignment. Pritchett v. Pollock, 82 Ala. 169 (1886).

Where one partner borrows money in his individual name, but in reality for the use of the firm, and it actually goes into the firm, the firm may assume the liability and confess judgment therefor, the consideration of such assumption being the moral liability, and the general creditor can have no ground of complaint, for the reason that the assets of the firm are increased to the precise extent of the money borrowed. Coffin's App. 108 Pa. 280, 286 (1884).

The fact that the money they obtained on the personal credit of one partner went into the partnership as, and was used for the exclusive benefit of, the firm, although not of itself sufficient to make the firm liable to the lender, is a consideration to support the firm's subsequent promise to pay. Siegel v. Chidsey, 28 Pa. 279, 70 Am. Dec. 124 (1857); Graeff v. Hitchman, 5 Watts, 454 (1836); Clay v. Cottrell, 18 Pa. 412 (1852).

A bill, subsequently given by a firm for money obtained by one partner on his personal credit which went into the partnership funds and was used exclusively for the partnership benefit, is a sufficient promise by the partnership to pay such sum, and an express undertaking on the part of the firm on a sufficient consideration to pay the debt out of the partnership assets, it becoming a partnership debt to all intents and purposes. Siegel v. Chidsey, *supra*.

And a judgment confessed by the firm under such circumstances and on such assumption would not be fraudulent. Walker v. Marine Nat. Bank, 98 Pa. 574, 579 (1882), citing and approving Siegel v. Chidsey, *supra*.

So it has been held that where one member of a firm purchases goods or borrows money for the firm on his own credit, giving surety for the payment thereof, and such money or goods go into and are used by the firm, and the surety has to pay as such, the firm may convey its goods to such surety in satisfaction of the money paid, and such conveyance will be valid as against a firm creditor. Gwin v. Selby, 5 Ohio St. 96, 101 (1855).

But if there was no debt due from the firm at the time of the giving of a note, if they had never received any consideration they have no right, when insolvent, to create a debt by voluntarily assuming the debt of one of the members so as to be good as against other creditors. Walker v. Marine Nat. Bank, *supra*.

In Roe v. Hume, 72 Hun, 1 (1893), the court held that, although the money, which was lent to the partner individually and partly secured by his individual mortgage, went for the firm benefit, yet this fact did not make it a firm obligation, for the reason that it might have formed part of his share of capital, or might have been paid in discharge of a debt due by him to the firm.

In addition to the above, see Rose v. Keystone Shoe Co. 18 W. N. C. 565, 568 (1886); Tilford v. Ramsey, 37 Mo. 565 (1866); National Bank of Commerce v. Meader, 40 Minn. 325 (1889), under head I., *supra*.

R. W.

of its business. The assumption of that debt by the firm, in the circumstances already stated, was supported in equity by a valuable and meritorious consideration, as explained in *Siegel* v. *Chidsey*, 28 Pa. 279, 70 Am. Dec. 121 (1857), and the firm's note, given for that debt, certainly created a legal obligation on the part of the firm to discharge it. Under the ruling of this court in *Sexton* v. *Anderson*, 95 Mo. 373 (1888), and in the absence of any evidence of actual fraud towards any of the partnership creditors, it seems to me that the firm note to McCune must be held a just charge against the firm assets. Hence my concurrence in the judgment of the court in banc.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

B. P. REYNOLDS, *Plff. in Err.*,
v.
GREAT NORTHERN R. CO.

(69 Fed. Rep. 803.)

1. **A person driving along a highway 10 or 12 feet distant from, and parallel to, a railroad track,** with a buffalo coat collar turned up against his ears, while the wind is blowing so that he does not hear a train coming behind him, but who does not look behind him to see the train, or drive with tight reins so as to prevent his horse, which is gentle, from drawing him against the train as it passes, is guilty of such negligence as will prevent recovery for injuries thereby received.

2. **The term "any other road,"** in Comp. Stat. 1887, § 3016, providing for railroad signals at crossings of other roads, refers only to public highways, and not to a private crossing.

3. **The duty to give warning signals of the approach of a train at a crossing,** imposed by Comp. Stat. 1887, § 3016, does not extend to a person driving along a highway parallel to the railroad, who has not lately used, and does not intend to use, any crossing, although he expects a signal to be given at a private crossing near by.

4. **The fact that a railroad is not fenced,** in the absence of a statutory requirement, does not make the railroad company liable for injuries to a person who is driving along a highway parallel to the track.

5. **A witness may be properly asked, on cross-examination, how a private crossing** came to be put in over a railroad, where he has testified in chief that he knew who put it in and when it was put in.

(August 19, 1895.)

ERROR to the Circuit Court of the United States for the District of North Dakota to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, *Circuit Judges.*

Messrs. **Taylor Crum** and **A. G. Hanson,** for plaintiff in error:

Independently of any statutory requirement, a jury might find, upon the facts of a case, that it was the duty of a railroad company to fence its track.

Donnegan v. *Erhardt*, 119 N. Y. 468, 7 L. R. A. 527.

The Compiled Laws of North Dakota, section 3016, provides for the ringing of a bell or blowing of a whistle "at least 80 rods from the place where the said railroad shall cross any other road or street," etc.

No exception is made as to public or private crossings, and the provision of section 3014, where certain requirements are made with reference to a "public highway," negatives the inference that the provision of section 3016 can be construed in any other sense than its plain language indicates, namely, "any road," public or private.

Sutherland, Stat. Constr. § 255.

The court erred in directing the jury to find a verdict for the defendant.

In *Gratiot* v. *Missouri P. R. Co.* (Mo.) 16 L. R. A. 189, the court says: "We know of no rule of law requiring a party to constantly look even one way, and especially none requiring him to constantly look both ways."

The courts cannot fix any exact point as the point where a traveler is bound to look and listen.

Cleveland, C. C. & I. R. Co. v. *Harrington*, 131 Ind. 426; *Glushing* v. *Sharp*, 96 N. Y. 676.

The question was pertinent, whether those in charge of the train did, or could, by reasonable diligence, have discovered the danger of plaintiff, traveling within 10 or 12 feet of the track, with his back toward the approaching train, in time to prevent it by sounding the whistle or ringing the bell to apprise him of the danger, and ought to have been submitted to the jury.

Cahill v. *Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 345; *Clumpit* v. *Chicago, St. P. & K. C. R. Co.* 84 Iowa, 71; 4 Am. & Eng. Encyclop. Law, p. 939; *Thomas* v. *Delaware, L. & W. R. Co.* 8 Fed. Rep. 729.

A statute providing for signals at a railroad crossing is for the benefit of all persons at or near the crossing, as well as for those actually crossing or about to cross, and omission to give statutory signals is prima facie negligence.

Lonergan v. *Illinois Cent. R. Co.* 87 Iowa, 755, 759, 17 L. R. A. 254, 257; *Ransom* v.

NOTE.—On the question as to what crossings are meant by statutes providing for signals by trains at crossings, see *note* to Sanborn v. Detroit, B. C. & A. R. Co. (Mich.) 16 L. R. A. 112.

See also 33 L. R. A. 101; 37 L. R. A. 591; 38 L. R. A. 302.

Chicago, St. P. M. & O. R. Co. 62 Wis. 178, 51 Am. Rep. 718; *Harty* v. *Central R. Co.* 42 N. Y. 468; *Galena & C. U. R. Co.* v. *Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Wakefield* v. *Connecticut & P. R. R. Co.* 37 Vt. 330, 86 Am. Dec. 711; *Cosgrove* v. *New York C. & H. R. R. Co.* 87 N. Y. 88, 41 Am. Rep. 355; *Voak* v. *Northern C. R. Co.* 75 N. Y. 320; *Saldana* v. *Galveston, H. & S. A. R. Co.* 43 Fed. Rep. 862; *Pike* v. *Chicago & A. R. Co.* 39 Fed. Rep. 754; *Pittsburgh, C. & St. L. R. Co.* v. *Martin*, 82 Ind. 476; *Western & A. R. Co.* v. *Jones*, 65 Ga. 631; Patterson, Railway Accident Law, § 162; *Grand Trunk R. Co.* v. *Rosenberger*, 9 Can. Sup. Ct. Rep. 311.

A railroad company is bound to take notice that the public is using a crossing put in by the company, although not on a regularly laid out public highway. The statutory requirements as to signals apply to any crossing of "any road or street," put in by the company and used by the public. Continued use without objection amounts to a license.

N. Dak. Comp. Laws, § 8016; *Lillstrom* v. *Northern P. R. Co.* 58 Minn. 464, 20 L. R. A. 587; *Barry* v. *New York C. & H. R. R. Co.* 92 N. Y. 289, 44 Am. Rep. 377; *Davis* v. *Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667; *Hooker* v. *Chicago, M. & St. P. R. Co.* 76 Wis. 542; *Pearce* v. *Humphreys*, 84 Fed. Rep. 282.

A person crossing or at or near a railroad crossing has a right to rely upon the giving of signals required by statute, and failure to anticipate that the company will not obey the statutory requirements as to signals, and failure to use other diligence than listening and looking, is not negligence, as a matter of law, when such signals are not given.

Correll v. *Burlington, C. R. & M. R. Co.* 88 Iowa, 120, 18 Am. Rep. 22; *Tabor* v. *Missouri Valley R. Co.* 46 Mo. 353, 2 Am. Rep. 517; *Chicago, St. L. & P. R. Co.* v. *Hutchinson*, 120 Ill. 587; *Ernst* v. *Hudson River R. Co.* 35 N. Y. 37, 90 Am. Dec. 761; *Brown* v. *New York C. Railroad*, 32 N. Y. 597, 88 Am. Dec. 353; *Klanowski* v. *Grand Trunk R. Co.* 57 Mich. 525; *Com.* v. *Fitchburg R. Co.* 10 Allen, 189; *Northern P. R. Co.* v. *Austin*, 64 Fed. Rep. 211; *Kelly* v. *St. Paul, M. & M. R. Co.* 29 Minn. 1.

Under the facts, as disclosed by the undisputed evidence in the case, the issues present a question of fact for the jury.

Northern P. R. Co. v. *Nickels*, 50 Fed. Rep. 718, 4 U. S. App. 385; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 665, 21 L. ed. 749; *Hayes* v. *Michigan C. R. Co.* 111 U. S. 239, 28 L. ed. 415.

Mr. **W. E. Dodge**, for defendant in error:

Statutes of the character of section 8016 of the Compiled Laws of North Dakota, requiring certain signals to be given by bell or whistle at a distance of at least 80 rods from the place where the railroad crosses any other road or street, are enacted for the purpose of averting danger to those approaching such crossings upon such road or street, and to give such persons warning while the approaching train is yet at a comparatively safe distance, in order that they may be placed upon their guard; and not for the protection of persons not on such other road or street, and who are not intending to use the crossing, but who may be traveling in another highway parallel with the railroad, and whose danger from approaching trains is therefore as great at any other distance as within 80 rods from such crossing.

East Tennessee, V. & G. R. Co. v. *Feathers*, 10 Lea, 103; *Rosenberger* v. *Grand Trunk R. Co.* 8 Ont. App. Rep. 482; *Gorris* v. *Scott*, L. R. 9 Exch. 125; *O'Donnell* v. *Providence & W. R. Co.* 6 R. I. 211; *Holmes* v. *Central R. & Bkg. Co.* 37 Ga. 598; *Elwood* v. *New York C. & H. R. R. Co.* 4 Hun, 808; *Harty* v. *Central R. Co.* 42 N. Y. 468; *Philadelphia & R. R. Co.* v. *Spearen*, 47 Pa. 300, 86 Am. Dec. 544; *Fletcher* v. *Atlantic & P. R. Co.* 64 Mo. 484; *Cordell* v. *New York C. & H. R. R. Co.* 64 N. Y. 535; *Byrne* v. *New York C. & H. R. R. Co.* 94 N. Y. 12; *Johnson* v. *Louisville & N. R. Co.* (Ky.) 13 Am. & Eng. R. Cas. 623; *St. Louis & S. F. R. Co.* v. *Payne*, 29 Kan. 166; Patterson, Railway Accident Law, 160; *Flint* v. *Norwich & W. R. Co.* 110 Mass. 222; *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 697, 24 L. ed. 542; 1 Thomp. Neg. p. 452, and authorities cited.

A person like the plaintiff, driving within a few feet of a railroad track, and therefore in a place of comparative danger, owes to himself a duty to look and listen for the approach of trains the noise of which at so short a distance may frighten his team and therefore enhance his danger.

Schofield v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Chicago, R. I. & P. R. Co.* v. *Houston*, *supra*.

The statute does not refer to private ways or farm crossings, and if so construed would necessitate that the locomotive bell, or whistle, be constantly sounded from one state line to the other.

Sather v. *Chicago, M. & St. P. R. Co.* 40 Minn. 91; *Greeley* v. *St. Paul, M. & M. R. Co.* 33 Minn. 137; *Brooks* v. *New York & E. R. Co.* 13 Barb. 597; *Cook* v. *Milwaukee & St. P. R. Co.* 26 Wis. 45; *Missouri, K. & T. R. Co.* v. *Long*, 27 Kan. 684; *Flint & P. M. R. Co.* v. *Willey*, 46 Mich. 88.

The verdict for the defendant was therefore properly directed.

Schofield v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Schulykill & D. Imp. & R. Co.* v. *Munson*, 81 U. S. 14 Wall. 442, 20 L. ed. 867; *Herbert* v. *Butler*, 97 U. S. 319, 24 L. ed. 958; *Griggs* v. *Houston*, 104 U. S. 553, 26 L. ed. 840; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003.

Sanborn, *Circuit Judge*, delivered the opinion of the court:

Between 6 and 7 o'clock on a clear night in February, 1894, B. P. Reynolds, the plaintiff in error, was driving along a public road which runs over a level territory parallel with and 12 feet distant from the railroad of the Great Northern Railway Company, the defendant in error, when his horse and sleigh went against a train, which was coming along the railroad from his rear, and he was injured, his sleigh was broken, and his horse was killed. He sued the defendant in error for negligence. The company denied negligence on its own part, and alleged that the carelessness of the plaintiff in error caused

the injury. At the close of the evidence for the plaintiff the court directed a verdict for the company, and this writ of error challenges the judgment upon that verdict.

The facts are undisputed, and they are these: The railroad of the defendant in error runs northwesterly from Fargo, in North Dakota. About half a mile northwest of Fargo, on this railroad, is the Standard Oil station. A little more than a mile northwesterly of the oil station, and on the east side of the track, stands the private slaughterhouse of one Moulton. In the summer of 1893, Moulton requested the defendant in error to put a crossing opposite his slaughterhouse, so that he could reach the public highway on the west side of the track, and it consented. Thereupon he graded the crossing, and the section men of the company planked it. This crossing was not on any traveled road. It extended only from the public road on the west side of the track to the doors of the slaughterhouse of Mr. Moulton, and it had never been opened, or laid out, or worked, or maintained by public authority. It was, however, on a section line, and people who had occasion to cross the railroad at that place had sometimes driven over it. The statutes of North Dakota required the railroad company to ring its bell or sound its whistle at a distance of at least 80 rods from its crossing of "any other road or street." And the plaintiff claimed that the company was negligent because it gave no such signal of the approach of its train to Moulton's crossing. The defendant never had rung its bell or sounded its whistle for this crossing, and it did not do so on the night of the accident. The public road from the oil station to this crossing ran along the west side of the railroad, parallel to, and about 10 or 12 feet distant from, it. The plaintiff in error had lived on a farm about 7 miles northwest from Fargo, and on the west side of the railroad, for three years, and had frequently passed over this road, and was familiar with its location and character. He was driving home from Fargo, along this road, and was about 10 rods southeasterly of Moulton's crossing when the accident occurred. He did not intend to cross the railroad, or to use the crossing in any way. The night was clear and cold. The mercury stood at zero. The ground was covered with snow. The two roads extended from the oil station to Moulton's crossing over a prairie without an obstruction to the view, and the plaintiff could have seen the coming engine, with its bright headlight, the distance of a mile from the place of the accident, if he had looked. He knew that a train passed up the railroad northwesterly every evening, but did not know at exactly what time it passed. He looked back towards Fargo, to see if it was coming, when he was about 40 rods northwesterly from the oil station, but he never looked again until he was struck by the train. He was driving on a gentle trot a manageable horse that was liable to be a little frightened by a moving train, and he testified that he was listening for the company to sound its whistle or ring its bell for Moulton's crossing, so as to be prepared for the train. The wind came from the north. He wore a buffalo coat. Its collar was turned up about his ears, and he never heard the roar of the approaching train until it struck him.

Was the charge of the court below to return a verdict for the defendant in error upon this state of facts erroneous? The rules of law by which this question must be answered are: (1) In order to maintain an action for negligence, where the injury was not wantonly, maliciously, or intentionally inflicted, it must appear that the negligence of the defendant was the proximate cause of the injury, and it must not appear that the negligence of the plaintiff contributed to that injury. (2) Where a diligent use of the senses by the plaintiff would have avoided a known or apprehended danger, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court. (3) It is the duty of the trial court at the close of the evidence to direct a verdict for the party who is clearly entitled to recover, where it would be its duty to set aside a verdict in favor of his opponent if one were rendered. *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 697, 24 L. ed. 542; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Aerkfets* v. *Humphreys*, 145 U. S. 418, 420, 36 L. ed. 758, 759; *Chicago & N. W. R. Co.* v. *Davis*, 3 C. C. A. 429, 53 Fed. Rep. 61, 10 U. S. App. 422; *Missouri P. R. Co.* v. *Moseley*, 6 C. C. A. 641, 57 Fed. Rep. 921; *Donaldson* v. *Milwaukee & St. P. R. Co.* 21 Minn. 293; *Brown* v. *Milwaukee & St. P. R. Co.* 23 Minn. 165; *Smith* v. *Minneapolis & St. L. R. Co.* 26 Minn. 419; *Lenix* v. *Missouri P. R. Co.* 76 Mo. 86; *Powell* v. *Missouri P. R. Co.* 76 Mo. 80; *Gowen* v. *Harley*, 6 C. C. A. 190, 56 Fed. Rep. 978, 980, and cases cited.

Conceding for the moment, but not deciding, that it was the duty of the defendant to give the statutory signal for Moulton's crossing, do not the facts of this case conclusively show that the plaintiff was himself guilty of contributory negligence? The question here is not whether the negligence of the defendant or that of the plaintiff was the more proximate cause of the injury, but whether or not the plaintiff's negligence contributed to it. In *Chicago, R. I. & P. R. Co.* v. *Houston*, 95 U. S. 697, 702, 24 L. ed. 542, 543, *Mr. Justice* Field, in delivering the opinion of the supreme court in a case in which a woman had been killed while crossing a railroad, said: "The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employés in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger." *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *McGrath* v. *New York Cent. & H. R.*

R. Co. 59 N. Y. 469, 17 Am. Rep. 359; *Rodrian* v. *New York, N. H. & H. R. Co.* 125 N. Y. 526.

The danger to the plaintiff from the coming train was from his possible failure to manage his frightened horse and keep him in the road, not from the possibility that the train would cross the road upon which he was traveling. He testified that his horse was gentle and manageable in the presence of moving trains, but that he might be a little frightened by one, and that for this reason he listened to hear the bell or whistle, that he might be prepared for the coming of the train he expected, and thus control his horse. In other words, he knew he was in a dangerous place, and the company did not, and he relied upon the bell or whistle of the company to make him careful to manage his horse and keep him in the public road, where he belonged. There were, however, two methods perfectly open to him that would have protected him against this danger, regardless of the statutory signals. One was to drive his horse with tight reins, and manage him as carefully as if the train was constantly passing, as long as he continued to drive along within 12 feet of the railroad track. The other was to use his eyes to look back often enough to see the bright headlight of a train before it could overtake him. The view from the place of the accident southwesterly was unobstructed for more than a mile, and to look was to see the coming train. The facts that the temperature was at zero, that he had turned the collar of his buffalo coat up against his ears, that he was sitting in a sleigh, that the wind came from the north, and that he never heard the roar of the approaching train until it struck him, show that he had made his sense of hearing practically useless. This made the duty of the diligent and frequent use of his eyes more imperative. *Missouri P. R. Co.* v. *Moseley*, 6 C. C. A. 641, 645, 57 Fed. Rep. 921; *Mynning* v. *Detroit, L. & N. R. Co.* 59 Mich. 257. It certainly is not a diligent use of the senses, when danger is apprehended from a train coming from the rear, to cover the ears with a buffalo coat, and steadily look in a direction opposite to that from which the train is expected, while a horse goes three quarters of a mile on a gentle trot. The ordinary use of his eyes would have informed the plaintiff of the coming of this train, and would have enabled him to avoid the danger. Moreover, after he had closed his ears to the roar of the train coming from the rear by the collar of his buffalo coat, and had concluded not to look back while he was traveling three quarters of a mile, it was certainly not the exercise of ordinary care to drive so carelessly that a horse that was gentle and manageable in the presence of moving trains would draw him onto the railroad or against the train as it passed. If he would not look for, and so dressed himself that he could not hear, the train he expected to come from his rear, ordinary prudence required him to drive his gentle horse so carefully that he would be prepared for its coming at any time. The evidence of contributory negligence was conclusive.

There is another reason why the judgment of the court below should not be reversed. This record does not tend to prove any negligence on the part of the railroad company. The fact that it failed to give the statutory signal for Moulton's crossing is the only evidence of its negligence in this record. It owed no duty to ring its bell or sound its whistle because the plaintiff was driving along the public road, unless that duty was imposed upon it by this statute. In the absence of the statute, it had as much right to use its railroad for its trains without notice to the plaintiff as the plaintiff had to use the public road without notice to it. If there was any difference between them, the heavier burden of care was upon the plaintiff, for he knew that he was there, and in danger, and the company had no such knowledge. Hence the company violated no duty to the plaintiff which the statutes did not impose. Did the statutes require the whistle to be sounded or the bell to be rung for Moulton's crossing? Section 3014 of the Compiled Laws of Dakota of 1887 provides that every railroad corporation operating a line of road within that state shall erect suitable signs of caution at each crossing of its road with a public highway. Section 3016 of these statutes requires that a bell shall be rung or a whistle sounded at the distance of 80 rods from the place where any railroad shall cross any other road or street. Section 3017 provides that when any person owns land on both sides of any railroad the corporation owning such railroad shall, when required, make and keep in repair one causeway or other safe and adequate means of crossing the same. The question is, Was Moulton's crossing, at the place where this railroad passed it, "any other road or street," within the meaning of section 3016, *supra*? Article 2, chap. 12, of the Political Code of North Dakota, which treats of public highways and roads, provides that all public roads and highways that have been open and in use as such, and included in a road district in the town in which they are situated, for twenty years preceding March 9, 1883, shall be public roads or highways (Dak. Comp. Laws 1887, § 1261); that every road laid out by order of proper authorities, as provided in this article, from which no appeal has been taken, shall be a public highway (Id. § 1262); and that the congressional section lines shall be considered public roads, to be opened to the width of 2 rods on each side of said section lines upon order of the board of supervisors. Section 1264 provides that the supervisors in the several towns shall "have the care and superintendence of the roads and bridges therein." Section 1266 provides that the overseers of highways in each town "shall repair and keep in order the roads within their respective districts." Section 1271 provides for a road tax. Section 1272 provides that the supervisors shall assess a road tax on all real estate and personal property. In section 1277 the overseers of highways are called "road overseers." Now, it is certain that Moulton's crossing was not a public highway. It had not been used twenty years. It had not been laid out by the proper authorities. It had

not been opened on the section line by order of the board of supervisors of the township. It was a mere private crossing, put in at the request of Moulton, to enable him to reach his slaughterhouse from the public road, which was on the opposite side of the railroad. In the instances to which we have referred the legislature of Dakota has repeatedly used the word "road" as synonymous with the term "public highway." The presumption is that they used it in the same sense in section 3016. This presumption is strengthened by the fact that it borders upon absurdity to suppose that the legislature intended to require the railroad companies to give this statutory signal 80 rods on either side of every farm crossing or way from a private dwelling or business house across their roads. If such were the rule, there would be few places on the line of this railroad in the eastern part of North Dakota where the bell or whistle would not be required to be sounding. We do not think this was the intention of the legislature, and, as Moulton's crossing was not a public highway, the railroad company was, in our opinion, guilty of no negligence in its failure to give the statutory signal at that crossing.

Our conclusion is that the term "other road," in section 3016 of the Compiled Statutes of Dakota, 1887, refers to a public highway as defined by the statutes of that state, and that it has no reference to farm ways and private wagon roads that cross the railroad. *Eather* v. *Chicago, M. & St. P. R. Co.* 40 Minn. 91; *Greeley* v. *St. Paul, M. & M. R. Co.* 38 Minn. 137; *Brooks* v. *New York & E. R. Co.* 18 Barb. 597; *Cook* v. *Milwaukee & St. P. R. Co.* 36 Wis. 45; *Missouri, K. & T. R. Co.* v. *Long*, 27 Kan. 684; *Flint & P. M. R. Co.* v. *Willey*, 47 Mich. 88.

Moreover, even if Moulton's crossing had been upon a road or street the failure of the company to give the statutory warning for it would not have charged it with the neglect of any duty it owed to the plaintiff. Failure to discharge a duty to the plaintiff, and resulting injury to him, are indispensable elements of actionable negligence. Where there has been no such failure, there has been no wrong, and therefore there is no remedy. In the absence of a statute which requires warning of a coming train at a crossing, the railway company owes to a workman in an adjacent field, to a domestic in a neighboring house, or to a traveler on a parallel road, who has not crossed, and does not intend to cross or enter upon, the railroad no duty to signal the approach of its trains. The measure of the reciprocal rights and duties of these parties and the railroad is not changed or affected by the enactment of such a statute. The evil it is intended to remedy did not threaten them. The warning it requires was not provided for their benefit. The object of such a statute is to warn persons in the vicinity of the crossing, who have just crossed, who are in the act of crossing, and who intend to cross, the railroad upon it, of the approach of the train, to the end that collisions and the danger of fright and injury from the use of the crossing may be avoided. Accordingly such a statute imposes upon the railroad companies a duty to warn such persons, but it imposes upon them no duty to warn others. Consequently, a failure to give the warning becomes a neglect of statutory duty, and, if injury results, raises a cause of action in favor of the former, but not in favor of the latter. This is a just and reasonable rule, because the crossing was a menace of danger to the former, but not to the latter. Its existence and use by the company neither increases nor diminishes the danger of the traveler on a paralled road, who has not used, is not using, and does not intend to use it; and hence he does not fall within the class of those for whom such a statute imposes upon railroad companies the duty of giving a warning of the approach of their trains to the crossing. Our conclusion is that a statute which requires railroad companies to give a warning signal of the approach of trains to their crossing of a road or street imposes no duty to give such warning to those who have not lately used, who are not using, and who do not intend to use the crossing, and such parties cannot recover of the railroad companies for a failure to give the warning. The purpose of such a statute is to warn those who have lately used, those who are using, and those who are about to use the crossing. It imposes a duty upon the railroad company to give to these persons the statutory warning, and a failure to give it is a neglect of duty to them, for which they alone may recover if injury results. These views are supported by the great weight of authority. *Pike* v. *Chicago & A. R. Co.* 39 Fed. Rep. 754; *Bell* v. *Hannibal & St. J. R. Co.* 72 Mo. 50, 58; *Evans* v. *Atlantic & P. R. Co.* 62 Mo. 49, 57, 58; *Rohback* v. *Pacific Railroad*, 43 Mo. 187; *Elwood* v. *New York Cent. & H. R. R. Co.* 4 Hun, 808; *O'Donnell* v. *Providence & W. R. Co.* 6 R. I. 211, 216; *East Tennessee, V. & G. R. Co.* v. *Feathers*, 10 Lea, 103, 105; *St. Louis & S. F. R. Co.* v. *Payne*, 29 Kan. 166, opinion by *Judge* Horton, concurred in by *Mr. Justice* Brewer; *Missouri P. R. Co.* v. *Pierce*, 33 Kan. 61, 64; *Clark* v. *Missouri P. R. Co.* 35 Kan. 350; *Gorris* v. *Scott*, L. R. 9 Exch. 125.

It is assigned as error that the court below refused to permit the plaintiff to testify whether or not there was any fence along the track of the railroad company at the place of the accident. It is not claimed that there is any statute in the state of North Dakota requiring a railway company to fence its track, and we are unable to perceive how the fact that it was or was not fenced could affect the right of the plaintiff to recover under the undisputed facts of this case.

It is assigned as error that the court permitted the witness Moulton to testify, upon cross-examination, "how the crossing opposite his slaughterhouse came to be put in." There was no error in this ruling. He had testified in chief that he knew who put the crossing in, and when it was put in, and it was certainly fair cross-examination to ask him how it came to be put in.

The judgment below must be affirmed, and it is so ordered.

NORTH CAROLINA SUPREME COURT.

FARMERS' CO-OPERATIVE MANUFACTURING CO.
v.
ALBEMARLE & RALEIGH R. CO., *Appt.*

(.....N. C.....)

1. **A private action for a public nuisance** may be maintained by one who is not the sole or even a peculiar sufferer, if his grievance is not common to the whole public, but is a common misfortune of a number or even a class of persons.
2. **The owner of a boat, whether licensed or not, and whether other individuals own boats similarly engaged** in navigating a river or not, may have a private action for an obstruction to a navigable river, where his boat is engaged in transporting material for manufacturing purposes from a point below the obstruction to a point above it.
3. **The fact that a boat was doing business as a common carrier,** as well as for the manufacturers who owned it, does not preclude a private right of action by the owner for obstruction of navigation.
4. **Damages for detention of a boat by obstruction of navigation,** where other means of transportation were not provided, will not include the cost of loading and unloading and of damage to the cargo by exposure after unloading.

(October 15, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Edgecombe County in favor of plaintiff in an action to recover damages for obstructing a navigable stream to the injury of plaintiff. *Reversed.*

Plaintiff was engaged in manufacturing cotton-seed oil at a plant erected on the Tar river, and in connection with its business it ran a boat to carry products to and from the mill. Defendant, in constructing a railroad, built a bridge across the river in such a way as to prevent the plaintiff's boat from passing it.

Further facts appear in the opinion.

Mr. **John L. Bridgers,** for appellant:

The maintenance of a public nuisance is indictable at common law.

7 Bacon, Abr. 223; 4 Bl. Com. 167.

And, following the common law, our legislature has also made this nuisance indictable.

Code, vol. 2, § 3711.

No citizen can maintain an action in his own behalf for an indictable offense.

3 Bl. Com. 219.

To create a public nuisance, the act must affect the public.

State v. *Jones*, 31 N. C. 38.

Whether a nuisance is public or private, is determined solely by its effect.

State v. *Wolf*, 112 N. C. 894; *Dunn* v. *Stone*, 2 Taylor Repos. 241.

Where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, he shall have private satisfaction by action.

3 Bl. Com. 219; Story, Eq. Jur. § 924; 1 High, Inj. § 762; *Innis* v. *Cedar Rapids, I. F. & N. W. R. Co.* 76 Iowa, 165, 2 L. R. A. 282; *Billard* v. *Erhart*, 35 Kan. 611; *Dunn* v. *Stone* and *State* v. *Wolf, supra; Hathaway* v. *Hinton*, 46 N. C. 246; *Boyden* v. *Achenbach*, 79 N. C. 548.

The peculiar injury must be distinctly shown.

Bigelow v. *Hartford Bridge Co.* 14 Conn. 565, 36 Am. Dec. 506; *Frink* v. *Lawrence*, 20 Conn. 117, 50 Am. Dec. 275; *Houck* v. *Wachter*, 34 Md. 265, 6 Am. Rep. 335.

The test is, Was the obstruction in the highway, in its effect, common to the public, and not peculiar and special to this plaintiff? The degree of the damage does not affect the question.

The plaintiff's alleged damage is not extraordinary, particular, and special to the plaintiff's boat, but is common to that and all other boats; and, the plaintiff failing to allege and show extraordinary, particular, and special damage to its boat, the action should be dismissed.

Georgetown v. *Alexandria Canal Co.* 37 U. S. 12 Pet. 98, 9 L. ed. 1015; *South Carolina S. B. Co.* v. *South Carolina R. Co.* 30 S. C. 539, 4 L. R. A. 209; *Dunn* v. *Stone*, 2 Taylor Repos. 241; *Clark* v. *Chicago & N. W. R. Co.* 70 Wis. 593.

The plaintiff, in constituting itself a common carrier, and entering into public transportation, without authority of law, violated the charter from which it derived its existence. It is a case in which the doctrine of *ultra vires* applies.

State v. *Webber*, 107 N. C. 965; *Luttrell* v. *Martin*, 112 N. C. 606; *Wiswall* v. *Greenville & R. Pt. Road Co.* 56 N. C. 183; *North Carolina R. Co.* v. *Leach*, 49 N. C. 347.

A cotton-seed oil company has no more right to go into the business of a common carrier and establish a line of transportation than a plank-road company has to establish a stage line.

Central R. & Bkg. Co. v. *Smith*, 76 Ala. 572, 52 Am. Rep. 358; *Beaty* v. *Knowler*, 29 U. S. 4 Pet. 168, 7 L. ed. 819; *Casey* v. *Cavaroc*, 96 U. S. 467, 24 L. ed. 779; *Bank of Augusta* v. *Earle*, 38 U. S. 13 Pet. 587, 10 L. ed. 307.

The public had no weal from the plaintiff's navigation, but did derive much use and convenience from the defendant's road passing over said bridge, and therefore there was no right to recover.

State v. *Glen*, 52 N. C. 333; *Gwaltney* v. *Scottish Carolina Timber & L. Co.* 111 N. C. 555; *Burke County Comrs.* v. *Catawba Lumber Co.* 115 N. C. 599.

The capability of use by the public for the purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use.

State v. *Glen, supra; Hickok* v. *Hine*, 23 Ohio

NOTE.—As to private remedy for public nuisance, see also South Carolina S. B. Co. v. South Carolina R. Co. (S. C.) 4 L. R. A. 209, and *note;* also Wylie v. Elwood (Ill.) 9 L. R. A. 726; and Kuehn v. Milwaukee (Wis.) 18 L. R. A. 552.

See also 33 L. R. A. 541.

St. 523, 13 Am. Rep. 255; *Benson* v. *Morrow*, 61 Mo. 345; *Wisconsin River Imp. Co.* v. *Lyons*, 30 Wis. 61.

To become a public highway a river must be navigable when in its natural condition. If artificially made navigable it does not thereby become a public highway; it must have been navigable in its natural condition before.

Morgan v. *King*, 35 N. Y. 454; *Wadsworth* v. *Smith*, 11 Me. 278, 26 Am. Dec. 525; *Veazie* v. *Dwinel*, 50 Me. 479.

These seed, unloaded, were damaged, and the jury were directed to allow damage for this and the expense of unloading one cargo, and loading another. It is clear that the bridge had nothing to do with all this. The bridge only did, and could only, stop the passage of the boat. This was a secondary consequence for which the plaintiff cannot recover.

Sledge v. *Reid*, 78 N. C. 442; *Boyle* v. *Reeder*, 23 N. C. 615; *White* v. *Griffin*, 49 N. C. 140; *Gwaltney* v. *Scottish Carolina Timber & L. Co. supra; Ashe* v. *DeRossett*, 50 N. C. 301, 72 Am. Dec. 552; *Maes* v. *Ramsey*, 74 N. C. 14; *Spencer* v. *Hamilton*, 113 N. C. 50; *Sturgis* v. *Kounts*, 165 Pa. 358, 27 L. R. A. 890; *Daniels* v. *Ballentine*, 23 Ohio St. 532, 13 Am. Rep. 264; Wood's Mayne, Damages, pp. 71–73; *Meredith* v. *Cranberry Coal & I. Co.* 99 N. C. 576.

Mr. **H. G. Connor** for appellee.

Avery, J., delivered the opinion of the court:

The most interesting question presented by this appeal is, whether the plaintiff, in any aspect of the evidence, has shown such special damage as would entitle him to redress by civil action for a public nuisance. The law provides an adequate remedy for the wrong to the public, and thereby prevents a multiplicity of vexatious private actions. But, in order to the maintenance of a civil action by an individual, in addition to the indictment by the state, it is not made incumbent on him to show an injury from which he is the sole, or even a peculiar, sufferer. The damage recoverable in a civil action founded upon the obstruction of a public highway must, however, be such as is not common to every one who actually does pass or may travel over the highway. It must be unusual or extraordinary, but not necessarily singular. While the wrong must be special, as contradistinguished from a grievance common to the whole public, who have the right to use the highway, it may nevertheless be the common misfortune of a number, or even a class of persons, and give to each a right of redress. The amounts of damage recoverable by them may vary according to the extent of the loss shown in each case, but every one of them may maintain his status in court by alleging and proving precisely the same sort of wrong caused by the same obstruction. For instance, in the familiar case of the plaintiff who was injured by falling into a ditch dug by another across the public highway, referred to by the elementary writers and the courts to illustrate the principle upon which civil actions are maintainable in such cases, it would not have impaired the right of the first man who suffered from falling into it if a dozen of his neighbors had tumbled into it afterwards on the same day, and had received more serious injury than he. So in *Downs* v. *High Point*, 115 N. C. 182, where the municipality created a public nuisance by negligence in allowing a sewerage ditch to discharge its contents in a place where the nauseous smell annoyed the whole public, but gave to the plaintiff a right of action because of his sickness and that of members of his family, due solely to the disagreeable odors, it would have been none the less competent for him to claim the right to show special damage, or such as was not common to the whole public because it appeared that other families in the vicinity and on all sides of the defective ditch had suffered in a similar way, and claimed like redress in the courts. Bishop, in his work on Non-Contract Law (sec. 424), by way of illustrating the principle we are discussing, says: "So, likewise, it is a public nuisance to obstruct a navigable stream, thereupon, if one is by such an obstruction prevented from fulfilling his contract, he can maintain a civil suit against the obstructer." The first authority cited to sustain the author's view was *Dudley* v. *Kennedy*, 63 Me. 465, where the facts were that the plaintiff, who had engaged to transport rocks and gravel in boats on the Kennebec river, which is a navigable stream, was prevented from carrying out his contract by a boom placed across the river between the point at which the rock and gravel were procured and the point of delivery, and the court held that the defendant was liable in a civil action for special damage. Though few of them are so directly in point as the case just cited, there is no dearth of authorities in which the general principle, as we have formulated it, is so fully sustained as to make its application to the case at bar obvious and the deduction inevitable. *Greasley* v. *Cobling*, 2 Bing. 263; *Chichester* v. *Lethbridge*, Willes, 70, 74; *Hughes* v. *Heiser*, 1 Binn. 463, 2 Am. Dec. 459, 462; *Ross* v. *Miles*, 4 Maule & S. 101; *Burrows* v. *Pixley*, 1 Root, 362, 1 Am. Dec. 56.

It is not material whether this particular boat was licensed or whether other individuals owned boats that were engaged in navigating the river. If the plaintiff suffered damage common to a class whose business required the transportation of material for manufacturing purposes from a point below the obstruction to a point located above it, but not common to the whole public, his right is not impaired by the fact that the boat was doing business as a common carrier as well as for the manufacturers who owned it. The case of *Dunn* v. *Stone*, 1 Taylor Repos. 241, falls far short of sustaining the defendant's contention. There the plaintiff claimed special damage because a dam placed by the defendant across the stream below the plaintiff's riparian possessions obstructed the passage of fish, and prevented the plaintiff from catching and using them. The court seem to have rested the decision entirely upon the ground that the fish were not the property of the plaintiff, but were subject to become the property of any person living on the stream upon reclaiming them. *Chief Justice* Taylor, delivering the opinion, said: "But what

property could plaintiff have in the fish in their wild state, before they ascended to the water flowing over his land? In animals *ferœ naturæ* a man may have a qualified property which continues only while they are in his possession or under his control; and so long they are under the protection of the law. But the defendant has the same extent of ownership in them, in virtue of which he might have caught them in his own waters, and thus have done an equal injury to the plaintiff's fishery." The cotton seed which the plaintiff was transporting up the river was its property, and was in a boat, which was private property, and was entitled, under the protection of the law, to pass over the highway without obstruction and damage growing out of detention. We understand the court to broadly intimate that, had the injury complained of in *Dunn* v. *Stone*, *supra*, grown out of the detention of property instead of fish by the obstruction, a different principle would have applied. Though any and every person had the right to transport goods and chattels along the river, just as the whole public might have enjoyed the use of the highway which was traversed by the ditch, a right of action accrued only to those who attempted to avail themselves of this privilege, and suffered by the detention of goods in the one case and from injury, to their persons or property in the other. *Rose* v. *Miles*, *supra*.

"Navigable waters include all those which afford a channel for useful commerce. Such waters are public highways of common right." 16 Am. & Eng. Encyclop. Law, p. 236. "It is not necessary that such waters be fit for navigation at all times, but their capacity therefor must recur with regularity." Id. 243, *note 1; Burke County Comrs.* v. *Catawba Lumber Co.* 116 N. C. 786.

Upon the testimony, which was not controverted, the defendant clearly had no cause to complain of the instruction which left the question of navigability to the jury under the foregoing rule. We are of opinion, however, that the court erred in allowing the jury to consider the cost of loading and unloading the cotton, and of damage to the cotton seed by exposure after they were unloaded. The damage to the cotton seed was caused directly by leaving them exposed, not by the obstruction. If they had been kept in the boat, or stored in a well-constructed warehouse, they would have remained uninjured after being detained with the boat for want of a draw in the bridge. The plaintiff was clearly entitled, as damages, to the reasonable worth of the boat for such time as it was detained by the obstruction; and in determining what the boat was worth it was competent to consider wages, if reasonable paid to the hands, as the value of its services were to some extent dependent upon the cost of the crew. *Greasley* v. *Codling*, *supra*. If the plaintiff during the period of detention had provided other means of transporting the cotton seed around the bridge to the mill above, the rule would have been the same as that applicable to detained passengers (*Hanley* v. *Jamesville & W. R. Co.* 115 N. C. at page 609, and authorities there cited), and the reasonable cost of carrying them by another route might have become an element of the damage assessed. In the case of *Rose* v. *Miles*, *supra*, *Lord* Ellenborough said: "He [the plaintiff] has been impeded in his progress by the defendants wrongfully moving their barge across, and has been compelled to unload and to carry his goods over land, by which he has incurred expense, and that expense caused by the act of the defendants. If a man's time or his money are of any value, it seems to me that this plaintiff has shown a particular damage." Bayley, *J.*, said that the plaintiff had placed the defendant in a situation that he unavoidably must incur expense in order to carry his goods another way, while Dampier, *J.*, said: "The expense was incurred by the immediate act of the defendants, for the plaintiff was forced to unload his goods, and carry them over land. If this be not a particular damage, I scarcely know what is." *Chichester* v. *Lethbridge*, *supra*. But the plaintiff, instead of procuring another conveyance for the cotton seed, left them exposed, so that they were injured. The measure of damage, therefore, was the reasonable cost of the boat, which was in the employment of the plaintiff during the period of detention. It is true that, upon a familiar principle, the defendant might have claimed a deduction from the aggregate value of its services during such time, of any sum which the boat and crew actually earned, but no evidence of that nature was introduced. *Hassard-Short* v. *Hardison*, 114 N. C. at page 487. A different case might have been presented if the plaintiff had been transporting a cargo to a market above, and had lost the advantage of the market (*Dudley* v. *Kennedy*, *supra*), but the gravamen of the complaint here is the cost incurred by detaining the boat. See *Greasley* v. *Codling*, *supra*. We conclude, therefore, that there was error in the instruction given as to the proper measure of damage, while there was no error in the other rulings complained of, and a new trial will be awarded only upon the question of the amount of damage which the plaintiff is entitled to recover. *Tillett* v. *Lynchburg & D. R. Co.* 115 N. C. 666.

New trial as to damage.

KENTUCKY COURT OF APPEALS.

George H. KIRKPATRICK, *Appt.*,
v.
G. T. BROWNFIELD.

(.....Ky.....)

A certificate of qualification from a judge, obtained after election as county court clerk, but before the term of office begins, is sufficient for qualification in this respect, under Const., § 100, providing that no person shall be "eligible to the office" unless he has procured such certificate, while it expressly makes the eligibility for certain offices, so far as age and residence are concerned, depend on the time of the election.

(May 28, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for La Rue County in favor of plaintiff in an action brought to contest defendant's right to the office of clerk of the county court, on the ground that he was ineligible to the office at the time he was elected to it. *Reversed.*

The facts are stated in the opinion.

Messrs. **Hobson & O'Meara,** for appellant:

Appellant got, a day or two after the election, the proper certificate, and had this certificate when he received notice of his election and before the contest by appellee was begun. This was a full compliance with the constitutional requirement.

Those who claim that any citizen, selected by his fellow citizens to fill any office, is disqualified to do so, should be able to point to some provision of the organic law that creates the disqualification in express terms.

Speed v. *Detroit*, 98 Mich. 360, 22 L. R. A. 842; *State* v. *Murray*, 28 Wis. 96, 9 Am. Rep. 489; *Privett* v. *Bickford*, 26 Kan. 52, 40 Am. Rep. 301; *Demaree* v. *Scates*, 50 Kan. 275, 20 L. R. A. 97; *Brown* v. *Goben*, 122 Ind. 118; *State* v. *Trumpf*, 50 Wis. 103; *Smith* v. *Moore*, 90 Ind. 294; Fed. Const. art. 1, § 100.

The first clause of the section requires certain facts to exist at the time of the election; the last clause relates, not to a fact, but an evidence of a fact.

When the makers of the constitution omitted in this clause the words "at the time of the election," contained in the first clause, it must be presumed they changed their phraseology because the meaning was not the same.

All words in an instrument of the dignity of a constitution must receive some meaning. The construction is best which gives to every word, and every section, and every clause, some meaning; this meaning, when given must be uniform.

Cooley, Const. Lim. 67.

"Legally qualified" is the meaning that should be given to the word "eligible."

Smith v. *Moore*, 90 Ind. 294; *Brown* v. *Goben*, 122 Ind. 118; *State* v. *Smith*, 14 Wis. 497; *State* v. *Murray*, 28 Wis. 96, 9 Am. Rep. 493; *Privett* v. *Bickford*, 26 Kan. 52, 40 Am. Rep. 301; *Demaree* v. *Scates*, 50 Kan. 275, 20 L. R. A. 97; *Vogel* v. *State*, 107 Ind. 374; *People* v. *Hamilton*, 24 Ill. App. 609.

The votes cast for an ineligible candidate are not void but must be counted.

Cooley, Const. Lim. 781.

If the votes must be counted and appellant was "eligible to the office" when notified of his election, why should the choice of the people be defeated?

Privett v. *Bickford*, *supra*.

Messrs. **I. W. Twyman** and **D. H. Smith** for appellee.

Hazelrigg, J., delivered the opinion of the court:

The appellant and appellee were rival candidates for the office of county court clerk of La Rue county at the November election, 1894. Appellant received a majority of the votes cast, and was awarded a certificate of election by the canvassing board. Appellee contested his election upon the ground that he had not, at the time of his election, procured from the proper officer a certificate of his qualification as required by law. It was agreed that the appellant, on the 8th day of September, 1894, had obtained from the clerk of the La Rue circuit court a certificate showing his qualification, and that on the 10th day of November, 1894, he had procured from his circuit judge a certificate stating that he had been examined by the clerk of the Metcalfe circuit court under the supervision of the judge, and that the applicant was qualified for the office of county court clerk, the first certificate being issued before and the second after the election. The contesting board held the appellant to have been ineligible at the time of his election, and hence not qualified to hold the office, which was therefore declared vacant. On appeal to the circuit court, that finding was approved, and from that judgment Kirkpatrick prosecutes this appeal.

It is not contended that the certificate of September, 1894, has any efficacy, but it is insisted by the appellant that the requirements of the constitution were met upon the procurement of the certificate of the circuit judge after the election and before the term began for which he was elected. The controlling provision of the constitution reads as follows: "No person shall be eligible to the offices mentioned in sections ninety-seven and ninety-nine, who is not at the time of his election twenty-four years of age (except clerks of county and circuit courts, who shall be twenty-one years of age), a citizen of Kentucky, and who has not resided in the state two years, and one year next preceding his election in the county and district in which he is a candidate. No person shall be eligible to the office of commonwealth's

NOTE.—As to the time at which eligibility of an officer is to be determined, see also, in support of the above case, State v. Van Beek (Iowa) 19 L. R. A. 622; Demaree v. Scates (Kan.) 20 L. R. A. 97; and opposed to these, the case of State v. Sullivan (Minn.) 11 L. R. A. 272.

See also 44 L. R. A. 446.

attorney unless he shall have been a licensed practicing lawyer four years. No person shall be eligible to the office of clerk unless he shall have procured from a judge of the court of appeals, or a judge of a circuit court, a certificate that he has been examined by the clerk of his court under his supervision, and that he is qualified for the office for which he is a candidate." Section 100. For the appellant, it is said that so much of this section as refers to the age and residence of the candidate relates to the time of the election, because it is so expressed; but that the rest of the section relates, not to the time of the election, but to the time of holding the office; that the words "eligible for the office," and "eligible to election," or "eligible when elected," are purposely used to convey different meanings. On the other hand, the appellee contends that the word "eligible" has a well-defined legal signification, and the expression "eligible to the office" is but a brief and concise form of stating, "capable of being legally chosen or elected to the office." Each party appeals to his favorite lexicographer to support his contention in the use of the word "eligible," and it is evident that the construction of the section cannot be made to depend on the definitions given by these learned compilers. The word is variously defined as "proper to be chosen," "legally qualified as eligible to office," and we are thus left to ascertain in some other way the sense to be attached to the words as used in the section. Primarily, the word "eligible," from the Latin "*eligere*" (to elect), means "capable of being elected," or, if we may temporarily coin a word, "eligible" means "electible." The use of the word is not at all confined to this primary meaning, and, if we attempt to substitute this meaning in the various sections of the constitution where the word is used, we reach quite absurd results; whereas, if we substitute the definition "legally qualified," as insisted on by appellant, we obtain a consistent and natural construction of all the sections. In section 114 we read: "No person shall be eligible to election as judge of the court of appeals," etc. In section 180 we read: "No person shall be eligible as judge of the circuit court who is less than thirty-five years of age when elected," etc. Manifestly, the words do not import in these sections more than that the person shall be "legally qualified," and, because that legal qualification is required to exist at the time of the election, other words were added to so indicate the purpose in view by the framers of the constitution. By section 93 certain officers are made eligible to re-election, and by section 165 a notary public and officers of the militia are declared not ineligible to hold or exercise any office, etc. The framers of the constitution in these sections used the word in the sense of "legally qualified" for office, or "qualified to hold office." Thus, "No person shall be qualified for election as judge of the court of appeals," etc., "or qualified as judge of the circuit court who is less than thirty-five years of age when elected," etc. And so in numerous instances it is apparent that, where eligibility is required as of the date of the election, words are used to make the meaning indisputable. So, in no less numerous instances, we find the words "eligible to the office" without additional words relating to the time of election. We think, therefore, that the words in themselves, as used in the constitution, mean "qualified for the office," not at the time of election, but at the time when the office is to be first assumed. Considering the care with which the constitution was prepared, and the scholarly distinction of many of its framers, we do not suppose that the same meaning is to be attached to the words "eligible to election" and "eligible to office" or "ineligible to re-election" or "ineligible to office." Our conclusion, therefore, is that, under the first part of the section under consideration, the words "eligible to the offices" mean "qualified for the offices," and, except for the words "at the time of his election," the eligibility required of the candidate would relate to the time when he was about to hold or assume the office, and that the same words, "eligible to the office," used in the latter part of the section, relate to the same time, and are without words fixing the date of the eligibility at the time of the election. This construction, it seems to us, is in accord with a general and manifest purpose on the part of the framers of the constitution. The changes of phraseology found in the various sections were not, we think, the result of mere chance. The words "office of clerk," mentioned in the last sentence of the section, embraced the offices of circuit and of county court clerks; and, as descriptive of the particular office for which the applicant should obtain a certificate of qualification, the words "for the office for which he is a candidate" were used. We think the words were used without an intention to indicate the time when the applicant for the office was to obtain his certificate. At best, the use of these words would raise only a presumption that the certificate was to be procured before the election, and we should not allow such a presumption to override what we conceive to be the general purpose in view by the use of the terms in controversy. To do so "would be to suppose," says Mr. Story, "that the framers weighed only the force of single words, as philologists and critics, and not whole clauses and objects, as statesmen and practical reasoners." While the provisions of the section under consideration are a substantial readoption of section 2, article 6, of the old Constitution, there seems to have been no adjudication by this court affecting the question here involved. In *Stevens* v. *Wyatt*, 16 B. Mon. 542, relied on by appellee, Garrett was held ineligible by the lower court, first, because he had no certificate of qualification, and, second, because he had not been a resident of Montgomery county for one year next preceding the election; and this court said, "As the facts respecting Garrett's ineligibility were agreed, no doubt is entertained of the propriety of the action of the board in refusing him a certificate of election." Here was an entire absence of any certificate obtained either before or after the election, and, manifestly, if Garrett had ob-

tained his certificate after the election, or even before, the result would not have been different, as he was ineligible for another and conclusive reason. There was no controversy on Garrett's part, and the opinion makes no reference to the point now involved, nor was the argument of counsel so directed. A few other cases from this court are referred to as touching the question, but throughout them all the question now in issue remained undetermined. Nor does the statute (Gen. Stat. § 1531, subsec. 8) providing for a new election in the event the person returned as elected is found not to have been legally qualified to receive the office at the time of the election affect the question. Many of the tests of eligibility are to be applied under the various statutes as of the time of the election, and if, when the term begins, the person elected cannot qualify, a vacancy necessarily occurs which may be filled as provided by law. The Nevada case of *State* v. *Clarke*, 8 Nev. 570, sustains the appellee's contention as to the meaning of the word "eligible," holding it to signify, when used in statutory and constitutional clauses such as we are considering, one "capable of being elected or chosen," and hence the "eligibility" must relate to the time of the election. To the same effect are the cases of *State* v. *McMillen*, 23 Neb. 385, and the Minnesota and California cases, as well as the earlier Indiana cases. But the Indiana court, in *Smith* v. *Moore*, 90 Ind. 294, reviewed their former decisions, and adopted a different construction, saying that "legally qualified" is the meaning that should be given to the word "eligible" as used in the section of the constitution under consideration. To the same effect are the cases of *State* v. *Murray*, 28 Wis. 96, 9 Am. Rep. 489; *Priestt* v. *Bickford*, 26 Kan. 52, 40 Am. Rep. 301, and *Demaree* v. *Scates* (1893), 50 Kan. 275, 20 L. R. A. 97, where the whole question is discussed and authorities reviewed. These cases discuss largely, and in some respects the conclusion is made to depend on, the etymology of the word "eligible," and in this respect we think the contention of the appellant is supported by the better argument. But, what is more important than this, we believe the framers of the constitution had in view a difference in meaning when they provided in one clause for "eligibility for office" and in another "eligibility to election."

The judgment below is reversed for proceedings consistent with this opinion.

TENNESSEE SUPREME COURT.

J. S. ROBERTS
v.
R. L. MITCHELL.

(94 Tenn. 277.)

The right to set off independent judgments rendered in different suits growing out of different causes of action is subject to attorneys' liens or claims for services.

(January 17, 1895.)

MOTION to set off judgments. *Set-off allowed, subject to attorneys' liens.*

The case sufficiently appears in the opinion.

Mr. **J. D. Goodpasture** for complainant.

Mr. **G. B. Murray** for defendant.

Beard, J., delivered the opinion of the court:

In this cause, on a former day of the present term, a money decree was rendered in favor of Mitchell against complainant, Roberts. On a still earlier day of the term, in another and independent suit, a decree was pronounced in favor of Roberts against Mitchell; and a motion is now made by Roberts to set off these judgments, one against the other, under section 3685 of the Code (Milliken & Vertrees). This motion is resisted by the solicitors of Mitchell, unless it be granted subject to their lien for services in obtaining the first decree.

While the attorney's lien upon the judgment recovered for his client, as the result of his professional labor, has been recognized and enforced in this state in a variety of cases, yet, so far as we have been able to discover, the exact question here involved has not been determined. Elsewhere, what is the proper rule in a case like the present has been the subject of much difference of opinion; and the result is, the practice of the courts of England, and of many of the states of this Union, has been very inharmonious. In the English courts, the claim of the attorney to have his fees and disbursements in a suit paid out of the judgment he obtained has been long recognized. In the courts of common pleas, however, it was held that this claim or lien was subordinate to the defendant's right of offset. The same rule obtained in the English chancery courts, while the court of king's bench held that the attorney's lien was superior to the defendant's right to such set-off. *Hall* v. *Ody*, 2 Bos. & P. 28; *Emdin* v. *Darley*, 1 Bos. & P. N. R. 22; *Simpson* v. *Lamb*, 40 Eng. L. & Eq. 59; *Taylor* v. *Popham*, 15 Ves. Jr. 79; *Ex parte Rhodes*, Id. 541. Afterwards, however, in the courts of common pleas the practice was changed; and the right of the attorney, against set-off, has been secured by the adoption of the rule so long enforced in the court of king's bench. *Simpson* v. *Lamb*, 49 Eng. L. & Eq. 59. As before stated, in the American courts the same difference of opinion and practice has obtained. In the supreme court of New York, at an early day, it was held that this lien would prevent one judgment from being set off against another in such a manner as to deprive the attorney of his costs. *Cole* v.

NOTE.—For right of set-off of judgments as affected by assignment, see *note* to Benson v. Haywood (Iowa) 23 L. R. A. 225.

See also 41 L. R. A. 852.

Grant, 2 Cal. Cas. 105; *Devoy* v. *Boyer*, 3 Johns. 247. In the states of Maine, New Hampshire, Nebraska, Florida, and Kentucky the right of set-off of the defendant is held to be subordinate to the attorney's lien for fees, or costs and disbursements, as may be. *Stratton* v. *Hussey*, 62 Me. 288; *Currier* v. *Boston & M. Railroad*, 37 N. H. 223; *Johnson* v. *Ballard*, 44 Ind. 270; *Boyer* v. *Clark*, 3 Neb. 161; *Carter* v. *Davis*, 8 Fla. 183. On the contrary, the courts of West Virginia, Vermont, Iowa, and Alabama maintain the right of set-off as superior to the attorney's lien. *Renick* v. *Ludington*, 16 W. Va. 378; *McDonald* v. *Smith*, 57 Vt. 502; *Tiffany* v. *Stewart*, 60 Iowa, 207; *Mosely* v. *Norman*, 74 Ala. 422. We think the better and more equitable rule is the one that subordinates the right of set-off of independent judgments rendered in different suits growing out of different causes of action, to the attorney's lien or claim for services rendered in the particular suit, and we do not hesitate to adopt it as the rule of practice in this state. On this subject, and in elaboration of our views, we quote the language of *Chancellor* Walworth in *Dunkin* v. *Vandenbergh*, 1 Paige, 624, 2 L. ed. 776: "The question in all these cases is, What is equitable and just between the parties and the attorney or solicitor? Where different claims arise in the course of the same suit, or in relation to the same matter, it is undoubtedly equitable and just that these equities should be arranged between the parties without reference to the solicitor's or attorney's lien. His lien is only on the clear balance due to his client after all these equities are settled. But where other claims arising out of different transactions, and which could not have been a legal or equitable set-off in that suit, exist between the parties, the court ought not to devest the lien of the attorney or solicitor which has already attached on the amount recovered for the costs of that particular litigation. When the solicitor has been at the labor and expense of prosecuting or defending a suit, it is equitable and just that his costs should be paid out of the result of that litigation." Nor is section 3685 of the Code to be construed so as to militate against this view. By that section it is provided that "judgments of the same court may be set off against each other on motion." But we hold that this section must be read as if it contained the implied condition that this set-off will not be allowed in derogation of the attorney's lien for his services in prosecuting the suit and obtaining the particular judgment. We think this construction gives full force to this provision of the code, and at the same time it preserves the equities of the parties interested. This was the view taken of a statute similar in character by the supreme court of New Hampshire, in *Shapley* v. *Bellows*, 4 N. H. 347.

In the case at bar *an order will be entered allowing the set-off*, but subject to the lien of the solicitors, which will be declared by a proper order.

TEXAS SUPREME COURT.

R. D. BILLS, *Plff. in Err.*,
v.
HIBERNIA INSURANCE CO.

(87 Tex. 547.)

A policy of insurance on a building and various articles of personal property therein, separately valued, is not forfeited as to the personal property by virtue of a lack of title to the land, under a provision that the entire policy shall be void if the "subject of insurance be a building on ground not owned by the insured in fee simple," since the building is not alone the subject of insurance.

(February 25, 1895.)

ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District to review a judgment reversing a judgment of the District Court for Navarro County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. **McKie & Autrey** for plaintiff in error.

Messrs. **Leake, Shepard & Miller** and **Barry & Etheridge** for defendant in error.

Brown, J., delivered the opinion of the court:

The Hibernia Insurance Company issued to R. D. Bills, upon his gin house and machinery, a policy of fire insurance in the sum of $1,480, the gin house being specified in the face of the policy as insured in the sum of $370, and the other items of property, separately valued at different amounts, making the total amount of insurance. The premium for the whole was the sum of $114.40. All the property was situated in and connected with the gin house, so as to be subject to destruction by the same fire. The gin house was situated upon a tract of land leased by Bills. The policy contained the following clause: "This entire policy . . . shall be void . . . if the subject of insurance be a building on ground not owned by the insured in fee simple." The building and all the personal property were destroyed by fire, and suit was instituted upon the policy. Defendant pleaded the above condition of the policy, and alleged that the building was upon ground not owned by Bills in fee simple, and therefore the policy was void as to the whole. It was admitted that the gin house was on leased ground, and plaintiff's counsel conceded that he could not recover for the gin house, but claimed that the policy was valid as to the other property. Upon trial the plaintiff recovered for

NOTE.—As to severability of policies of insurance, see *note* to Wright v. Fire Ins. Asso. of London (Mont.) 19 L. R. A. 211

See also 40 L. R. A. 358.

all except the gin house, from which judgment the defendant appealed, and the court of civil appeals reversed the judgment of the district court, and remanded the case to the district court, with instructions to enter judgment for the plaintiff, Bills, for $114.40, the amount of premium paid.

The policy of insurance upon which this suit was instituted was evidently prepared by filling in the blanks in a form intended to embrace a house or personal property or both, and contains clauses applicable to the two, also such as are applicable to each class of property separately. The property insured consisted of a gin house valued at $870, and machinery and other things situated in the house, each item valued separately, aggregating the sum of $1,430; the premium being a gross sum of $114.40.

Three assignments of error were presented to the court of civil appeals, all, however, stating in different forms the proposition that the policy sued upon was rendered entirely void by the fact that the gin house was upon land not owned by the assured in fee simple. Fraud in the application for insurance is not presented in these assignments, and therefore will not be considered by this court. The question to be decided arises upon the following language used in the policy: "This entire policy shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple." We have inserted the language as it would read in its application to this question, omitting intervening words not applicable. It is claimed on the part of the plaintiff that this policy is a divisible contract, and that it may be void as to the building and valid as to the other property insured. On the other hand, the defendant claims that it is an entire contract, and is void in all its parts if void at all. It is unnecessary to enter into a discussion of the rules which govern in determining whether a policy of insurance upon different articles, separately valued, is to be held entire or not. There is much division among the courts upon the question. It would, indeed, be difficult to decide as to which has the greater number of cases in its support, and sound reasons can be given in support of each side of the controversy. The language in this policy, however, is so definite upon the subject that there is no room for construction. The insurance company selected the words in which to express the terms and conditions upon which the forfeiture could be enforced, and must abide by the effect to which they are entitled under the established rules of construction. The plaintiff accepted the policy, and is equally bound by them under the law applicable to his rights. The terms being that the policy shall be entirely void upon a certain state of case, it cannot become void in part in that event. A contract cannot be entirely void, and at the same time partially valid. Entirely void means *in toto*, in all its parts, and as to all rights claimed under it. We agree with counsel for defendant that the contract is entire, and that, if the facts bring the case within the language of the clause expressing the conditions of forfeiture, it is void as to all the property embraced. Plaintiff has yielded his claim as to the gin house, and we shall not discuss the effect upon that, except in so far as it is involved in the construction of the words used. The language was selected by the defendant to express the terms of forfeiture imposed by it, and the language will be strictly construed against it for that and for the additional reason that forfeitures are not favored, and will not be declared, unless the case comes within the terms prescribed. *Goddard* v. *East Texas F. Ins. Co.* 67 Tex. 71; Wood, Fire Ins. § 60, p. 161; *Equitable L. Ins. Co.* v. *Hazlewood*, 75 Tex. 347, 7 L. R. A. 217. In order for the clause of forfeiture to be given effect, it must clearly embrace the case made by the facts. *Boon* v. *Ætna Ins. Co.* 40 Conn. 575; *Commercial Ins. Co.* v. *Robinson*, 64 Ill. 265, 16 Am. Rep. 557. In the case last cited the policy provided that the company should not be liable if the loss was occasioned by explosion of certain things mentioned therein. There was an explosion of one of the kinds of explosives mentioned, in a different building, that set the fire, which fire was communicated to the property covered by the policy, and the loss occurred by fire thus caused by an explosion. The court held that this was not within the language of the contract, and the exemption from liability did not exist. In the other case (*Boon* v. *Ætna Ins. Co.*) the policy provided that the company should not be liable for any loss or damage "by fire which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power." The property was situated in a town in Missouri, which was occupied by the Federal troops during the late war, and a superior force of Confederate troops attacked the town, when the commander of the United States troops, in order to prevent the stores falling into the hands of the Confederates, set fire to the building in which such stores were, from which the fire spread and consumed the property insured. The court held that this did not exempt the company, because it did not fall within the terms of the policy. If the conditions or warranties be repugnant to the portions of the policy describing the subject of insurance, the condition must yield to that portion which expresses the terms of liability; as if, for instance, the body of the policy grants insurance upon a stock such as is usually carried in a "country store," or such as is usually carried in a "retail store," and in the conditions prescribing that the carrying in the stock certain articles named as extra hazardous will cause a forfeiture of the policy, and it appear from the evidence that the articles expressly named are usually carried in such stocks and embraced in the terms of the policy describing the subject, the clause of forfeiture must yield to the language of the body of the policy, and the forfeiture will not be enforced. Wood, Fire Ins. § 64, p. 169; *Pindar* v. *Kings County F. Ins. Co.* 36 N. Y. 648, 93 Am. Dec. 544; *Whitmarsh* v. *Conway F. Ins. Co.* 16 Gray, 359, 77 Am. Dec. 414.

These authorities suffice to illustrate the rule that the terms of the policy must be broad enough to cover, under a strict construction, the facts of the case under consideration, and that every doubt arising upon the terms of the instrument must be resolved against the insurer. With this rule in view, we will examine the case now before the court, upon this point. "The subject of the insurance" in this policy was the property insured. This consisted of a building, and various other articles of personal property, separately valued. In order to sustain the contention of the defendant, we must import into the clause of forfeiture words to give to it the effect as if it read thus: "If the subject of insurance or any part of it be a building," etc., as in the case of *Smith* v. *Agricultural Ins. Co.* 118 N. Y. 526. The court, however, will not imply anything in favor of a forfeiture, but must try the matter by the language used by the parties. "The subject of insurance," as used in the condition of forfeiture, means a definite single subject; that is, a house, one house, and not a house and other property. If we consider all of the insured property (consisting of a house and many pieces of machinery) as constituting the subject, then the subject was not a house, and the facts do not fall within the terms of the contract. If we consider each piece of property as a separate subject of insurance, the house was not the subject, but one of the subjects; and, in either case, the facts proved do not establish the contingency upon the happening of which the policy is to be entirely void.

The court of civil appeals erred in reversing the judgment of the district court and rendering judgment for the defendant, for which error *the judgment of the Court of Civil Appeals is reversed, and the judgment of the District Court is affirmed.*

MINNESOTA SUPREME COURT.

Mamie LANE, *Respt.*,
v.
MINNESOTA STATE AGRICULTURAL SOCIETY, *Appt.*

(.....Minn.....)

***1. Held, that the allegations of the complaint,** when read in connection with the general laws of the state relating to the defendant, do not show it, the Minnesota State Agricultural Society, to be a public corporation organized for the sole purpose of discharging a governmental function, and therefore exempt from liability to persons injured by its negligence.

2. The complaint alleges that the defendant engaged the plaintiff to ride in a running race for horses, which was promoted and controlled by it; that, knowing a certain horse was dangerous and unsafe to run in any race by reason of a vicious habit of track bolting, of which plaintiff was ignorant, it negligently permitted such horse to run in the race in which she rode, pursuant to her engagement with defendant, without warning her of the unusual danger to which she was thus exposed; that, by reason of such horse bolting the track during such race, she was thrown from her own horse and injured. *Held*, that the complaint states a cause of action.

(October 2, 1895.)

APPEAL by defendant from an order of the District Court for Ramsey County overruling a demurrer to the complaint in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Mr. **Ira B. Mills,** for appellant:

All the acts of the legislature in relation to the defendant are general and public laws. It is not necessary to plead them; the court will take judicial notice of them, and so far as the defendant's liability in this action is governed and controlled by them the question can be raised by demurrer.

Bliss, Code Pl. § 181; Sutherland, Stat. Constr. §§ 181, 182.

If defendant is a corporation it must belong to one of the two divisions recognized by law, public or private, or what is known as a quasi corporation.

Private corporations are associations by the voluntary agreement of their members.

Morawetz, Priv. Corp. § 8.

The defendant is not a voluntary association, there is no contractual relation between the members.

It is undoubtedly a public corporation, whether it be held to be only a quasi corporation or what is generally understood as a public corporation, such as exist for the purpose of government and management of public affairs.

People v. *Harper*, 91 Ill. 357.

Defendant is not liable for the negligence of its officers or agents.

The legislature intended to create a public state institution, as an agency of the state for the improvement of all branches of industry, to stimulate its citizens, develop its agricultural resources, and by annual exhibits of its wealth attract strangers to settle within its limits.

A'Hern v. *Iowa State Agr. Soc.* (Iowa) 24 L. R. A. 655; *Bank* v. *Brainerd School Dist.* 49 Minn. 106; *Altnow* v. *Sibley*, 30 Minn. 186, 44 Am. Rep. 191; *Snider* v. *St. Paul*, 51 Minn. 466, 18 L. R. A. 151.

The holding of an annual fair is one of the duties imposed on defendant by statute; the details of the entertainment are necessarily left with the board of managers; the providing of the running race was one of the many attractions offered, and in the line of defendant's duty to furnish an annual exhibit of the products and resources of the state. If not, the

*Headnotes by STARR, *Ch. J.*

NOTE.—For nature of incorporated state institutions, see *note* to State v. Board of Regents of University of Kansas (Kan.), *ante*, 373.

See also 37 L. R. A. 258; 38 L. R. A. 156; 40 L. R. A. 345, 677; 42 L. R. A. 277; 47 L. R. A. 577.

acts were *ultra vires* and there would be no liability.

A'Hern v. *Iowa State Agr. Soc. supra.*

It is quite common for states to organize boards possessing corporate powers,—among them to bring actions for penalties or enforce contracts, and to carry out the policy of the state for the benefit of the state; yet no action lies against them for the negligence of their agents or servants.

Walsh v. *New York & Brooklyn Bridge Trustees*, 96 N. Y. 427.

Where the vicious habit of an animal is directly dangerous, such as kicking, biting, or striking in a horse, hooking in a horned animal, or biting in a dog, the owner, if it is known to him, is bound to notify those dealing with the animal of such habit; but it is otherwise when the habit is not such as will directly inflict injury.

Moake's Underhill, Torts, 297; *Keshan* v. *Gates*, 2 Thomp. & C. 288; *O'Brien* v. *Miller*, 30 Conn. 214.

Messrs. **Schoonmaker, Fleming & Hinckermister**, for respondent:

The allegation of incorporation is generally one of an ultimate and issuable fact, which, under a familiar rule, stands admitted by a demurrer.

Walsh v. *New York & Brooklyn Bridge Trustees*, 96 N. Y. 427; *Morton* v. *Power*, 33 Minn. 221; Morawetz, Priv. Corp. §§ 18, 20.

The defendant has always acted as a private corporation, and appeared in this court alleging its corporate existence.

Minnesota State Agr. Soc. v. *Swanson*, 48 Minn. 231.

In conducting a running race, for witnessing which it charged the public a fee, defendant was not discharging a public governmental duty involuntarily imposed by statute.

Moulton v. *Scarborough*, 71 Me. 267, 36 Am. Rep. 308; *Hand* v. *Brookline*, 126 Mass. 324; *Pilley* v. *Allegheny City*, 118 Pa. 490; Dill. Mun. Corp. 4th ed. §§ 980–985, and *notes*.

Where an undertaking is voluntarily assumed and carried on under permissive legislative authority, by any legal entity, whatever the precise legal status of that entity, out of which tolls are received from the public or profits are derived, all authorities agree in holding such entity liable for injuries resulting from negligence or omission of duty, the same as an individual.

Dill. Mun. Corp. 4th ed. § 113, *note* 1, §§ 980–985, and *notes; Hill* v. *Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Snider* v. *St Paul*, 51 Minn. 466, 18 L. R. A. 151; *Moulton* v. *Scarborough, supra; Hannon* v. *St. Louis County*, 72 Mo. 313.

If it appear that any domestic animal has a vicious habit, and is accustomed or is inclined to do the particular hurt or mischief that has been done, and that the owner has notice thereof, then a duty is imposed on the owner to keep the animal secure, and to warn persons rightfully dealing with the animal of such habit, custom, or inclination.

Cooley, Torts, 2d ed. pp. 403–406, and *notes*.

Start, *Ch. J.*, delivered the opinion of the court:

This is an appeal by the defendant from an order overruling its demurrer to the complaint of the plaintiff, wherein she alleges that she was injured by the negligence of the defendant, September 10, 1891, while riding in a horse-race conducted by the defendant on the State Fair Grounds. Two general propositions are urged by counsel in support of the demurrer: First. That the defendant is a public board or corporation, organized for the sole purpose of discharging a governmental function; and therefore, as such public agent, it is not legally liable for the negligence of its officers, agents, and servants, or any of them. Second. That the facts alleged in the complaint do not constitute negligence on the part of the defendant or its agents. If either proposition is correct, the demurrer is well taken; but we are of the opinion that, tested by the allegations of the complaint which are admitted, neither is correct.

1. The state may and must commit the discharge of its sovereign political functions to agencies selected by it for that purpose. Such agencies, while engaged exclusively in the discharge of such public duties, do not act in any private capacity, but stand in the place of the state, and exercise its political authority. Therefore, when the state creates public corporations solely for governmental purposes, such corporations, while engaged in the discharge of the duties imposed upon them for the sole benefit of the public, and from the performance of which they derive no compensation or benefit in their corporate capacity, are clothed with the immunities and privileges of the state; and no private action, in the absence of an express statute to that effect, can be maintained against them for negligence in the discharge of such duties. The liability of cities and other municipal corporations created by special charters, for negligence in the care of their streets, is an illogical exception to this rule, but the rule itself is too well settled, by the almost unanimous agreement of all of the authorities, to be now questioned or discussed. *Snider* v. *St. Paul*, 51 Minn. 466, 18 L. R. A. 151. The rule, however, has no application to private corporations,—that is, to those which are organized by the voluntary act and agreement of their members for their own benefit,—although the creation of such corporations directly promotes the public interest and welfare. It is also subject to the qualification that public or quasi public corporations are not exempt from liability to which other corporations are subject for negligence in managing or dealing with property or rights voluntarily held by them for their own profit and advantage, although inuring ultimately to the benefit of the public. 2 Dill. Mun. Corp. §§ 980–984; *Oliver* v. *Worcester*, 102 Mass. 489, 3 Am. Rep. 485; *Mersey Docks & Harbour Board Trustees* v. *Gibbs*, 11 H. L. Cas. 687; *Glavin* v. *Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675; *Moulton* v. *Scarborough*, 71 Me. 267, 36 Am. Rep. 308; *Hannon* v. *St. Louis County*, 62 Mo. 313.

The allegations of the complaint, standing alone, make a prima facie case of a private corporation engaged, for its own benefit, in

an undertaking outside of any public duties, viz., promoting, controlling, and conducting a horse-race,—a case not within the rule of immunity applicable to public corporations, institutions, and agencies created solely for governmental purposes. The demurrer admits the corporate existence and acts of the defendant as alleged, but its counsel claims (1) that the court must take judicial knowledge of the general statutes of the state relating to the defendant and its organization, and read them as if they were incorporated in the complaint; and (2) that such statutes show that the defendant is a public or quasi public corporation organized for the sole purpose of discharging governmental functions. We assume, without so deciding, that the first of these claims is correct, but we cannot take judicial notice of the provisions of the defendant's articles of incorporation, adopted and filed pursuant to the statute under which it was organized; nor can we assume that it has no capital or property derived from membership and entrance fees, from fees for admission to its exhibitions, and from the sale of privileges to private parties to conduct, upon the grounds controlled by it, a multitude of independent shows and enterprises. On the contrary, it is a matter of common knowledge that it does derive a large revenue from these sources, over which the state has no control. A consideration of the general laws relating to the defendant does not justify the claim of its counsel that it is not liable for the negligence alleged in this action because it is within the rule of immunity to which we have referred. At the outset of our examination of such laws we are embarrassed by the fact that there is nothing in the record to show when or under what particular law the defendant was incorporated. This necessitates a review of the entire legislation in reference to the defendant.

Pub. Stat. 1849-1858, chap. 17, §§ 884-888, authorized the incorporation of agricultural societies of the character of the defendant, and by implication authorized a division of the property of the corporations upon dissolution. Chapter 17 of the Laws of 1860 made ample provisions for incorporation of county agricultural societies. Section 2 of this Act provided that such corporations should have perpetual succession, with the right to adopt a seal, constitution, and by-laws, to purchase, hold, sell, and convey all real and personal property necessary to promote the objects of the corporation, and to have police and full control of its grounds. Provision was made by section 3 for filing a copy of the constitution and by-laws of such corporations in the office of the register of deeds, and for the making of annual reports of their receipts and disbursements to the governor of the state. Sections 4, 5, and 6 provided for annual meetings of the societies, for the election of officers, and for two delegates from each county society, who, together with its president as delegate *ex officio*, were to represent their county in the state agricultural society. These delegates were to meet together, at the city of St. Paul or such other place as a majority should determine, on the first Wednesday in February in each year, and at the first meeting after the passage of the act file articles of their incorporation in the office of the secretary of state. Section 8 of this Act declared that the State Agricultural Society (presumably the defendant) "shall possess all of the powers enumerated in section 2," to which we have referred. This chapter 17, Laws 1860, was repealed by Gen. Stat. 1866, chap. 122, but such repeal did not affect any act done or any right accruing or accrued or established under the statute before its repeal. Id. chap. 121, § 4. Therefore, if the defendant became incorporated under this Statute of 1860, its repeal did not work a dissolution of the corporation. This would seem to be so without reference to the saving clause of the repealing statute. The Act of 1860 was substantially re-enacted by Laws 1867, chap. 29. In 1868 the corporate existence of the defendant was expressly recognized by the legislature, which appropriated to it $1,000, and $2,000 *pro rata* to the several county societies, but no part of either appropriation was to be used for the payment of officers' salaries or fees or as a premium for horse racing. Laws 1868, chap. 19. This last act required the defendant to keep an account of the manner in which the state appropriations to it were expended, and transmit the same annually to the governor of the state. In the year 1876 the legislature confirmed and legalized the incorporation of the defendant. Laws 1876, chap. 29. There was no further legislation affecting the legal status of the defendant prior to the year 1883, and it is obvious, without discussion, that prior to this date the defendant was a private corporation, and not within the rule of immunity claimed for it. This proposition is not seriously controverted by counsel, but it is claimed that by the legislation of 1883, 1885, and 1887 the status of the defendant was materially changed, and that thereafter it became, and now is, essentially a public corporation or agency for the sole purpose of discharging a governmental function. A brief analysis of this subsequent legislation will show the unsoundness of the claim. By an act entitled "An act to reorganize the State Agricultural Society and to appropriate money thereto and to other agricultural societies," approved March 5, 1883 (Laws 1883, chap. 142), a change was made in the membership of the defendant and its officers. It was, however, provided that nothing in the act should be construed as annulling any existing life or annual membership of the defendant. The fee for life membership was fixed at $10, and the annual dues at $1 for each member, as a condition to the right of voting at the annual meetings of the defendant. The act also created a board of auditors, consisting of the governor and three other persons, to be appointed by him and confirmed by the senate, to examine all of the transactions of the defendant, and to report to the legislature at each session; and further required the by-laws of the defendant to be submitted to this board for approval. Other than this no attempt was made by the act to reorganize or deprive the defendant of any existing corporate right

or power. This act increased the annual appropriation to the defendant, to aid it in paying premiums, to $4,000, and the annual appropriations to county societies for a like purpose to $6,000, and repealed the appropriations of 1868 and all inconsistent acts and parts of acts. Assuming that the defendant accepted the provisions of this act as to the change of membership and for a qualified state control in consideration of the increased appropriation, still there was no essential change in the status of the defendant, for it continued to be a corporation, with all the powers, rights, and privileges which it acquired by virtue of the prior Acts of 1860 and 1867 relating to its organization. By chapter 174, Laws 1885, the county of Ramsey was authorized to convey to the state of Minnesota certain real estate, to be held by it for the public purpose, and for no other, of exhibiting annually thereon, under the management of the State Agricultural Society, or its successor, the agricultural, stock-breeding, horticultural, mining, mechanical, and industrial products and resources of the state. This act further provided that there should be held by the defendant, upon the premises to be conveyed, such exhibit as the society might provide for, and at such times as it might prescribe. It also made an appropriation of $100,000, to be expended under the direction of the society for permanent buildings on the premises, the custody and control of which were given to the defendant. By chapter 181, Laws 1887, the membership of the defendant was enlarged, the fee for life membership abolished, the time of holding its annual meeting changed; police powers were conferred upon its board; its secretary was required to make to the governor an annual report, showing in detail the financial condition and proceedings of the society for the current year; the provisions of the Act of 1883 in reference to its board of managers and the board of auditors to examine all the transactions of the society were re-enacted, and the Act of 1883 repealed, except the part thereof relating to the annual appropriations to the defendant and county societies. Chapter 163, Laws 1891, appropriated $20,000 to pay the debts of the defendant. These Acts of 1883, 1885, 1887, and 1891 seem to indicate that the legislature regarded the defendant as a quasi public corporation, but they must be construed with reference to the previous status of the defendant as a private corporation, and the further fact that the changes made by the legislature in the membership and control of the affairs of the defendant were accompanied by substantial benefits to the defendant, which were naturally calculated to induce it to accept such legislation, and, if it did so, it could not thereafter question its validity. *State* v. *Sibley*, 25 Minn. 387. It is also to be observed that this legislation does not assume to create a new corporation. It simply deals with an existing one, giving it aid, and in consideration thereof controlling, in a measure, its affairs. But it does not follow, because the state makes annual contributions to assist the defendant in paying premiums, and, to make it certain that its bounty shall not be misapplied, has provided for an examination of the defendant's accounts, and exacts a report of its transactions from it, that it is a public corporation for the sole purpose of discharging a governmental function. Otherwise railway corporations which have received state aid, and must report to the state as to their earnings and other matters, banking corporations, religious corporations, which indirectly receive annually state aid by exemption of their property from taxation, all county agricultural societies which receive state aid, and many other similar corporations must be classified as state agencies, and held not liable in a private action for their negligence whereby individuals are injured. So far as can be gathered from this legislation and the allegations of the complaint, the defendant may be a voluntary corporation. It does not appear that the state has any voice in the selection or control of its officers, or in fixing their compensation, or in the disposition of its property and revenues, except such as it receives from the state, or as to the character and extent of the annual exhibitions it may give, or the fees to be charged for admission thereto. If the defendant refuses to give an annual exhibition of the products and resources of the state, the state may withdraw its appropriations and the use of the fair grounds, but it cannot otherwise coerce the defendant. In short, we are unable, without further information as to the defendant's articles of incorporation, by-laws, business, revenues, and whether or not the latter are impressed with any public trust, than that afforded by the record in this case, to discover anything in the general laws of the state relating to the defendant to rebut the prima facie case made by the allegations of the complaint, to the effect that the defendant was, at the time of committing the act of negligence complained of, a private corporation conducting an exhibition for its own benefit.

2. It is claimed by defendant, in support of its second ground of demurrer, that track bolting is not a dangerous or vicious habit in a horse, "any more than balking, or the habit of running away," and that the defendant was not bound to notify the plaintiff that one of the horses, known as "Isaac B.," which it permitted to run in the race, was a "track bolter." We have no knowledge of the meaning of the term "track bolting," except as we are advised by the allegations of the complaint, which state that track bolting is a vicious and dangerous habit in a horse, rendering him dangerous and unsafe to run in any race, and that "Isaac B." was such a horse. This conclusion is amply supported by the allegations of fact in the complaint as to what this horse actually was and did in the race in which the plaintiff rode pursuant to her contract with the defendant. It is made clear by these allegations that the plaintiff was injured by the horse in question bolting the track, as was his dangerous and vicious habit to do, and that defendant, being advised of this habit and the plaintiff being wholly ignorant of it, knowingly permitted the horse to run in the race in which the plaintiff rode, without informing her of

the unusual danger to which she was thus exposed, and of which she was ignorant. If these allegations are true, this was a manifest violation of the defendant's duty to the plaintiff, as its employé, and it was guilty of actionable negligence in the premises.

Order affirmed.

ARKANSAS SUPREME COURT.

STATE MUTUAL FIRE INSURANCE CO. OF ILLINOIS, *Appt.*, v. BRINKLEY STAVE & HEADING CO.

(.....Ark.....)

1. **Applications for insurance sent by mail to another state,** where they are passed upon and accepted, and in which policies are dated and signed and then mailed to the insured, are governed by the laws of that state so as to be unaffected by statutes at the residence of the insured prohibiting insurance by unauthorized foreign companies.

2. **The failure of an insurance company of another state to comply with statutory prerequisites** to the right to do business does not prevent such company from enforcing a claim for premiums due for insurance, although the corporation is guilty of a misdemeanor and subject to a penalty by reason of the insurance.

3. **The right to recover unearned premiums on the termination of insurance** in a mutual company does not exist until the dues or liabilities which the insured may be liable to pay under the charter and by-laws of the organization can be ascertained and deducted, where the charter provides for withdrawal by notice and "paying all dues and liabilities."

(May 18, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Monroe County in favor of defendant in an action brought to enforce payment of an assessment upon an insurance policy. *Reversed.*

The facts are stated in the opinion.

Messrs. **H. A. Parker** and **J. R. Parker,** for appellant:

When an application, bid, or offer is sent through the mail, it becomes a valid and binding contract the minute the acceptance is put in the mail to be sent to the party so offering; and it is governed by the law of the place where it is accepted, and not from which it is sent.

2 Kent, Com. 12th ed. p. 477, *note;* 3 Minor, Inst. p. 127; 2 Parsons, Cont. 7th ed. p. 712; 1 Parsons, Cont. pp. 515, 516, 562; *Taylor* v. *Merchant's F. Ins. Co. of Baltimore,* 50 U. S. 9 How. 390, 13 L. ed. 187; *McIntyre* v. *Parks,* 3 Met. 207.

When the statute does not impose a forfeiture, the courts will not and cannot, unless the legislature failed to declare a punishment. And when the legislature has pronounced two severe punishments, courts cannot impose any more.

Ehrman v. *Teutonia Ins. Co.* 1 Fed. Rep. 471; 2 Morawetz, Priv. Corp. § 665; *Toledo Tie & Lumber Co.* v. *Thomas,* 33 W. Va. 566; *Columbus Ins. Co.* v. *Walsh,* 18 Mo. 229; *Union Mut. L. Ins. Co.* v. *McMillen,* 24 Ohio St. 67; *Clay Fire & Marine Ins. Co.* v. *Huron Salt & Lumber Mfg. Co.* 31 Mich. 346; *Hartford Live Stock Ins. Co.* v. *Matthews,* 102 Mass. 221; 2 Beach, Priv. Corp. § 415, and cases cited.

The liability of a stockholder or member of a mutual insurance or benefit association is governed by the laws of the domicil of the corporation, and can be enforced against any member wherever found.

Kerr, Corp. 20; *Flash* v. *Conn,* 109 U. S. 371, 27 L. ed. 966; *Canada Southern R. Co.* v. *Gebhard,* 109 U. S. 527, 27 L. ed. 1020; 1 Beach, Priv. Corp. §§ 148; 149, and latter part of section 289.

If the contract is not made in Arkansas, foreign corporation acts have no application.

Scruggs v. *Scottish Mortg. Co.* 54 Ark. 566; *St. Louis, A. & T. R. Co.* v. *Fire Asso. of Philadelphia,* 55 Ark. 163; May, Ins. chap. 25, § 54; 2 Morawetz, Priv. Corp. 2d ed. §§ 743, 755, 756, 874, 875.

Defendant cannot join a mutual insurance or benefit company in a sister state, or in his own state, and then object to any irregularities or illegalities in forming or operating the same.

2 Morawetz, Priv. Corp. § 743; *Potts* v. *Wallace,* 146 U. S. 689, 36 L. ed. 1135.

Mr. **C. F. Greenlee,** for appellee:

Where an act is prohibited by statute, a contract to do the act is illegal and unenforceable, and where a statute pronounces a penalty for an act, a contract founded on such act is void.

5 Lawson, Rights, Rem. & Pr. § 2393, and citations; *Jones* v. *Little Rock,* 25 Ark. 306; *Martin* v. *Hodge,* 47 Ark. 378, 58 Am. Rep. 763.

There can be no doubt of the power of the state to enact such laws as will afford adequate protection to the citizens of this state.

State v. *Ackerman,* 24 L. R. A. 298, 51 Ohio St. 168; *Reliance Mut. Ins. Co.* v. *Sawyer,* 160 Mass. 418; *Hicks* v. *National L. Ins. Co.* 60 Fed. Rep. 690.

If we concede the contract of insurance is an Illinois contract, the courts all hold that appellant cannot recover.

Cincinnati Mut. Health Assur. Co. v. *Rosenthal,* 55 Ill. 86, 8 Am. Rep. 626; *American Ins. Co.* v. *Stoy,* 41 Mich. 401; *Seamans* v. *Zimmerman* (Iowa) 59 N. W. Rep. 290; *Rose* v. *Kimberly & C. Co.* 27 L. R. A. 556, 89 Wis. 545; *Seamans* v. *Temple Co.* (Mich.) 28 L. R. A. 480.

To permit the companies when they admit that they have disregarded all the requirements, to recover, would be for the courts to disregard

NOTE.—The decision in the above case, sustaining an action by a foreign insurance company for a premium on unauthorized and prohibited policies, is supported by a few of the authorities, but a majority of the decisions on the subject deny any such remedy to the corporation which has violated the statute. See, on this subject, the analysis of the decisions, found in *note* to Edison General Electric Co. v. Canadian Pac. Nav. Co. (Wash.) 24 L. R. A. 315.

the expressed will of the general assembly, and to say what it has said shall be unlawful is and shall be lawful and binding.

Hughes, J., delivered the opinion of the court:

The plaintiff, appellant, a mutual fire insurance company incorporated under the laws of the state of Illinois, sued the defendant, the appellee, for an assessment of $225 for dues, losses, and liabilities incurred as a member of plaintiff company on two policies. The defendant denied the liability; set up that policies were canceled; that plaintiff owed it $125 for unearned premiums; and that plaintiff's contract on policies was void for noncompliance with foreign corporation law; and prayed judgment for $125 on counterclaim.

The court found the facts to be: (1) That the insurance for which the policy was issued was solicited in the state by an agent of the plaintiff during the course of regular business herein, and that the application was made and the policy was accepted in this state. (2) That plaintiff is a foreign corporation, and has wholly failed to comply with any of the laws of this state regulating insurance, and was not entitled to transact insurance business in this state. (3) That the insurance was on the 26th of May, 1891, terminated, and defendant, on its cross-complaint, is entitled to recover from plaintiff $125 unearned premiums.

The court declares the law to be: (1) No foreign corporation shall do any business in this state, except while it maintains therein one or more known places of business, and an authorized agent in the same upon whom process may be served, and they shall exercise no greater powers nor have any greater privileges than are exercised or had by like corporations of this state. (2) Before mutual fire insurance companies are permitted to do business in this state, it is required that they shall give bond to the state of Arkansas for the use of the beneficiaries of the policy holders of such companies, with security to be approved by the secretary of state, in the sum of $20,000, conditioned for the prompt payment of all assessments to the parties or beneficiaries entitled thereto, which bond shall be filed in the office of the secretary of state; and the law requires insurance corporations doing business on the assessment plan to make return to the auditor of state annually, on or before the 1st of March, of a statement of the affairs of the corporation for the year ending on the 31st of December next preceding. (3) Plaintiff was not entitled to do insurance business in this state until it had complied with Act 84 of the Acts of Arkansas for 1887, and received from the auditor of state a certificate to that effect; and if any person transacted any insurance business for plaintiff until it had complied with the requirements of said act, he was guilty of a misdemeanor, and subject to a fine in the sum of $500. (4) Plaintiff cannot recover in this action, unless it has complied with section 3832, Mansf. Dig., and paid the taxes therein prescribed. (5) If plaintiff has wholly failed to comply with its duties as prescribed in sections 3833, 3834, Mansf. Dig., and the act of Arkansas above mentioned, and the insurance was obtained from defendant company, and the same was solicited by an agent of plaintiff while in the course of regular business in this state, then plaintiff cannot recover in this action. (6) If defendant company or its agents requested the termination of the insurance, it is entitled to recover from the plaintiff the amount of unearned premium proved by the evidence. (7) Where an act is prohibited by statute, a contract to do the act is illegal and unenforceable, and where a statute pronounces a penalty for an act, a contract founded on such act is void.

The appellee made application to the agent of the appellant at Brinkley, Ark., for two policies of insurance in the appellant company. The applications were forwarded to the company at Chicago, Ill., and there passed upon, accepted, dated, and signed by the proper officers of said company, which was a mutual fire insurance company chartered under the laws of Illinois, with its domicil at the city of Chicago, in said state. The policies were then sent by the company directly to the appellee, at Brinkley, Ark., and the premiums were thereupon forwarded to the appellant company at Chicago. It appears that the agent to solicit insurance for the appellant had no authority to pass upon applications, to bind his company, or to issue policies, nor were the policies when issued sent to him for delivery, nor the premiums paid to him, to be forwarded to his company. These contracts, for the reasons stated, were not Arkansas contracts, but Illinois contracts. When the applications of the appellee had been received, passed upon, and accepted, and the policies of insurance had been dated and signed at Chicago, and then mailed to the appellee, the contracts were then and there complete, and were Illinois contracts, and governed by the laws of that state. 2 Parsons, Cont. 712; 2 Kent, Com. 12th ed. p. 477, and *note; Taylor* v. *Merchants F. Ins. Co. of Baltimore*, 50 U. S. 9 How. 390, 13 L. ed. 187; *McIntyre* v. *Parks*, 3 Met. 207. Though the appellant company failed to comply with the statute by not doing those things required of foreign corporations before doing business in this state, the contracts in this case were not void on that account, as they were Illinois contracts.

It is also contended these policies are void because the appellant company failed to comply with the statute in regard to "foreign insurance companies and agents therefor," found in Sandf. & H. Dig. §§ 4137-4139, inclusive; and particularly because section 4138 says that "any person or persons or corporation receiving premiums or forwarding applications, or in any other way transacting business for any insurance company or corporation not of this state, without having received authority agreeably to the provisions of this act, shall forfeit and pay to the school fund of the state the sum of five hundred dollars for each month or fraction thereof during which such illegal business was transacted; and any company not of this state, doing business without authority, shall forfeit a like sum for every month or fraction thereof.

and be prohibited from doing business in this state until such fines are fully paid; and every such person or persons or corporation shall be deemed guilty of a misdemanor, and upon conviction shall be fined in any sum not less than five hundred dollars." It will be observed that, though penalties are imposed in this act upon the persons or corporations doing the things therein prohibited without first complying with its requirements, it does not make void the contracts made by the insurance companies without such compliance, either as to the corporations named therein, or the policy holders in such companies. In *Toledo Tie & Lumber Co. v. Thomas*, 33 W. Va. 566, it is stated,—correctly as we think,—by the supreme court of appeals of West Virginia, that "a contract made by a foreign corporation before it has complied with the statutory prerequisites to the right to do business in another state will not on that account be held absolutely void, unless the statute expressly so declares; and if the statute imposes a penalty upon the corporation for failing to comply with such prerequisites, such penalty will be deemed exclusive of any others." See cases cited in that opinion. The insurance contracts in this case were not void on account of the failure of the insurance company to comply with the statutory prerequisites to the right of a foreign insurance company to do business in this state. The penalty imposed by the statute was exclusive of any other forfeiture.

There was a provision in these policies of insurance (section 8), that "this insurance may be terminated at any time at the request of the assured, in which case the association shall retain only the customary short rates for the time the policy has been in force." The defendant contends that before the expiration of the first year, for which it had paid premiums, to wit, in May, 1891, and before the commencement of this suit, it requested the cancellation of its policies of insurance, and the return of the unearned premiums, amounting to $125, which amount the defendant claimed was due it, and for which it demanded judgment. It contended that its request for cancellation terminated its liability for any assessments thereafter made, and left the company indebted to it for unearned premiums, and says the company refused to cancel the policies or pay the unearned premiums till the maturity or anniversary of the policies. There was proof tending to support this contention. The company maintains that, before it could ascertain the amount due the appellee for unearned premiums, it would have had to await the expiration of the year, or the anniversary of the policy, that it might be able to determine for what proportion of the expenses and liabilities, in proportion to appellee's insurance, up to the date of the request for cancellation, the appellee would be liable, and it does not appear that there was any offer by appellee to meet these in any way; but it seems that the appellee claimed that it was entitled at once to the unearned premiums, at the date of its request for cancellation of its policies, without provision for, or recognition of, any obligation to bear its legitimate proportion of the liabilities of the association of which the appellant was a full member, according to the charter of the said association. The ninth section of the charter of the appellant company provides that "any member of this company may withdraw therefrom by notice in writing to the secretary and paying all dues and liabilities." If there were dues or liabilities which the appellee was liable to pay to the company, it was entitled to recover the unearned premiums less the amount of its dues and liabilities to the association, but not until these could be ascertained and the balance of the unearned premiums became due and payable according to the charter and by-laws of the association, to which the appellee subscribed when it became a member of the association. It is apparent from what has been stated herein that the circuit court in its first finding of facts erred, and in its third finding stated only what was conceived to be the legal effect of the evidence, and not the evidence itself.

The declarations of law made by the court are inapplicable to this case and erroneous. The court, it seems, tried the case upon a wrong theory. For the errors indicated *the judgment is reversed*, and the cause is remanded for a new trial.

Rehearing denied.

MAINE SUPREME JUDICIAL COURT.

STATE of Maine
v.
Charles F. SWETT.

(.....Me.....)

A common carrier who does not know or have good reason to know that barrels received by him for shipment contain short lobsters is not liable for receiving them, under Laws 1889, chap. 202, § 2, making it unlawful to catch or "possess for any purpose" between specified dates any lobster less than 10½ inches long.

(January 5, 1895.)

EXCEPTIONS by defendant to rulings of the Superior Court for Cumberland County made during the trial of an action against defendant for violating a provision of the game laws in having in his possession short lobsters, which resulted in a conviction. *Exceptions sustained.*

The facts sufficiently appear in the opinion.

Mr. **Clarence Hale**, for defendant:

General words and phrases, however wide and comprehensive in their literal sense, must

NOTE.—For game laws as affecting interstate commerce, see State v. Geer (Conn.) 13 L. R. A. 804, 29 L. R. A.

See also 40 L. R. A. 759; 47 L. R. A. 153.

be construed as strictly limited to the immediate object of the act, and as not altering the general principles of law.

Endlich, Interpretation of Statutes, § 118.

The common law is not to be understood as having been displaced by a statute, unless the statute displacing it is in its express terms or necessary effect plain and unequivocal.

Bishop, Stat. Crimes, §§ 75, 129–132.

To constitute crime there must be a joint operation of act and criminal intent, or criminal negligence amounting to intent.

1 Bishop, Crim. L. 4th ed. chap. 17; Desty, Am. Crim. L. § 5 (a), and cases cited; *Com.* v. *Rogers*, 7 Met. 500, 41 Am. Dec. 458; Endlich, Interpretation of Statutes, § 130; *State* v. *Gardner*, 5 Nev. 377; *Bradley* v. *People*, 8 Colo. 599.

If a man honestly believes certain facts to exist, and, though they do not exist, acts as he would be legally justified in acting if what he honestly believes to be were real, he is justified in law the same as he would be in morals.

Bishop, Stat. Crimes, §§ 355, 358; *Stern* v. *State*, 58 Ga. 229, 21 Am. Rep. 266; *Birney* v. *State*, 8 Ohio, 230; *Miller* v. *State*, 3 Ohio St. 475; *Hearne* v. *Garton*, 2 El. & El. 66; *Aberdare Local Board of Health* v. *Hammett*, L. R. 10 Q. B. 162; *Reg.* v. *Sleep*, 8 Cox, C. C. 472, 12 Am. L. Rev. 469; *Hopton* v. *Thirwall*, 9 L. T. N. S. 327.

In the case at bar the statute is a statute not for the protection of public health or morals, and it cannot be construed in derogation of the common-law principle, but should be construed under the light of such principles; and the courts have never gone so far in the construction of such a statute as is necessary to convict in this case.

Bishop, Stat. Crimes, p. 357.

When the alleged short lobsters were seized they were in the possession of the respondent as a common carrier of merchandise from Maine, through Massachusetts, to New York for delivery to the consignee, and they were commerce among the several states, and as such were under the exclusive jurisdiction of congress. This state had no power over them.

State v. *Intoxicating Liquors*, 3 Inters. Com. Rep. 581, 83 Me. 160; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *State* v. *Burns*, 82 Me. 558; *Bennett* v. *American Exp. Co.* 83 Me. 237, 13 L. R. A. 33; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 195, 6 L. ed. 70; *Brown* v. *Houston*, 114 U. S. 631, 29 L. ed. 260; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244; *Robbins* v *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527.

The police power of a state cannot obstruct foreign commerce or interstate commerce.

Cook v. *Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Brown* v. *Maryland*, 25 U. S. 12 Wheat. 419, 6 L. ed. 678; *The Daniel Ball*, 77 U. S. 10 Wall. 564, 19 L. ed. 1001; *Hall* v. *De Cuir*, 95 U. S. 485, 24 L. ed. 577; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 572, 30 L. ed. 249; *Ex parte Koehler*, 25 Fed. Rep. 76.

Mr. **Frank W. Robinson**, *County Atty.*, for the State:

If the possession of the lobsters by the respondent was in violation of law, he was none the less guilty because they may have been taken from him wrongfully or illegally.

Guptill v. *Richardson*, 62 Me. 257; *Com.* v. *Dana*, 2 Met. 329.

Whether or not the law under discussion is constitutional as affecting lobsters brought into this state by a common carrier does not arise upon the facts in the present case.

Tiernan v. *Rinker*, 102 U. S. 123, 26 L. ed. 103; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36; *Re Rahrer*, 140 U. S. 562, 35 L. ed. 577; *Hall* v. *DeCuir*, 95 U. S. 485, 24 L. ed. 547.

A state has the authority to regulate the fisheries within its territorial tide waters.

McCready v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Com.* v. *Manchester*, 9 L. R. A. 286, 152 Mass. 230; *Manchester* v. *Massachusetts*, 139 U. S. 240, 35 L. ed. 159; *Corfield* v. *Coryell*, 4 Wash. C. C. 371; *Kidd* v. *Pearson*, 128 U. S. 21, 32 L. ed. 350; *Smith* v. *Maryland*, 59 U. S. 18 How. 71, 15 L. ed. 269; *Dunham* v. *Lamphere*, 3 Gray, 268; *Moultop* v. *Libbey*, 37 Me. 472, 59 Am. Dec. 57; *Phelps* v. *Racey*, 60 N. Y. 10, 19 Am. Rep. 140.

As an incident to the right to regulate its fisheries, a state has the power to adopt enactments to prevent the unreasonable taking of fish, including shell-fish, and to render such legislation effective by suitable penalties.

Corfield v. *Coryell*, 4 Wash. C. C. 380; *Smith* v. *Maryland*, 59 U. S. 18 How. 74, 15 L. ed. 270; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 203, 6 L. ed. 71; *Patterson* v. *Kentucky*, 97 U. S. 504, 24 L. ed. 1116.

The intent of the statute under consideration is to protect lobsters and prevent their unreasonable destruction.

State v. *Craig*, 80 Me. 88.

Legislation of the character mentioned is not in conflict with the interstate commerce provision of the Federal Constitution.

Corfield v. *Coryell*, *supra*; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 471, 24 L. ed. 530; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 489, 31 L. ed. 708, 1 Inters. Com. Rep. 823; *Nathan* v. *Louisiana*, 49 U. S. 8 How. 80, 12 L. ed. 995; *Gibbons* v. *Ogden*, 22 U. S. 9 Wheat. 235, 6 L. ed. 79; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. ed. 819; *Kidd* v. *Pearson*, 128 U. S. 23, 32 L. ed. 351, 2 Inters. Com. Rep. 232; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 293, 21 L. ed. 167.

Lobsters do not become articles of trade or commerce until lawfully removed under the regulations of the state.

Corfield v. *Coryell*, 4 Wash. C. C. 371; *Turner* v. *Maryland*, 107 U. S. 58, 27 L. ed. 378; *Kidd* v. *Pearson*, 128 U. S. 13, 32 L. ed. 349, 2 Inters. Com. Rep. 232.

They do not become property in the hands of any person, unless possession is lawfully obtained.

James v. *Wood*, 8 L. R. A. 448, 82 Me. 177; *Blades* v. *Higgs*, 11 H. L. Cas. 631; *American Exp. Co.* v. *People*, 9 L. R. A. 138, 133 Ill. 649.

The state owns the tide waters and the fish in them, so far as they are capable of ownership while running.

McCready v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Manchester* v. *Massachusetts*, 139 U. S. 240, 35 L. ed. 165; *Martin* v. *Waddell*, 41 U. S. 16 Pet. 410, 9 L. ed. 1012; *Moulton* v. *Libbey*, 37 Me. 472, 59 Am. Dec. 57; *American Exp. Co.* v. *People*, *supra*.

The carrier may refuse to receive packages offered without his being made acquainted with their contents, if there is good ground for believing that they contain anything of a dangerous character.

Crouch v. *London & N. W. R. Co.* 14 C. B. 291; *Fitch* v. *Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 83; *Robinson* v. *Baker*, 5 Cush. 144, 51 Am. Dec. 54.

The state may prohibit transportation by a common carrier of lobsters illegally taken, and, *a fortiori*, the possession of such lobsters by a common carrier.

American Exp. Co. v. *People*, 9 L. R. A. 188, 133 Ill. 649; *Bennett* v. *American Exp. Co.* 13 L. R. A. 33, 83 Me. 236; *Corfield* v. *Coryell*, 4 Wash. C. C. 380; *Kidd* v. *Pearson*, 128 U. S. 18, 32 L. ed. 349, 2 Inters. Com. Rep. 232; *Turner* v. *Maryland*, 107 U. S. 58, 27 L. ed. 378.

It is competent for the legislature to make an act criminal regardless of the knowledge or motive of the doer of such act.

1 Whart. Crim. L. 9th ed. § 88; *Halsted* v. *State*, 41 N. J. L. 552, 32 Am. Rep. 247; *State* v. *Hopkins*, 56 Vt. 250.

Every man is conclusively presumed to know the law.

Com. v. *Boynton*, 2 Allen, 160.

Peters, *Ch. J.*, delivered the opinion of the court:

One of the proprietors of Swett's Express Company, and a cartman in the employment of the company, were tried on a criminal complaint against them for having in their possession 1,924 lobsters of less than 10½ inches in length.

The complaint was brought upon section 2 of chapter 292 of the Laws of 1889, which section reads as follows:

"It is unlawful to catch, buy, or sell, or expose for sale, or possess for any purposes, between the first day of July and the first day of the following May, any lobster less than 10½ inches in length, alive or dead, cooked or uncooked, measured in manner as follows: Taking the length of the back of the lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, the length to be taken with the lobster extended on the back its natural length; and any lobsters shorter than the prescribed length when caught, shall be liberated alive at the risk and cost of the parties taking them, under a penalty of one dollar for each lobster so caught, bought, sold, exposed for sale, or in possession, not so liberated."

There were twelve barrels of the lobsters, packed in the customary manner for shipment to New York. There was evidence tending to show that the respondents knew that the barrels contained lobsters, but no evidence that they knew, while the same were in their possession, that they were short lobsters. The barrels had been in their possession but a few moments before they were seized and carried away by a game and fish warden.

The counsel for the respondents asked for instructions appropriate to the positions of the defense, which were refused by the learned judge, who gave in their stead the following rulings:

"If these respondents did not know that the barrels intrusted to them contained lobsters of some length,—that is, if they were not aware that the barrels contained lobsters at all, even though they were constructively in their possession,—then they cannot be found guilty. But while a common carrier is obliged to receive all goods offered him for transportation, he is not obliged to receive into his possession such goods as the law forbids him to receive into his possession. He is not obliged to receive short lobsters for transportation, because the law prohibits the possession of them for any purpose. But, gentlemen, I will go a little further, and I instruct you that if a common carrier receives into his possession, for transportation or otherwise, lobsters,—that is, if he receives barrels which he knows contain lobsters,—then he is bound, in law, to know whether those lobsters are longer or shorter than 10½ inches, measured according to the statute; and if any such lobsters, as a matter of fact, are less than 10½ inches in length, then short lobsters are in his possession, within the meaning of the law, and he would be guilty of violating this statute.

"Now you apply these principles of law to the testimony in this case, taking up each one of these respondents. If the respondent Swett knew when he sent his team to Commercial wharf that it was to receive twelve barrels of lobsters, and, as matter of fact, it did receive twelve barrels of lobsters, then he was bound to know whether those lobsters were shorter than prescribed by the statute which I have read; he is bound to know it, in law; and if any of those lobsters were less than 10½ inches in length, measured according to the statute, they were in his possession, and you would be justified in finding a verdict against him. But if you have a reasonable doubt as to any of these facts, he is entitled to the benefit of it, and must be acquitted."

We are of the opinion that the law is not so exacting as these rulings would make it, and we feel clear that, if the respondents neither knew nor had good reason to believe that the barrels contained short lobsters, they should have been acquitted.

There are in our markets long as well as short lobsters,—legal as well as illegal lobsters. And it must be presumed that the legal constitute the vast bulk of those that are the subject of traffic and transportation. Therefore it may properly have been presumed by the respondents that the lobsters in question were of the length required by law, there being nothing indicating the contrary. The presumption is that the conduct of men will be in obedience to the requirements of the law, when a violation of such law constitutes a criminal offense. Legal

lobsters and illegal lobsters are two distinct and independent things.

What inconveniences and risks would men be subjected to who are only in an indirect way connected with commerce in lobsters, or commerce in other articles as well, if the rule given in this case in behalf of the government should prevail! All subordinates in railroad corporations and express companies would be as much punishable for handling freight containing illegal lobsters as their principals would be, including such classes as agents, clerks, cartmen, porters, and employés of every grade and kind. There can be no distinction between the liabilities of the different classes of men engaged in exercising a control over the property. In fact, subordinates would be the persons usually to be caught in the net of the law. If a carrier who knows that packages delivered to him contain lobsters, not knowing whether they are long or short lobsters, transports them at his personal peril, his business will be profitless and hazardous as far as that kind of carriage is concerned. In such case the freight must be overhauled and examined, entailing a delay, and consequently an injury to such perishable property. How long would it probably have taken the employés of this express company to measure these 1,924 lobsters, "by taking the length of the back of the lobster, measured from the bone of the nose to the end of the bone of the middle flipper of the tail, the length to be taken with the lobster extended on its back its natural length?"

How much more reasonable would it be to relieve carriers of such extreme impositions, as long as they are not conniving with lawbreakers, and to leave the work of discovering such infractions of the laws to fish and game wardens and other official detectives! The judge, in his charge in this case, said: "It is true, as claimed by the attorney for the respondent, that, if a package is offered to a carrier for transportation, he is not compelled by law to break open the package for the purpose of ascertaining whether or not it contains contraband goods. A law requiring such strictness of examination would be an interference with the rights of shippers that would not be tolerated." Why do not these remarks apply here exactly? Why is not this a case where the argument of intolerable inconvenience applies as forcibly as in any other? The aim of the law is to attain only reasonable and practical results in all matters where public interests are concerned. If the respondents did not know, or have reason to believe, that the packages contained short lobsters, they were not under any obligation to explore and hunt as a detective would, to see if they might not perchance obtain such knowledge. Their possession was excusable, at least.

An appeal in behalf of the government is made to the doctrine of the courts that for some statutory offenses a person may be held, even though he be ignorant of the facts which constituted his offense. That principle is applied only in minor offenses, upon some ground of public policy, for the protection of society against abuses which cannot be prevented under any more liberal rule. But public policy requires the application of no such rigorous rule here, where an express carrier and his cartman could each be punished, if punished at all, in the sum of $1,924, for having in possession for from five to fifteen minutes a property for the carriage of which the company would have received the sum of only $6. We do not think that the facts of the case present a very meritorious complaint against the respondents, in any view of the law.

The authorities on this question are few, for the reason that hitherto extreme notions on the subject have not prevailed. The case of *Bennett* v. *American Exp. Co.*, 88 Me. 286, 18 L. R. A. 33, is certainly in the direct line of the doctrine which we adopt in the present case. In the *Nitro-Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206, it was held that no liability rests on a common carrier for injuries caused by dangerous explosives loaded on his ship, neither he nor his agent knowing, or having reasonable cause to believe, that the materials were hazardous merchandise. In the opinion the pending question is quite elaborately discussed on authority and principle. The doctrine of that case was followed in *State* v. *Goss*, 59 Vt. 266, 59 Am. Rep. 706, where the agent of an express company was complained of for selling intoxicating liquors, because he received packages of liquors, and delivered them, and received money therefor for the shipper, the sale taking place at the date of such delivery. The court decided that the respondent could not be held unless he knew, or had good reason to believe, that the packages delivered by him contained intoxicating liquors. And the court, in closing its discussion in that case, says: "If, then, in the absence of suspicious appearances and circumstances, an express carrier is neither bound to know nor authorized to find out, as a condition of receiving it, what a package contains that is offered him for carriage, it would be strange to hold him guilty of a criminal offense because of the character of its contents; for in such case he is bound to carry, and is liable if he does not; and the law will not compel a man to act, and then punish him for acting."

Exceptions sustained.

CALIFORNIA SUPREME COURT.

Charles C. JUDSON, Exr., *et al.*, *Respts.*,
v.
GIANT POWDER CO., *Appt.*

(107 Cal. 549.)

1. **The risk of damages from a negligent explosion** in a dynamite factory is not assumed by conveying land for use in that business, and by continuing to carry on business near by after one explosion has occurred.

2. **An explosion of nitro-glycerine in process of manufacture** into dynamite raises a presumption of negligence, in the absence of any explanation of the real cause of the explosion.

(June 28, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Alameda County in favor of plaintiff in an action brought to recover damages for injuries caused by an explosion in defendant's manufactory. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Galpin & Zeigler** and **J. F. Cowdery**, for appellant, in support of petition for rehearing:

An explosion having occurred which may have been occasioned either by accident or negligence, and there being no proof made by plaintiffs of any facts which tend to show which cause produced the result, have plaintiffs made out affirmative proof of negligence by establishing the existence of the explosion?

Does this presumption of negligence so over come the contrary presumption of performance of duty and prudence, that plaintiffs can recover on the first-mentioned presumption alone?

Will the presumption of negligence be raised in a case where all contrary evidence is impossible?

Will it in such case be raised in favor of one who has consented to take the hazard of an accidental explosion?

The only explosion case in this state in which this question has arisen was decided contrary to the decision of this case.

The Nitro-Glycerine Case, 82 U. S. 15 Wall. 524, 21 L. ed. 206.

The opinion in the case at bar also overrules the well-considered cases of *Cosulich* v. *Standard Oil Co.* 122 N. Y. 118; Thomp. Neg. 1227; *Walker* v. *Chicago, R. I. & P. R. Co.* 71 Iowa, 658; *Daniel* v. *Metropolitan R. Co.* L. R. 3 C. P. 216; *Campbell* v. *Bear River & A. Water & M. Co.* 35 Cal. 679; *Galvin* v. *Gualala Mill Co.*

NOTE—*Negligence in the manufacture and storage of gunpowder, nitro-glycerine, dynamite, and other explosives.*

I. *General doctrine.*
II. *The effect of city ordinances.*
III. *Negligence in the manufacture.*
IV. *Negligence in the storage.*

This note is limited to the question of negligence in the manufacture and storage of explosives in the strict sense of the term, and does not include that class of cases wherein the question of negligence has arisen by means of the insufficient packing of explosive articles for the purpose of transportation, in which the matter is one of liability as between the carrier and consignor and involves the question of notice.

Upon the question of liability for negligence in the escape and explosion of gas and natural gas, see *notes* to Ohio Gas Fuel Co. v. Andrews (Ohio) *ante*, 337 (1896); Lebanon Light, H. & P. Co. v. Leap (Ind.) *ante*, 342 (1894); and McGahan v. Indianapolis Nat. Gas. Co. (Ind.) *ante*, 355 (1894).

As to the duty of those engaged in blasting, with respect to the safety of others, see *note* to Blackwell v. Moorman (N. C.) 17 L. R. A. 729 (1892).

I. *General doctrine.*

The general principles deducible from the cases upon this subject would seem to be that, if the manufacture or storage of explosives is such as to amount to a nuisance, either private or public, the party so manufacturing or storing the articles in question will be liable for all damages occasioned by or through an explosion thereof, even though he may not be guilty of negligence.

This doctrine is borne out by the cases of Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L. R. A. 262 (1890); Wright v. Chicago & N. W. R. Co. 27 Ill. App. 200, 208 (1888); Marine Ins. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. Rep. 642, 653 (1890); Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205 (1870), affirmed 35 N. J. L. 574.

But although the keeping of large quantities of explosive material in a building in a populous town or city may be a nuisance for the consequences of which the defendant may be held liable in damages, yet the fact whether it is such or not must depend upon locality, quantity of material stored, and other circumstances. Collins v. Alabama G. S. R. Co. (Ala.) 61 Am. & Eng. R. Cas. 229 (1894).

Where the facts showed that the defendants kept and used, in a thickly settled and populous neighborhood, a powder-house in which were stored large quantities of gunpowder, and that the house was stricken by lightning, the ignition of the powder causing an explosion which damaged the plaintiff's houses and property, and the question before the court was whether the erection of a powder magazine in a populous part of the city and keeping stored therein large quantities of gunpowder was *per se* a nuisance such as would render the defendants liable for the damages occasioned by the explosion, the court held that it was such a nuisance, and therefore defendants were liable. Chestham v. Shearon, 1 Swan, 213, 55 Am. Dec. 734 (1851).

So, it has been held that the fact that the defendant's establishment, in which he manufactured and stored gunpowder and other explosives, was outside of the territorial limits of the city, will not relieve the owner from responsibility, or alter the case, if the dangerous erection was in close contiguity with dwelling houses or buildings which might be injured or destroyed in case of an explosion; the fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of vigilance, evincing its dangerous character, and, in some localities, rendering it a private nuisance; and in such cases the rule exonerating a party engaged in a lawful business when free from negligence has no application. Heeg v. Licht, 80 N. Y. 579, 581, 36 Am. Rep. 654, 3 Abb. N. C. 355 (1880), reversing 16 Hun, 257 (1878).

In Lounsbury v. Foss, 80 Hun, 296 (1894), damages were sought to be recovered for the death of plain-

See also 34 L. R. A. 118; 36 L. R. A. 689; 37 L. R. A. 489; 43 L. R. A. 435; 45 L. R. A. 658.

98 Cal 268; *Tompkins* v. *Clay Street R. Co.* 66 Cal. 163.

The very latest expression of the New York court of appeals is directly at variance with the opinion of this court in the present case.

Booth v. *Rome, W. & O. T. R. Co.* 140 N. Y. 267, 24 L. R. A. 105.

In actions like the present the burden of proving that the injury complained of was caused by the defendant's negligence lies on the plaintiff.

Holbrook v. *Utica & S. R. Co.* 12 N. Y. 242, 64 Am. Dec. 502.

There are many cases cited in the opinion where the circumstances connected with the event are such that the event cannot be attributed to any other cause than negligence, and in such case the presumption would arise in great part because of the ease with which the defendant could rebut the presumption by proof that the result was attributable to accident alone.

Kearney v. *London, B. & S. C. R. Co.* L. R. 5 Q. B. 411; *Byrne* v. *Boadle*, 2 Hurlst. & C. 722; *Scott* v. *London & St. K. Docks Co.* 3 Hurlst. & C. 596; *Briggs* v. *Oliver*, 4 Hurlst. & C. 403; *Mullen* v. *St. John*, 57 N. Y. 567, 15 Am. Rep. 530.

The next class of cases cited in the opinion relates to defects in machinery, viz., the bursting of boilers.

The precautions to be taken to prevent their bursting and the tests to be applied are all so well understood that the bursting of a boiler cannot well be a matter of accident.

The next class of cases referred to is that of sparks escaping from locomotive engines. The same principle might be applied here as to boilers.

Is it the experience of mankind that powder mills seldom explode? On the contrary, do we not read every week in the newspapers of some powder-mill explosion?

But without this judicial knowledge of harmlessness and safety of the manufacture of dynamite, you cannot reach the result that a given explosion is occasioned by carelessness.

Can the court take judicial knowledge of the safety of the process of manufacturing dynamite when the opposite of the judicial knowledge is proved as a fact in the case?

The record contradicts the judicial knowledge of the long-continued harmless manufacture of dynamite in this factory, for this record shows that this factory has exploded two or three times before this, thereby giving to the defendant that notice which, it is admitted, he received. Do not these repeated prior explosions destroy the ground-work of a presumption based on long-continued safe manufacture?

If this presumption is to be raised in favor of the general public, is it to be raised in favor

tiff's intestate, caused by an explosion at the defendant's dynamite works. The court held that the case came within the principles laid down by that court in Hay v. Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279 (1849), Tremain v. Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284 (1849), and Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744 (1844), and was controlled by the principles laid down in the case of Heeg v. Licht, 80 N. Y. 579, 581, 36 Am. Rep. 654 (1880), which latter case decided that the keeping of gunpowder or other explosive materials in a place where or under circumstances whereby they will be liable, in case of an explosion, to injure the dwelling houses or the persons of those residing in close proximity, constitutes a private nuisance for which the person so keeping them is liable to respond in damages in case of injury resulting therefrom, without regard to the question whether he is chargeable with carelessness or negligence or not.

And the person so keeping it will be liable, even though the act causing the explosion is due to other persons and is not chargeable to his personal negligence. McAndrews v. Collerd, 42 N. J. L. 189, 192, 36 Am. Rep. 508 (1880).

The fact that the explosion destroyed plaintiff's buildings shows that the keeping of powder in a magazine, considered with reference to the locality, the quantity, and the surrounding circumstances, constitutes a nuisance *per se*, which will entitle the plaintiff to recover damages for an explosion injuring his property. Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L. R. A. 262 (1890).

And the fact that the defendant's powder magazine exploded is sufficient to show that it was dangerous, in order to entitle a plaintiff to recover for damages occasioned to his person or property by reason of such explosion. *Ibid.*

In an action to recover damages for injuries sustained by an explosion of gunpowder, it should be left to the jury to determine whether, from the dangerous character of the business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance such as would render him liable for the damages occasioned by the explosion.

Heeg v. Licht, 80 N. Y. 579, 581, 36 Am. Rep. 654, 8 Abb. N. C. 355 (1880), reversing 16 Hun, 257 (1878).

And in Lee v. Vacuum Oil Co., 54 Hun, 156, 162 (1889), it is stated that the rule is of uniform application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjacent proprietor or of his neighbors, even in pursuit of a lawful trade.

Whether or not the keeping of such materials constitutes a nuisance *per se* for which damages can be recovered, depends in each case upon the locality, the quantity, and the surrounding circumstances, the question being left to the jury under proper instructions from the court. Lounsbury v. Foss, 80 Hun, 296 (1894); Lee v. Vacuum Oil Co., *supra*.

The act of keeping a large quantity of gunpowder in a wooden building insufficiently secured and situated near other buildings, thereby endangering the business of persons residing in the vicinity, has been held to amount to a public nuisance; and if an explosion occurs in consequence of the burning of such building, and an individual is wounded or injured thereby, an action will lie for damages against the party maintaining such nuisance, and the latter will be liable, even though the fire was not occasioned by his negligence. Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744 (1844).

The principles enunciated by the court in People v. Sands, 1 Johns. 78, 3 Am. Dec. 296 (1806), and Myers v. Malcolm, *supra*, were approved of by the court in Bradley v. People, 56 Barb. 72, 78 (1866), in which case the defendants were indicted for erecting and maintaining a powder house and storing therein large quantities of powder near dwelling houses, thereby endangering the lives of persons.

The manufacturing of powder and other explosives, and storing the same on premises near two railroads and the public road, is a public nuisance, and a party injured by an explosion of such powder may recover damages without proof of negligence in the operation of such business. Wilson v. Phœnix Powder Mfg. Co. (W. Va.) 21 S. E. Rep. 1035 (1895).

of every person? Suppose an action brought by the relatives of one of the employés who was killed by this explosion. Could the plaintiff, in such case, recover upon showing merely the existence of the explosion?

It is certain that he could not recover if the explosion occurred from spontaneous combustion, or other uncontrollable accident.

Thomas v. *Quartermaine*, L. R. 18 Q. B. Div. 697; *Fearn* v. *West Jersey Ferry Co.* 143 Pa. 122, 18 L. R. A. 366; *Jacksonville Street R. Co.* v. *Chappell*, 21 Fla. 175; *Potts* v. *Chicago City R. Co.* 33 Fed. Rep. 610; *Federal Street & P. Valley R. Co.* v. *Gibson*, 96 Pa. 83; *Quinlan* v. *Sixth Ave. R. Co.* 4 Daly, 488; *Central Pass. R. Co.* v. *Kuhn*, 86 Ky. 578; *Pennsylvania R. Co.* v. *MacKinney*, 124 Pa. 462, 2 L. R. A. 820; *Hayman* v. *Pennsylvania R. Co.* 118 Pa. 508; *Delaware, L. & W. R. Co.* v. *Napheys*, 90 Pa. 135; *Pennsylvania Co.* v. *Marion*, 104 Ind. 229; *Le Barron* v. *East Boston Ferry Co.* 11 Allen, 312, 87 Am. Dec. 717.

These plaintiffs sold the property where the explosion occurred to this powder company for the purpose of having it used for the manufacture of dynamite.

It was not seriously contended, and could not be, that plaintiffs did not voluntarily subject themselves to all the accidents of the business.

Watts v. *Norfolk & W. R. Co.* 89 W. Va. 196, 28 L. R. A. 674; *Chicago, R. I. & P. R. Co.* v. *Smith*, 111 Ill. 368.

Messrs. **Page, Eells & Wheeler** for respondents.

Garoutte, J., delivered the opinion of the court:

Respondents recovered judgment for the sum of $41,164.75, as damages for acts of negligence. This appeal is prosecuted from such judgment and from an order denying a motion for a new trial. The damages to respondents' property were occasioned by an explosion of nitro-glycerine in process of manufacture into dynamite, in appellant's powder factory, situated upon the shore of the bay of San Francisco. Appellant's factory buildings were arranged around the slope of a hill facing the bay. Nearest to respondents' property was the nitro-glycerine house; next was the washing house; next were the mixing houses; then came the packing houses; and finally the two magazines used for storing dynamite. These various buildings were situated from 50 to 150 feet apart, and a tramway ran in front of them. The explosion occurred in the morning during working hours, and originated in the nitro-glycerine house. There followed within a few moments of time, in regular order, the explosion of the other buildings,

No amount of care can exempt a party from liability for damages occasioned by the carrying on of a dangerous business, although such business may be in itself lawful, when carried on in a public place so as to become a public nuisance, and in such cases it makes no difference whether the business is carefully or negligently conducted and managed, negligence not being in such cases a material element, as the plaintiff is injured by that which breaks the law made for his protection. *Ibid.*

The principles enunciated in the above case of Wilson v. Phoenix Powder Mfg. Co., *supra*, were approved of by the court in Huntington & K. Land D. Co. v. Phoenix Powder Mfg. Co. (W. Va.) 21 S. E. Rep. 1007 (1895).

It has been held that the keeping of explosives unsafely guarded, in such quantities as to be dangerous to persons and property, near a frequented street or other public place of business of others, under circumstances that threatens calamity to the person or property of others, the consequence being an explosion causing damage to the person or property of another, will give the latter a right of action to recover from the person keeping the explosives for such damage as would not have happened in the absence of such articles. Wright v. Chicago & N. W. R. Co. 27 Ill. App. 200, 208 (1888).

In the above case, however, the court was of opinion that the mere fact of keeping the articles in question, of itself, gave no right of action, the question being one of fact whether the damage was the proximate consequence of such keeping, and therefore one for the jury. *Ibid.*

Negligence in the keeping of gunpowder or other explosive materials, or in the manner of keeping it, is requisite in order to impose a liability to answer in damages for injuries caused by an accidental explosion or fire, which it is incumbent upon the party affirming it to prove. Collins v. Alabama G. S. R. Co. (Ala.) 61 Am. & Eng. R. Cas. 289 (1894).

So, if the business in question is located in a secluded spot, and is removed from highways, and is in itself a lawful business, it is not a public nuisance, and therefore, before a party can recover for damages to his property caused by the explosion, he must prove negligence on the defendant's part. Wilson v. Phœnix Powder Mfg. Co. *supra*.

In cases, however, where the manufacture and storage of such articles is a lawful business and does not amount to a nuisance, the plaintiff must prove negligence on the defendant's part before he can recover.

In a case where defendant's business was lawful, it was held that the law does not in its conduct impose the obligation of saving others harmless from the consequences of the occurrence of inevitable accidents, but burdens it simply with the duty of using reasonable care and caution to save others from injury. Cosulich v. Standard Oil Co. 122 N. Y. 118 (1890).

If, in the exercise of a lawful business, the owner omits that duty and fails to observe the ordinary care incumbent upon him, then he, because of such neglect, becomes legally chargeable with the damages resulting therefrom, but not otherwise. *Ibid.*

The existence of negligence in such cases is an affirmative fact to be established by the party alleging it as a foundation of his right, and it is incumbent upon him to point out by evidence the defendant's fault, the presumption being, until the contrary appears, that every man has performed his duty. *Ibid.*

It has been held in such actions that in determining whether the plaintiff has sustained the burden of establishing negligence, it is necessary to inquire whether an inference of the fact of negligence can be drawn from other facts proved; if it can a presumption of the fact of negligence is permissible, and embraces, not only the doing or omitting to do the thing complained of, but also the relation of the parties,—that is, whether, in that which he did or omitted to do, defendant failed to discharge some duty owing to the plaintiff. *Ibid.*

The fact that the injury sustained may have been the direct result of a fire which originated upon defendant's premises will not of itself render defend-

the two magazines coming last; but, though last, they were not least, for their explosion caused the entire downfall and destruction of respondents' factory, residences, and stock on hand. There is no question but what the cause of this series of explosions following the first is directly traceable, by reason of fire or concussion, to the nitro-glycerine explosion. Of the many employés of appellant engaged in and about the nitro-glycerine factory at the time of the disaster, none were left to tell the tale. Hence any positive testimony as to the direct cause of the explosion is not to be had. The witnesses who saw and knew, like all things else around, save the earth itself, were scattered to the four winds.

1. Respondents sold the premises to appellant for the manufacture of dynamite, and it is claimed that the maxim *volenti non fit injuria* applies, and therefore no recovery can be had. We attach but little importance to this contention. The grant of these premises for the purposes of a dynamite factory in no way carried to appellant the right to conduct its factory as against the grantors in any and every way it might see fit. There is no principle of law sustaining such a proposition. Let it be conceded that respondents, by reason of their grant, could not invoke the aid of a court of equity to prevent the appellant from conducting its business; still that concession proves nothing. This action is not based upon the theory that appellant's business is a nuisance *per se*, but negligence in the manner in which the business was conducted was alleged in the complaint, and is now insisted upon as having been proved at the trial. In making the grant, respondents had a right to assume that due care would be exercised in the conduct of the business, and certainly they have a right to demand that such care be exercised. It is argued that the explosion of all powder works is a mere matter of time; that such explosions are necessarily contemplated by every one who builds beside such works, or who brings dynamite into his dooryard. It is further contended that appellant gave to respondents actual notice of the dangerous character of its business by a previous explosion which damaged respondents' property, and that respondents, by still continuing in business after such notice, in a degree assumed and ratified the risk, and cannot now be heard to complain. The only element of strength in this line of argument is its originality. The contention that, in the ordinary course of events, all powder factories explode, conceding such to be the fact, presents an element foreign to the case. The doctrine of fatalism is not here involved. In the ordinary course of events the time for this explosion had not

ant liable to respond in damages therefor. So held in an action to recover damages sustained by the burning of plaintiff's vessel through the alleged negligence of the defendant, the owner and manager of a petroleum refinery, the plaintiff's vessel lying at a wharf adjoining the same, the evidence showing that the oil in defendant's premises took fire, a quantity of it while burning flowing down a pipe which was connected with the lighter laden with petroleum moored at the wharf, when an explosion occurred, the burning oil and sticks being thrown upon plaintiff's vessel, the court upholding the court below and affirming a nonsuit. *Ibid.*

The explosion of nitro-glycerine in a gas well on a person's own land, used to increase the natural flow, is not an unlawful interference with the rights of other persons from whose land the gas is thereby drawn. People's Gas Co. v. Tyner, 131 Ind. 277, 16 L. R. A. 443 (1892).

And the burden of proof in such cases is on the plaintiff. Walker v. Chicago, R. I. & P. R. Co. 71 Iowa, 658 (1887); Cosulich v. Standard Oil Co. 122 N. Y. 118 (1890).

The plaintiff is bound to show that the explosion was caused solely by the fault of the defendant, as verdicts must stand upon evidence, and not upon mere conjectures, however plausible. Babcock v. Fitchburg R. Co. 140 N. Y. 308, 311 (1893).

Where the only evidence that the jury had was that an explosion occurred which damaged the plaintiff's property, the court held that there was no question to be submitted to them. Walker v. Chicago, R. I. & P. R. Co. *supra*.

In an action to recover damages occasioned by an explosion of gunpowder kept by the defendant upon his premises in large quantities, the plaintiff can only charge actual damages. Myers v. Malcolm, 6 Hill, 292, 41 Am. Dec. 744 (1844).

In an action to recover compensation for injuries sustained by an explosion of fireworks kept by defendant upon his premises, evidence that other explosions and fires had occurred on premises kept by other persons is inadmissible, where it is in no way connected with the issue, and there is no proof that the conditions were similar. Fillo v. Jones, 2 Abb. App. Dec. 121, 123 (1868).

In Lee v. Vacuum Oil Co., 54 Hun, 156, 162 (1889), damages were claimed for the death of plaintiff's intestate caused by the explosion of defendant's pipes through which was conveyed naphtha to a gas company, the pipes having been damaged by a third party and not repaired by the defendant, the naphtha escaping and causing an explosion. The court held that, as it was no more dangerous to life or property to convey naphtha in a strong and secure pipe through a populous city than it was to distribute manufactured or natural gas by such means, such method of conveyance was not a nuisance *per se* for which the defendant could be made liable, and that negligence, which was a question for the jury, must be proved.

II. *The effect of city ordinances.*

If the defendant has carried on the manufacture or storage of such articles upon premises in violation of a city ordinance, his act has been declared a nuisance, for which he will be liable in damages to all parties injured in consequence of his malfeasance.

Thus, the maintenance by defendant of a powder magazine containing a large quantity of powder within the city limits, in violation of the city charter or ordinance, was declared a nuisance, and such defendant was held liable for the injuries resulting to the plaintiff from its explosion. Hazard Powder Co. v. Volger, 58 Fed. Rep. 152, 156 (1893).

And this for the reason that in keeping a powder magazine in a town without complying with the conditions named in the ordinance a defendant is guilty of malfeasance. Laflin & R. Powder Co. v. Tearney, 151 Ill. 332, 7 L. R. A. 262 (1890).

The New Jersey Statute (Rev. Stat. pp. 264, 266) prohibits the keeping in store within a quarter of a mile of any town, etc., quantities of nitro-glycerine or of gunpowder in larger quantities than a specified amount, and makes the violation of the prohibition in either case a misdemeanor, and if the nuisance is of a public nature no degree of

arrived, and appellant had no legal right to hasten that event by its negligent acts. Neither do we think respondents lost any legal rights by continuing to do business in this locality after being served with notice of the danger that surrounded them. While the notice was in the form of an object lesson which came to them in no uncertain tones, yet appellant was not justified in serving it, nor were respondents negligent in disregarding it. Respondents were not bound to abandon their property, though negligence of appellant in the conduct of its factory was ever a menace and danger to their lives and property. Conceding that respondents, by their grant, thereby assumed certain risks and dangers which may be said to always surround the manufacture of dynamite, still they assumed no risks and waived no action for damages which might arise through appellant's negligence. Both reason and authority support this conclusion.

2. It is contended that respondents offered no evidence tending to show that the explosion of the nitro-glycerine factory was occasioned by the negligence of appellant, and this contention brings us to the consideration of a most important principle of law. In addition to the fact of an explosion being established, the respondents offered expert testimony to the effect that if the factory was properly conducted, and the employés careful during the process of manufacturing, an explosion would not occur. For the present we lay aside the evidence of the experts, and meet squarely and directly the question presented: Does the proof of the explosion draw with it a presumption of negligence sufficient to establish a prima facie case for a recovery? While the cases are not in entire accord in holding that a presumption of negligence arises from the fact of the explosion, still they largely preponderate upon that side, and we think but few well-considered cases can be found looking the other way. All courts agree that, where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a prima facie case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations, and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises upon proof of the accident by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract.

care will relieve from liability to respond for damages arising from it. McAndrews v. Collerd, 42 N. J. L. 189, 192, 36 Am. Rep. 508 (1880).

It is no defense to such an action that the magazine was properly constructed and the powder carefully stored, and that the explosion was due to no personal negligence of the defendant or its agent, and such defendant is liable for the injuries resulting from its explosion from any cause, because its location, under the ordinance, made it a nuisance. Hazard Powder Co. v. Volger, *supra*.

So it is no defense to an action to recover damages for an explosion of a powder magazine kept within the city limits in violation of a city ordinance, to prove that the plaintiff knew the danger he incurred in living near the magazine, and was therefore guilty of contributory negligence, the plaintiff not being driven to the alternative of abandoning his house or releasing the defendant from all claim of damages for the injuries he might sustain by reason of the maintenance of such a nuisance. *Ibid.*

Where the defendant's magazine was located on a lot of a smaller size than that required by the town ordinance, which prohibited the keeping of a powder magazine, or place for storing or keeping gunpowder or other explosive material, except such as were located upon a lot of a certain size and area; and the defendant claimed that the injury to the plaintiff's property was not caused by the violation of such ordinance, which imposed no liability upon the defendant,—the court held that the keeping of the gunpowder in the town was an illegal act, for all consequences of which the defendant was responsible, inasmuch as, if the magazine had not been where it was, the explosion would not have taken place and the injury to plaintiff's property would not have resulted, the ordinance absolutely prohibiting any powder magazine from being kept within the town except as therein specified. Laflin & R. Powder Co. v. Tearney, *supra*.

Where the evidence showed that the article (petroleum) which was alleged to have caused the damage complained of came into the defendant's possession and was kept in its building simply for the purposes of transportation, the court held that the question whether or not the city ordinance applied to such a keeping or storing must depend upon its terms and the objects sought to be accomplished. Wright v. Chicago & N. W. R. Co. 27 Ill. App. 200, 208 (1888).

The first clause of the ordinance in question made it unlawful to *store or keep for sale* within the city any crude petroleum in larger quantities than specified; the second clause related to the keeping *for sale* or the *storage* of any refined carbon oil, etc., except such as would stand a certain test; the third clause to the *keeping* of such articles in excess of a certain quantity in any part of a building except a cellar, etc.; and the fourth clause to the *keeping* or *storing* of crude petroleum, etc., in front of any dwelling or on any street, alley, wharf, lot, or sidewalk, for a longer time than was sufficient to receive it in store, or to deliver the same, such time not to exceed six hours. The court held that the third clause really prohibited the keeping by any person or corporation, except as therein specified, and that no exception was made in favor of a railroad company keeping the articles for purposes of transportation, the oils enumerated being just as dangerous to life and property when in possession of a railroad for the purpose of removing it from the city, as in the hands of a shipper. *Ibid.*

With reference to the fourth clause of the ordinance referred to in the above case, the court held that the court did not intend in using the words "store" and "storage" to confine the ordinance to the keeping in a store for hire, the design being to guard life and property against the dangers incident to the accumulation of large quantities of such inflammable substances, and that to permit railroad companies to ignore the ordinance would amount to a practical denial of the protection intended, the danger being the same whether the keeping is paid for or not, and whether kept for sale or for hire. *Ibid.*

In that case, however, the court held that the mere fact of keeping the oils in its building, although prohibited by the city ordinance, gave no

The carrier is not an insurer of his passenger. If he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebuttable; but such is not the fact, for it is only prima facie and always disputable. As was well said by the court in *Rose* v. *Stephens & C. Transp. Co.*, 11 Fed. Rep. 438: "Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation in authority or in reason for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties." The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care towards this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. Based upon the foregoing principles, a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in Shearman and Redfield on Negligence (sec. 60): "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care." Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule, as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions

right of action, it still being a question of fact whether the damage alleged was a proximate consequence of such keeping, the question still being one for the jury. *Ibid.*

Where, however, it was not claimed that the keeping and storing of fireworks in contravention of the city ordinance was for that reason alone such an unlawful act as to bring the case within the statute authorizing a recovery for a death caused by an explosion, it was held necessary for plaintiff to show, either that the defendant was guilty of negligence in the mode of keeping and storing or handling such articles, or that such keeping and storing were of themselves an unlawful act at common law, because a common nuisance dangerous to human life. Filio v. Jones, 2 Abb. App. Dec. 121, 123 (1868).

So where, in an action against a railroad company to recover for damage caused by an explosion, it was not shown that there was any city ordinance against the storing of powder in its depot for the purpose of delivering it to the consignee, and the goods in question arrived the day before the explosion, of which fact the consignee was duly notified on the morning of the day of the explosion; and the evidence showed that the company was careful to preserve the goods against accident in a house built for that purpose and carefully guarded, and that the explosion occurred through the act of an employé, behind in his accounts, who set fire to the building for the purpose of hiding his defaults,—the court held the company was not liable for the damages occasioned by such explosion. Collins v. Alabama G. S. R. Co. (Ala.) 61 Am. & Eng. R. Cas. 229 (1894).

III. *Negligence in the manufacture.*

In McKain v. Elkin, 27 Pittsb. L. J. 169, it was held that the manufacturer of an explosive oil, selling it for illuminating purposes, was liable for injuries sustained by a person using the same.

Negligence in the manufacture of an illuminating oil may be inferred from the fact of its flashing and igniting at a temperature lower than that ordinarily used by people in their houses, so as to render the defendant liable in an action for damages occasioned by an explosion. *Ibid.*

In Nichols v. Brush & D. Mfg. Co., 53 Hun, 137 (1889), damages were sought for causing the death of the plaintiff's intestate by an explosion, while engaged in the employment of the defendant engaged in the manufacture of crude oil. The facts showed that in the process of distillation a large amount of gas was generated, some of which was used for fuel and the remainder escaped into the running-room, which was at all times dangerous if a lighted lamp was brought there when the machinery was in operation. The court held that, if the accident could have been prevented by the exercise of proper care on the defendant's part, it was negligence in the master, the defendant, not to have avoided the danger, and that, if the deceased had the right to assume the performance of such duty, there was no ground on which he could be charged with negligence contributing to the injury.

In Yates v. Southwestern Brush E. L. & P. Co., 40 La. Ann. 467 (1888), damages were claimed for injuries received while in the performance of a duty, the injuries being occasioned by the explosion of a metal pipe through which an electric wire passed, conveying electricity into the building for lighting purposes. The defendants were held liable under the provisions of the Louisiana code, which declare that "every act whatever of man, that occasions damage to another, obliges him through whose fault it happened to repair it," and "every person is responsible for the damage he occasions, not merely by his act, but by his negligence, imprudence, or want of skill," and, "we are responsible, not only for the damage occasioned by our own act, but for that which is caused by . . . the things which we have in our custody."

The proximate cause of the accident in the above case was the insufficiency of the fuse catches, either in number or capacity, to break the circuit and cut off the flow of electricity from an arc wire on the outside of the building. *Ibid.*

In the following cases no negligence was proved against the defendants:

In Collins v. Cincinnati, N. O. & T. P. R. Co., 18

come equally within its provisions. In speaking on this question, it is said in Cooley on Torts (p. 799): "The rule applied to carriers of passengers is not a special rule, to govern only their conduct, but is a general rule which may be applied wherever the circumstances impose upon one party alone the obligation of special care." The author then cites the case of a householder engaged in repairing his roof. A piece of slate falls therefrom, and injures a traveler upon the street. He then says: "True, the act of God, or some excusable accident may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection."

The important question here involved, and the want of harmony in the decisions of courts bearing upon it, seem to demand a citation somewhat in detail of the many authorities which hold against appellant's views of the law. In England the authorities are in entire accord. Plaintiff was passing along a highway, under a railroad bridge, when a brick used in the construction of the bridge fell and injured him. Negligence in the railroad was presumed. *Kearney* v. *London, B. & S. C. R. Co.* L. R. 5 Q. B. 411. A barrel of flour rolled out of the window of a warehouse, injuring a person passing upon the street. Negligence in the warehouseman was presumed. *Byrne* v. *Boadle*, 2 Hurlst. & C. 722. The same rule was declared upon a similar state of facts in *Scott* v. *London & St. R. Docks Co.* 3 Hurlst. & C. 596; likewise in *Briggs* v. *Oliver*, 4 Hurlst. & C. 403. The explosion of a boiler of a steamboat is prima facie evidence of negligence. *Posey* v. *Scoville*, 10 Fed. Rep. 140; *Rose* v. *Stephens & C. Transp. Co.* 11 Fed. Rep. 438; *Grimsley* v. *Hankins*, 46 Fed. Rep. 400. In the *Rose Case* it is said: "In the present case the boiler which exploded was in the control of the employés of the defendant. As boilers do not usually explode when they are in a safe condition, and are properly managed, the inference that this boiler was not in a safe condition, or was not properly managed, was justifiable." The same general principle is declared in *Cummings* v. *National Furnace Co.* 60 Wis. 603; *Mulcairns* v. *Janesville*, 67 Wis. 24; *Kirst* v. *Milwaukee, L. S. & W. R. Co.* 46 Wis. 489; *Thomas* v. *Western U. Teleg. Co.* 100 Mass. 156; *Hooser* v. *Cumberland & P. R. Co.* 80 Md. 146, 27 L. R. A. 154. In the case of *Dixon* v. *Pluns*, 98 Cal. 385, 20 L. R. A. 698 (a case which in its facts is an exact photograph of one of the New York

Ky. L. Rep. 670 (1892), damages were claimed for the death of plaintiff's intestate, an employé of the railroad company, through the latter's negligence in constructing and maintaining gas works of an imperfect and dangerous character upon its premises. The facts showed that the deceased was killed by an explosion of gas while assisting as in duty bound, in the extinguishment of a fire in the gas house, the negligence charged being that the company used tar roofing instead of metal in the construction of the roofing of the gas house and in the building of the gas reservoirs. The court held that such facts were not sufficient to charge the company with wilful negligence for which alone they could be held liable, the case not being one of a claim for an injury to an employé, but for his death.

So, in **Benfield v. Vacuum Oil Co., 75 Hun, 209 (1894)**, plaintiff sought to recover damages for injuries occasioned while in the defendant's employ engaged in the manufacture of oil, the injuries complained of being occasioned by an explosion of gas in a tank in which paraffine oil was being heated, the facts showing the plaintiff himself caused the accident through bringing a lighted lantern in contact with the substance in the tank when raising the lid. The court held the defendant not liable, no negligence on its part being proved.

IV. *Negligence in the storage.*

In the following cases the defendants were held liable for negligence in the storage of the articles:

Where the foreman of the defendant company stored explosives, consisting of powder and dynamite, in a shop, without the permission of the plaintiff, in order to preserve the same for the benefit of his master, promising to remove the same before the plaintiff came to work the next morning, and plaintiff was injured in consequence of sparks igniting such powder while in the pursuit of his business without first ascertaining whether the explosives had been removed according to the foreman's promise, the court held the defendant liable, and that the plaintiff was not guilty of contributory negligence. Birmingham Water-Works Co. v. Hubbard, 85 Ala. 179 (1887).

The question for determination in the above case was whether the act of the foreman, which produced the injury, incidentally grew out of the authority conferred upon him by the defendant as his master, and whether such act would fairly and reasonably be implied as an act authorized to be done by the servant in the master's absence and in a given emergency in the furtherance of his business, the court holding that if the act of the foreman was bona fide in the preservation or furtherance of the master's interest the defendant was liable, but if it were done to further the interest of the foreman himself the defendant was not liable. *Ibid.*

In Denver, S. P. & P. R. Co. v. Conway, 8 Colo. 1, 54 Am. Rep. 537 (1884), damages were claimed by reason of the burning of defendant's building and the explosion of gunpowder therein contained, through the negligence of the defendant, who had notice of a defective flue and that the building was therefore unsafe and liable to take fire, and also that the plaintiff's property was in close proximity, notwithstanding which he carelessly and negligently stored giant powder and explosive caps in the building, thereby occasioning the explosion and injuring the plaintiff. The court held the company liable, inasmuch as artificial persons, like natural ones, are liable in damages for acts of negligence imputable to them whereby injuries result to third parties, a corporation acting through its officers and employés, who, in the exercise of their respective functions and to that extent, represent the corporation, the rules and principles of law applicable to the relation of master and servant applying equally to corporations and their agents, the damages resulting from the negligence of both classes of persons being measured in the same manner.

So in Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 7 L. R. A. 262 (1890), where the action was brought to recover damages to plaintiff's premises resulting from the explosion of defendant's powder magazine, the plaintiff's buildings and the defendant's magazine being located in close proximity to each other, the latter being situated so as to inflict serious injury upon the plaintiff's person or property in case of an explosion, the court

cases hereafter cited), a chisel, used by a workman upon a building, fell upon and injured a girl while passing upon the street below. It was held that a prima facie case of negligence was established, and that the rule as declared in section 60 of Shearman and Redfield on Negligence was sound law and controlling.

While there is some discord existing in the New York authorities as to the true doctrine upon this question, still they are largely in line with the cases we have above cited. *Mullen* v. *St. John*, 57 N. Y. 567, 15 Am. Rep. 530, is a leading case upon the question, and, while it has been vigorously assaulted at various times during the past twenty years, it still stands as a declaration of law by the courts of that state, not weakened and mutilated by such assaults, but rather strengthened and unscathed. In *Cahalin* v. *Cochran*, 1 N. Y. S. R. 533, negligence was inferred from the fact of a chisel falling from a building where workmen were engaged, and striking plaintiff when walking upon the street. A case to the same effect is *Goll* v. *Manhattan R. Co.*, 25 Jones & S. 74. *Mullen* v. *St. John* is expressly approved, and the doctrine for which we are here contending ratified to its full limits, in the very recent case of *Volkmar* v. *Manhattan R. Co.*, 134 N. Y. 418.

As supporting a contrary doctrine, one of the leading cases is *Young* v. *Braneford*, 12 Lea, 232. Yet in the report of that case we find the following language: "At the same time, the fact that there was an explosion, which is not an ordinary incident of the use of a steam boiler, ought to have some weight, inasmuch as it may be out of the power of the aggrieved party in some instances to prove any more. The reasonable rule would seem to be that laid down by *Judge* Wallace: 'That from the mere fact of an explosion it is competent for the jury to infer, as a proposition of fact, that there was some negligence in the management of the boiler, or some defect in its condition.'" Another case is *Huff* v. *Austin*, 46 Ohio St. 386, a case which relies for support in part upon *Losee* v. *Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623. Yet in *Mullen* v. *St. John* the *Losee Case* was expressly held to be not in point by reason of the presence of other evidence. *Cosulich* v. *Standard Oil Co.*, 122 N. Y. 118, is the latest authority to which our attention has been directed holding these views. It cites the Tennessee and Ohio cases, and also relies, as do others of these cases, upon a general

held that such magazine was a private nuisance, and that therefore the defendant was liable whether the powder was carefully kept or not, the question of care or want of care not being involved in an action for injuries resulting from a nuisance; and that if actual injury resulted from the keeping of the gunpowder the person keeping it was liable therefor, even though the explosion was not chargeable to his personal negligence.

Again, where the evidence showed that the explosion of oils was the probable and proximate consequence of the keeping and storing of the same in an inflammable frame building through whose cracks sparks, falling from any passing locomotive, might at any time have started a fire, the court held that the danger might have been foreseen by any person of average intelligence, and that therefore the defendant was liable, and that it was not necessary to prove that the fire itself might have been foreseen, nor that the defendant should have anticipated the loss from any particular source, if the circumstances were such that defendant should reasonably have been aware of the danger caused by the sparks of an engine, the burning of any other building or structure in the vicinity, or the carelessness of any other person; the court in that case not being able to say as a matter of law that the oils had not been kept an unreasonable time. Wright v. Chicago & N. W. R. Co. 27 Ill. App. 200, 211 (1888).

And again, in Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154 (1884), damages were claimed for injury caused by the negligence of defendant's servant in leaving a dynamite cartridge in a common packing box upon the premises, part of the premises having been leased by defendant to the plaintiff, over which the plaintiff and his firm had a right of way, the cartridge exploding and injuring the plaintiff's child. The court held the defendant liable, even though the box in which the cartridge was found was labeled "powder," neither the plaintiff nor his child being able to read, there being no contributory negligence on their part.

In McAndrews v. Collerd, 42 N. J. L. 189, 192, 36 Am. Rep. 508 (1880), a railroad company had legislative authority to construct a tunnel and contracted with the defendant to do the work. The defendant constructed, within the limits of a city, a magazine for the explosive material used in blasting the rock, and, while the magazine was maintained there by such defendant for the purposes of such construction, the materials exploded in the night-time and damaged the surrounding property, among which were houses belonging to plaintiff. The court, in an action for damages, held that the authority vested in the company did not include authority to use materials of a dangerous nature which would jeopardize the person or property of others, although such materials might be necessary for the work, the legislative authority being no protection against a private action for damages arising from a nuisance,—following the doctrine laid down in Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279 (1849); Tremain v. Cohoes Co. 2 N. Y. 163, 51 Am. Dec. 284 (1849).

So in Allison v. Western N. C. R. Co., 64 N. C. 382 (1870), where a number of slaves were assigned a room for living purposes in which, unknown to them, there was an open keg of powder under their sleeping bunk, while one of such slaves was in search of his hat with a lighted torch the powder exploded and injured him. It was held the company was liable for negligence as bailee for the injuries caused to the slave by reason of such explosion, though the bailee did not know of the presence of the powder, the same having been placed there by his servant in the course of his employment, and that it made no difference that the servant was not the immediate servant of the bailee, but the servant of contractors who were the agents of the bailee.

Again, in Tissue v. Baltimore & O. R. Co., 112 Pa. 91, 56 Am. Rep. 310 (1886), where the dynamite magazine, from the explosion of which plaintiff's intestate lost his life, was placed in the position which it occupied by the direction of the superintendent of the work upon the defendant railroad, the court held that, so far as it concerned subordinate employés, it was the act of the corporation itself, and could not be attributed to any of the fellow servants of the deceased, and that therefore the company was liable, as, although it was true that the master did not warrant the absolute safety of those he employed to do his work, yet he was bound to

statement, found in Thompson on Negligence (p. 227), namely: "But it is believed that it is never true, except in contractual relations, that the proof of the mere fact that the accident happened to the plaintiff, without more, will amount to evidence of negligence on the part of the defendant." The case cited by Mr. Thompson in no way supports this text, if the text is to be construed as the *Cosulich Case* seems to construe it, and the learned author's illustrations, which immediately follow, conclusively indicate that, in making the statement quoted, he never contemplated for it any such construction as the New York court seems to give it. This is doubly apparent when we see that upon the same page he indorses the doctrine of *Byrne* v. *Boadle*, *supra*. Indeed, the author prefaces his whole discussion of the question of *res ipsa loquitur* by a report in full of the celebrated case of *Kearney* v. *London, B. & S. C. R. Co.*, *supra*, the doctrine of which he fully indorses, and which in no sense was a case of contractual relation. Beyond all this, the *Volkmar Case*, already cited, is a later expression emanating from the New York court, and earlier cases coming from the same source, if opposed to the doctrine there declared, must give way.

There is another class of cases in all essentials fully supporting our views upon this question of negligence. These cases arise in the destruction of property caused by fire escaping from locomotive engines, and, while there is some conflict in the authorities as to the true rule, it is said in Shearman and Redfield on Negligence (sec. 676): "The decided weight of authority and of reason is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumptively chargeable with negligence, and must assume the burden of proving that it had used all those precautions for confining sparks or cinders (as the case may be), which have been already mentioned as necessary. This is the common law of England, and the same rule has been followed in New York and Maryland," etc., citing many other states. While we have not deemed it necessary to verify the correctness of the statement of the authors as to all the states mentioned, we do say there are numberless cases supporting the text. See *Piggot* v. *Eastern Counties R. Co.* 3 C. B. 229; *Louisville & N. R. Co.* v. *Reese*, 85 Ala. 497; *Spaulding* v. *Chicago & N. W. R. Co.* 30 Wis. 110,—citing many cases.

In this state the question has never been

take heed that he did not, through his own want of care, expose his servants to unnecessary risks or dangers, either from the character of the tools with which he supplied them, or the place in which he required them to operate.

In that case the court stated that the question whether a superintendent of a railroad company in placing a dynamite magazine where it was placed ought to have known that he was exposing men operating the road to unnecessary danger was one for the jury, and that the fact that such superintendent was ignorant of the peculiar properties of the material which he was intrusted to handle was no excuse for the company, in an action brought to recover damages for injuries sustained by reason of an explosion of such dynamite.

And again, where the plaintiff's storehouse was injured through the negligence of the defendant, who kept gasoline stored upon his premises in an unsafe condition, the plaintiff was allowed to recover, there being no contributory negligence, the mere fact that he built in close proximity to the defendant's warehouse not of itself being sufficient to show negligence on his part, as he had a right to expect the defendant to exercise due care in conducting his business. Waters-Pierce Oil Co. v. King, 6 Tex. Civ. App. 98 (1894).

So also, in Rollins v. Farley, 22 N. Y. Week. Dig. 843, 100 N. Y. 620, mem. (1885), where action was brought to recover damages caused by the explosion of dynamite cartridges used by defendants in blasting, the evidence showing that such cartridges were negligently placed in contact with a hot steam pipe, the question was whether the evidence was sufficient to sustain the verdict, the court affirming the judgment of the court below in the plaintiff's favor.

In the following cases, however, the courts held that no liability rested upon the defendants in such cases:

In the case of Parrott v. Wells (The Nitro-Glycerine Case), 82 U. S. 15 Wall. 524, 21 L. ed. 206 (1873), damages were claimed for injuries occasioned to plaintiff's building by reason of the explosion of a package of nitro-glycerine which defendants had taken upon the premises for the purpose of discovering the cause of a leak therein, but without knowledge of the dangerous character of the contents of the package, or anything to arouse their suspicions as to the same. The court held there was no negligence on the part of the defendant, who handled the package in the same way as other packages of similar outward appearance.

In the above case the defendants leased the premises in question from the plaintiff upon conditions prohibiting the receipt or storage of "gunpowder, alcohol, or any other articles dangerous from their combustibility," and the defendants occupied the building, subject to the terms of the lease, as bankers and expressmen, and for the purposes therein stated.

So, in Russell v. New Jersey S. B. Co., 10 Misc. 593 (1894), wherein damages were claimed, under section 4472 of the Revised Statutes of the United States, enacted to prevent the carrying of certain articles therein mentioned on steamboats carrying passengers, for injuries caused by the explosion of a steam cylinder containing compressed gas delivered to the defendant company for transportation, the question being whether the article in question came within the provisions of the statute,—the court held that it did not, as it was proved that such article was not, like those specified in the statute, dangerous in consequence of its inflammability, the danger not arising from the article itself, but from the use to which the article was put, in that case compressing it in a cylinder not strong enough to hold it, the danger being in overcharging the cylinder, and not in the elements of the article itself.

Again, in Murphy v. Smith, 19 C. B. N. S. 361 (1865), where damages were claimed for injuries sustained by plaintiff through an explosion of combustible materials used in the defendant's factory, the plaintiff, a boy of sixteen, was engaged in storing a magazine in a vessel, in the presence of a fellow workman, who, in the absence of the foreman or general manager, assumed the management. The evidence showed that such fellow workman was guilty of negligence in permitting an inexperienced person to perform the work. The court held the defendant was not liable, as, in order to render a master liable for an injury to one in his employ through the negligence of another

directly passed upon as to whether or not negligence will be presumed from the fact of sparks escaping from a locomotive engine, and the destruction of grain fields resulting therefrom. In *Butcher* v. *Vaca Valley & C. L. R. Co.*, 67 Cal. 518, the doctrine is inferentially favored, although in that case the plaintiff placed an expert witness upon the stand, who testified that "a perfect engine, properly equipped and properly run, will not ordinarily throw out sparks sufficient to start a fire." This line of evidence was also held sufficient to establish a prima facie case of negligence, in *Hull* v. *Sacramento Valley R. Co.*, 14 Cal. 387, 73 Am. Dec. 656, and *Henry* v. *Southern P. R. Co.*, 50 Cal. 176. For our purpose it is not necessary to enter into a prolonged investigation to determine why this evidence of the expert strengthened plaintiff's case. But, taking the converse of the proposition, let us assume that defendant's engine was a perfect engine, properly equipped and properly run, and that, notwithstanding such conditions, it would ordinarily when in use throw out sparks of fire, leaving in its wake, as it passed through the country, property destroyed and possibly lives lost. Certainly, this could hardly be tolerated in law. Hence we fail to fully appreciate the importance of this line of evidence. Such conduct upon the part of a railroad company would render it guilty of the commission of a nuisance, and liable in damages for property destroyed. Certainly, it is no answer to such a condition of things to say that the legislative grant to the corporation to do business with the aid of steam locomotives carries with it the right to destroy the property of adjoining owners; but, rather, we must assume that the grant was made only after a prior determination by the same legislative power that a perfect locomotive engine, properly equipped and properly run, will not ordinarily throw out sufficient sparks to destroy adjoining property. It is only upon such a theory that the right to do business by the use of this character of implement was ever granted; and hence we again say that it may be considered doubtful if this class of evidence strengthens the plaintiff's case; for it is but proving, as a fact, something of which the courts and possibly all the world take full notice.

In the case at bar, following the lines marked out by the cases last cited, respondents placed before the court expert evidence to the effect that, if the correct process of manufacturing and handling dynamite was

person also in his employ, it must be shown that the latter was placed by the master in such a position of trust and authority as to be fairly considered as a representative in the establishment, it not being shown that the fellow servant filled any other position in relation to the plaintiff than that of a fellow workman.

In the case of Fillo v. Jones, 2 Abb. App. Dec. 121 (1868), action was brought under the statute for damages for the death of the deceased, which resulted from the explosion of fireworks on the premises of defendant, who was a dealer in gunpowder and fireworks, the testimony showing that among the articles so kept by defendant were colored signal lights, the keeping of which an ordinance of the corporation prohibited on account of the danger to life and property. It was not claimed by the plaintiff that the keeping and storing of the fireworks in contravention of the city ordinance was for that reason alone such an unlawful act as to bring the case within the statute authorizing a recovery, and the court therefore held that, before a recovery could be had, it was necessary to show, either that the defendant was guilty of negligence in the mode of keeping and storing or handling of the articles, or that such keeping and storing were of themselves an unlawful act at common law, because a common nuisance dangerous to human life.

Where in railroad construction the contractors, with the consent of the company, subcontracted the rock excavation to a third party, the understanding being that the rock was to be removed by blasting with nitro-glycerine, and negligence was charged in the use of such material on the premises owned by the company, the party injured being an employé of the subcontractor, selected by him to take charge of the nitro-glycerine used in the works, the facts showed that after the subletting of the contract permission was granted by the engineer of the defendant company for the erecting of a magazine for the storage of oil necessary for executing the work; that the contract with the original contractor stipulated that he should not be at liberty to sublet without consent, and that no subcontract should relieve him from liabilities under the contract; and that competent foremen, workmen, and experienced mechanics were to be employed; but it was not shown that these provisions were incorporated in the contract with the subcontractor; and it was also shown that the magazine, as located when used for the storage of nitro-glycerine, was a public nuisance, and that the engineer of the company was its agent in consenting to such use; that the party employed to superintend such storage was an improper person. The liability of the company was sought to be placed on two grounds: First, that the person so employed was its servant; and, second, that the injury resulted from the nuisance maintained upon the land with the company's consent. The court held that such party was not the servant of the company, and that therefore the company could not be held liable for injuries resulting from his negligence. Cuff v. Newark & N. Y. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205 (1870).

So, in Weed v. Barney, 45 N. Y. 344, 6 Am. Rep. 96 (1871), where action was brought to recover compensation for merchandise destroyed by the explosion of a package of nitro-glycerine while such package was in the defendants' warehouse, the nitro-glycerine being artfully concealed so that the contents of the package were not known to the defendants, who were warehousemen and general carriers. The goods were shipped C. O. D. and the consignee was notified from time to time of their presence and requested to remove them, which he promised but failed to do, and the court held the defendants not liable, being considered as warehousemen, and not as common carriers.

Again, in Abrahams v. California Powder Works (N. M.) 8 L. R. A. 378 (1890), where compensation was claimed for injuries to plaintiff's building caused by an explosion of powder stored in a powder house erected and maintained by the defendants, it was held that the ownership of gunpowder which had been sent for sale on commission did not render the owners liable for an explosion which occurred while the powder was in the hands of the consignees.

And where an agreement between a railroad company and its contractor for the construction

carefully carried out, an explosion would not occur. This evidence is stronger than in the smokestack cases, for here it declares as a certainty what there is only stated to be the probable or ordinary result; but, be that as it may, if this character of evidence was relevant and material in the smokestack cases, it is equally relevant and material here. If it was sufficient there to complete and perfect a prima facie case of negligence, it is ample here to do the same. Again, if appellant had the right, under the laws of the state, to manufacture dynamite (which is conceded), and if, by reason of the existence of such right, courts may assume that, if dynamite is properly handled in the process of manufacture, explosions will not probably occur, then respondents' case is doubly proved, for here we have not only the presumption of the existence of certain conditions, but the evidence of witnesses as to the existence of them.

In concluding this branch of the case, we can only reiterate that the true rule appears to be found in section 60 of Shearman and Redfield on Negligence, which we have already quoted; and, gauging this case by the test there prescribed, a prima facie case of negligence was established by respondents' evidence. This case seems to clearly come within the provisions of the rule there declared. There is nothing to distinguish it in principle from the army of cases that have been held to come directly within its provisions. Appellant was engaged in the manufacture of dynamite. In the ordinary course of things, an explosion does not occur in such manufacture if proper care is exercised. An explosion did occur, *ergo*, the real cause of the explosion being unexplained, it is probable that it was occasioned by a lack of proper care. The logic is unassailable, and the principle of law of presumptions of fact erected thereon is as sound as the logic upon which it is based.

8. Questions of negligence in the storage of the gunpowder become unnecessary to consider, owing to our views upon the main question discussed. Neither do we find anything in the record, bearing upon the measure or amount of damages declared and decreed by the court, demanding a new trial of the case.

For the foregoing reasons, *the judgment and order are affirmed.*

We concur: **Van Fleet, J.; Harrison, J.**

Rehearing denied.

of a railroad contained a clause for the storage of nitro-glycerine necessary for the operations of blasting in the construction of such works, and the evidence showed that at the time of the accident oil belonging to third parties had been stored upon such premises without the knowledge or consent of the company or of the contractors,—the court held that the company was not liable for injuries sustained by an explosion occasioned in filling an order for the sale of the oil so wrongfully stored upon the premises. Cuff v. Newark & N. Y. R. Co. *supra.*

In Slayton v. Fremont, E. & M. V. R. Co., 40 Neb. 840 (1894), the evidence showed that the company had torpedoes, necessary to the operation of its road, deposited and kept in an untenanted section-house, the doors and windows of which were securely fastened, access to the building and the removal of the torpedoes being effected by children opening the windows, in consequence of which an explosion occurred causing injury. The court held the defendant not liable, and that the court below should have directed a verdict for defendant, there being no evidence to support the action.

Again, in Foley v. Chicago & N. W. R. Co., 48 Mich. 622, 42 Am. Rep. 481 (1882), where the negligence charged against the defendant was the sending of the plaintiff's intestate into the vicinity of a dangerous explosive, nitro-glycerine, received for the purpose of being switched over its track, without informing or cautioning him of the danger, the company was held not liable, inasmuch as it had a right to assume that due care had been exercised in packing the substance in question, the loading of the cars being performed by the manufacturer's own servants, the intestate's only duty being to see that the car in question was properly switched, the switchman exercising no control over the action of the parties, and having a general knowledge of the character of the article.

So, in Walker v. Chicago, R. I. & P. R. Co., 71 Iowa, 658 (1887), where damages to plaintiff's building were caused by the explosion of gunpowder in a box car standing on a side track in the freight yard of the defendant company, and the facts showed that the same had been received for transportation by the company, which had tendered it to another railroad company to be conveyed over its line to its destination, but, the latter company refusing to receive it, the defendant company placed it upon its own side track to await orders as to its future disposition, the fire occurring after it had remained on the track for about twenty-four hours, the defendant using all diligence to extinguish the fire,—the court held that the facts disclosed no sufficient ground for action against the company, there being no evidence of negligence in storing the car, the relation between the parties not being such that the law would presume negligence in the defendant by the mere fact that the plaintiff's property was injured.

In Socola v. Chess-Carley Co., 39 La. Ann. 344 (1887), the fire originated in a warehouse adjoining the plaintiff's mill, a barrel of petroleum oil or fluid used for illuminating purposes in the mill being stored in such warehouse. The facts showed that the mill employés were engaged after midnight in drawing oil from the barrel, when the explosion occurred. The plaintiff's contention was that the defendant was responsible for the reason that the order sent to defendant was for a barrel of puroline, a burning fluid which could be used for illuminating purposes with safety, and that instead the defendant shipped a barrel of gasoline, a dangerous fluid, plaintiff alleging fraud of the defendant in causing the barrel to be branded as "puroline," and purposely omitting to mark it "dangerous and explosive," through which deception plaintiff was barred from suing or recovering upon his insurance policy. The court held with respect to the fraudulent imposition or deception that the defendant was not guilty, the difference between the articles being hardly perceptible, the package containing the stamp "explosive and dangerous," as required by the Act of 1877, under the authority of the state itself, and that the plaintiff's fire was occasioned by the negligent act of his servant.

E. W.

ALABAMA SUPREME COURT.

J. C. GOODLOE, *Appt.*,
v.
MEMPHIS & CHARLESTON R. CO.

(.....Ala.....)

A railroad company is not liable for injuries received by a passenger from an accidental blow by one of its employés while making a playful attempt to strike another employé, as the act is not within the line of his employment.

(June 19, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Colbert County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by the negligence of a servant for whose conduct defendant was responsible. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **Jackson & Sawtelle** and **Joseph H. Nathan** for appellant.

Messrs. **Humes, Sheffey & Speake,** for appellee:

The liability of the master for intentional acts which constitute legal wrongs can only arise when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant has stepped aside from his employment to commit a tort which the master neither directed in fact nor could be supposed from the nature of his employment to have authorized or expected his servant to do.

Cooley, Torts, p. 585; *Crocker* v. *New London, W. & P. R. Co.* 24 Conn. 249; *Wright* v. *Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; *Pittsburg, A. & M. Pass. R. Co.* v. *Donahue*, 70 Pa. 119; *Rounds* v. *Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 Am. Rep. 597; Wood, Mast. & S. 580, 581; *Evansville & C. R. Co.* v. *Baum*, 26 Ind. 70.

If a servant wholly for a purpose of his own, disregarding the object for which he is employed, and not intending by his act to execute it, does an injury to another within the scope of his employment, the master is not liable.

Cooley, Torts, 537, *note.*

The master is not liable for the tortious acts of a servant unless done within the scope and range of his employment.

Gilliam v. *South & North Ala. R. Co.* 70 Ala. 268; *Mobile & O. R. Co.* v. *Seales*, 100 Ala. 368.

The question is, "Can the act be fairly and reasonably implied as one authorized to be done by the servant in the master's absence, and in the given emergency, in furtherance of the master's business?"

Birmingham Water-Works Co. v. *Hubbard*, 85 Ala. 179.

Haralson, J., delivered the opinion of the court:

We examine the single question presented by the defense and alone considered by the appellant,—that the defendant is not guilty for the reason that the injury complained of was not inflicted on plaintiff by the defendant's servants or employés while they were acting within the range, but outside, of the authority conferred by defendant on them. Other errors assigned are not insisted on in the argument filed, and are therefore treated as waived. The question presented has been well considered by this and many other courts. It was recently before us in the case of *Lampkin* v. *Louisville & N. R. Co.* (Ala.) 17 So. Rep. 448, in which, as the result of the authorities there cited, it was stated, as the well-settled rule, that the carrier's obligation was to protect its passengers against the violence and insults of its own servants and of strangers and copassengers; that a contract exists between a common carrier and its passengers to use all reasonable exertion to protect them from injury from fellow passengers, and its agents in charge of the train. In an earlier case it was said that "the clearly established doctrine now is, that railroad corporations are liable for all acts of wantonness, rudeness, or force, done or caused to be done by their agents or employés, if done in and about the business or duties assigned to them by the corporation; and the rule of vindictive or punitive damages against such corporations for abuse by their employés of the duties and powers confided to them is the same as that which applies to natural persons, who are guilty of such misconduct. It is confined, however, to abuses perpetrated in the line of duties assigned to them, and does not extend to any tort, wantonness, or wrongful act the employés may commit in matters not connected with the service of the railroad corporation. In the line of their assigned duties, they stand in the place of the corporation; without that line, the corporation is bound by nothing they may do." *Louisville & N. R. Co.* v. *Whitman*, 79 Ala. 325. The same principle had been differently but very clearly expressed in *Gilliam* v. *South & North Ala. R. Co.*, 70 Ala. 268,—"that if the employé, while acting within the scope of the authority of the employment, do an act injurious to another, either through negligence, wantonness, or intention, then for such abuse of authority conferred upon him, or implied in his employment, the master or employer is responsible in damages to the person thus injured. But if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master is not." The principle settled in these and many other similar adjudications is not disputed, but its application to the cases as they occur gives rise to continued disputations. What is meant by the words, "while acting within the range of the authority of the employment of the servant," is made the ground for contention in each case. But that seems, also, to be well settled on authority, and while it is often a

NOTE.—As to liability of carrier for assaults upon passengers, see note to Davis v. Houghtelin (Neb.) 14 L. R. A. 737.

See also 39 L. R. A. 784; 43 L. R. A. 84.

matter of nice adjustment to the facts of a case, it has been made clear enough not to be of very difficult application. It is said, on the point under consideration, that the rule of the responsibility of the master for the acts of his servants "does not apply simply from the circumstances that at the time when the injury is inflicted the person inflicting it is in the employment of another; but that, in order to make the master liable, the act inflicting the injury must have been done in pursuance of an express or implied authority to do it. That is, it must be an act which is fairly incident to the employment; in other words, an act which the master has set in motion. . . . And generally, where the injury results from the execution of the employment the master is liable." 2 Wood, Railway Law, § 316. In explanation of the rule, this court long ago held, as the result of the authorities examined and cited, that when the servant is in the performance of his master's orders or authorized acts, and in the doing thereof conducts himself so negligently or unskillfully that injury results to another, then the doctrine of *respondeat superior* applies, and the master will be liable in an action on the case; but that, for the acts of the agent willfully and intentionally done without the command and authorization of the master, the servant, and not the master, is liable; and that the rule has no application when the servant actually wills and intends the injury, or steps aside from the purpose of the agency committed to him, and inflicts an independent wrong. *Cox* v. *Keahey*, 36 Ala. 340, 76 Am. Dec. 325. So, we find it held that where a slave, being a passenger on a steamboat, was wounded by a gun negligently discharged by the second engineer of the boat, the captain, in an action against him for the injury, was held not to be liable, because the discharge of the gun by the engineer was not an act done in the course of his employment, or in the discharge of any duty connected with the service. *McClenaghan* v. *Brock*, 5 Rich. L. 17. And where a servant employed to light fires in a house lighted furz and straw in order to clean a chimney that smoked, and the house caught fire therefrom and was destroyed, it was held that the act of cleaning the chimney in the manner stated was one outside the scope of her employment, and the master was not liable. *McKenzie* v. *McLeod*, 10 Bing. 385. And still again, in a recent case, where an employé, being behind in his accounts, was suspected of setting fire to the building in which he was employed in order to destroy the evidence of his default, we said that there was no evidence tending to show if the employé did set fire to the building, that it was a negligent act of his done while in the performance of his duty; and that, if he did it at all, it was his own tortious, wicked act done outside the line of his employment, in which the defendant did not participate, or, afterwards, in any manner ratify, and for which it was not in any manner responsible. *Collins* v. *Alabama G. S. R. Co.* (Ala.) 16 So. Rep. 142.

In the case before us the evidence shows that the appellant purchased a ticket at Tuscumbia, from the defendant company, to go as a passenger on its train to his home at Barton, and tarried in the waiting room until the arrival of the train, when he left the waiting room, went on the platform along the side of the train, and proceeded to the point at which he could enter the passenger coach, and, when near the entrance of the coach, as he expressed it, he "was struck against, quartering on his back and shoulder with such force as to knock or push him off the platform on the south side of it, and fell to the ground breaking his left leg," etc. McCormick, a witness for defendant, testified that he was supervisor of the middle division of the defendant's railroad, from Corinth to Decatur, and was going over his division on the train which plaintiff was about to enter when he was hurt; that he had nothing to do with the train as an employé; that he had gotten off on its arrival, and gone to the train despatcher's office to see if he had any message for him, and on his return he found Mr. Porterfield, the roadmaster of defendant, and Mr. Jones, the sleeping-car conductor, in conversation with each other on the platform. Mr. Porterfield asked witness if he had ever met Mr. Jones, to which witness made a playful remark, to the effect that he did not want to know him, at the same time making a lick at him with his hand, when Jones threw up his hand, as if to ward off the blow, and knocked or pushed witness against the plaintiff, which caused him to fall off the platform, and injure himself. Jones, the Pullman conductor, gave substantially the same account of the transaction. There was no evidence that either had ill will towards plaintiff or intended to do him any harm. McCormick knew him well and was friendly with him, and Jones did not know him at all. The evidence also shows that McCormick and Jones were friends, and what occurred between them was in sport. What these parties did to cause plaintiff's injury was not in the line of their respective engagements, or that of either of them, to their employer; it was not fairly incidental to their employment; it was not done in pursuance of an express or implied authority from the master to do it; it was the result of the conduct of these employés, who, in the commission of the injurious act, however innocently done, had stepped aside from the purposes of the agency committed to them, and inflicted an independent wrong on the plaintiff; and they, if anybody, and not the defendant company, are liable for it.

Affirmed.

NEVADA SUPREME COURT.

John H. DENNIS, *Appt.*,
v.
W. H. CAUGHLIN, *Respt.*

(.....Nev.....)

1. **Only errors of which the appellant complains** can be considered on appeal in a contested election case.
2. **A slightly blurred spot or erasure on a ballot, made to correct a mistake,** and not indicating an intention to identify the ballot, or a slight pencil mark made by mistake, or a tobacco stain, will not avoid the ballot under the Ballot Law, section 26, providing that any ballot on which appear marks written or printed except as provided shall not be counted.
3. **A blurred spot plainly made on a ballot, which might have been made for identification,** or a cross not opposite the name of any candidate, or a number of crosses in a bunch, or a mark which is not a cross, or the use of a blue lead pencil, is ground for rejecting the ballot under Ballot Law, section 26, providing that the ballot shall be marked with a cross after the names of the persons for whom the elector votes, in black pencil, and that any marks except as provided in the act shall invalidate the ballot.

(September 28, 1895.)

APPEAL by plaintiff from a judgment of the District Court for Washoe County in favor of defendant in an action brought to contest defendant's election to the office of sheriff of Washoe County. *Reversed.*

The facts are stated in the opinion.

Mr. **T. E. Haydon** for appellant.

Messrs. **Torreyson & Summerfield** for respondent.

Belknap, J., delivered the opinion of the court:

This is a contest brought by John H. Dennis, an elector of Washoe county, against the respondent, to determine whether John Hayes or W. H. Caughlin is legally entitled to the office of sheriff of Washoe county. According to the official returns, respondent received the highest number of votes and was declared elected by the board of canvassers. At the trial it was stipulated that all returns and all ballots of each and every precinct in the county should be examined and considered, and legal ballots counted for whom cast, and under this stipulation the trial was had. Respondent recovered judgment.

One of the first questions to be determined is whether we can review all the rulings of the district court or only such as have been assigned as error by the appellant. It has frequently been decided that a party who has not appealed from a judgment cannot, on an appeal by the opposite party, obtain a review of the rulings of the court against him. In *Dougherty* v. *Henarie*, 47 Cal. 9, the plaintiff offered to dismiss the action as to one of the defendants, who objected, and the court thereupon denied the motion to dismiss, the plaintiff excepting. Said the court: "But he cannot avail himself of his exception on this appeal. Having submitted to the judgment, and prosecuted no appeal from it, he cannot, on an appeal by the defendants, review the rulings of the court which he claims are to his prejudice." *Maher* v. *Swift*, 14 Nev. 324; *Moresi* v. *Swift*, 15 Nev. 215; *Nesbitt* v. *Chisholm*, 16 Nev. 40.

Again, in *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 57, the supreme court of Iowa said, in an election contest case: "The appellee complains that ballots similar in marking to some of those we hold should have been excluded were offered by the contestant, and counted for him, but, as the incumbent does not appeal, we cannot determine the question he thus presents." Our conclusion is that only such errors as the appellant complains of can be considered upon this appeal.

The errors assigned by the appellant embrace the rulings of the district court upon thirty-two ballots. These rulings involve a construction of the Statute of 1891 generally known as the "Australian Ballot Law." The provisions of the statute relating to the preparation of the ballot by the elector, and its rejection in certain cases, are as follows:

"Sec. 20. On receiving this ballot the voter shall immediately retire alone to one of the places, booths, or compartments. He shall prepare his ballot by marking a cross or × after the name of the persons for whom he intends to vote for each office. In case of a constitutional amendment or other question submitted to the voters, the cross or × shall be placed after the answer which he desires to give. Such marking shall be done only with a black lead pencil. Before leaving the booth or compartment the voter shall fold his ballot in such a manner that the watermark and the number of the ballot shall appear on the outside, without exposing the marks upon the ballots, and shall keep it so folded until he has voted. Having folded his ballot, the voter shall deliver it to the inspector, who shall announce the name of the voter and the number of his ballot. The clerk having the registry list in his charge, if he finds the number to agree with the number of the ballot delivered to the voter, shall repeat the name and number, and shall mark opposite the name the word 'Voted.' The inspector shall then separate the strip bearing the number from the ballot, and shall deposit the ballot in the ballot box. Said strip and number shall be immediately destroyed."

"Sec. 26. In counting the votes any ballot not bearing the water-mark, as provided in this act, shall not be counted, but such ballot must be preserved and returned with the other ballots. When a voter marks more names than there are persons to be elected to an office, or if for any reason it is impossible to determine the voter's choice for any office,

NOTE.—For distinguishing marks on ballots, see also Tebbe v. Smith (Cal.) *ante*, 673, and cases cited in *footnote* thereto.

See also 30 L. R. A. 227, 354; 34 L. R. A. 45.

his vote for such office shall not be counted. Any ballot upon which appear names, words, or marks written or printed, except as in this act provided, shall not be counted."

Statutes more or less similar in their nature have been adopted in many of our sister states, and a reference to some will aid in the construction to be placed upon our law. In *Re Vote Marks*, 17 R. I. 812, the supreme court of Rhode Island said: "A cross is the only mark authorized by the statute to be used to designate the person voted for, and it is only by force of the statute that it gets its significance for that purpose. If another mark be used, there is nothing to certify its meaning. It might be conjectured that it was used inadvertently, instead of a cross, but in our opinion such a conjecture would not justify the counting of it. The statute declares: 'No voter shall place any mark upon his ballot by which it may be afterwards identified as the one voted by him.' If marks other than crosses were counted they might be used both to answer the purpose of crosses and to identify the ballots." In *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 57, in considering a law of this nature adopted in Iowa, the court said: "It is not practicable to adopt a rule in regard to identifying marks which would be applicable in all cases. It will not do to say that all ballots which bear marks not authorized by law should be rejected. All voters are not alike skillful in marking. Some are not accustomed to using a pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross first made may be clumsily retraced. It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted, but where the unauthorized marks are made deliberately, and may be used as a means of identifying the ballot, it should be rejected." In Indiana it was provided that the voter should indicate his choice by stamping a certain square opposite the candidate's name, and, if he desired to vote for all candidates of one party, should place the stamp on the square preceding the party designation. The court held that the provision concerning the use of the stamp was mandatory, the stamping of the square being the only method prescribed by which the voter can indicate his choice. The statute was amended at the next session of the legislature so that a stamp placed upon a ballot, which does not touch a square thereon, was declared to be a distinguishing mark, and was not to be counted. The court said: "This amendment was intended, we think, to make certain that which, prior to its passage, was left in some measure to construction, but it only makes certain that which was intended by the legislature when it passed the original section." *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775. In Maine the statute provides that "the voter shall prepare his ballot by marking on the appropriate margin or place a (×) as follows: He may place such mark opposite the name of a party or political designation; or he may place such mark opposite the name of the individual candidates of his choice for each office to be filled." Me. Stat. 1891, chap. 102, § 24. The court said of this provision: "Its distinguishing feature is its careful provision for a secret ballot. The leading purpose of it was to give the elector an opportunity to cast his vote in such a manner that no other person would know for what candidates he voted, and thus to protect him against all improper influences and enable him to enjoy absolute freedom from restraint and entire independence in the expression of his choice. . . . If it be conceded that the intention of the voter may be correctly inferred from the mark actually made by him in each of these instances, it is still a fatal objection to the ballot that such an irregular and unauthorized mode of marking it might readily be, and probably would be, agreed upon with the voter as a distinguishing mark to identify the ballot cast by him whenever identification was desired. Such a palpable disregard of the plain requirements of the act strikes at the root of the secret-ballot system." *Curran* v. *Clayton*, 86 Me. 42.

These decisions show that the only way the voter can indicate his choice is by a cross or × used in the manner required by the statute. The statute of this state is less liberal in its terms than those of the other states, and if its provisions relating to "marks," in the twenty-sixth section of the act, are to be literally enforced, many voters would be disfranchised. This section provides that any names, words, or marks, except as in the act provided, shall invalidate the ballot. Under the terms of the statute, any mark, although innocently or accidentally made, would come within its provisions. The evils against which the statute was directed were bribery and intimidation, and to repress these the secret ballot was adopted. Its aim was that the ballot should not disclose by whom it was cast, and for this reason all of the means by which it may be identified were interdicted. Courts should construe statutes with such liberality, if practicable, as to advance the object and correct the evils which the legislature had in view. A mark satisfactorily appearing to have been inadvertently or accidentally made, and not for an evil purpose, is not within the meaning of the statute, and should not be construed as an identifying or distinguishing mark; and we think the statute should be read as if this qualification were attached to it. Adopting this view, a ballot written by a hand unaccustomed to the use of a pencil, or awkwardness in its use, or carelessness, or an apparent attempt to retrace a clumsily made cross ×, or an effort to make it more certain, and in doing so employing more lines than are necessary to properly make a cross, or a slightly blurred spot to correct a mistake, not indicating an intention to identify the ballot, or a slight erasure for the same purpose, or cross made when the ballot paper was defective, and to avoid the defect, and make the vote more certain, a second cross was made, or a slight pencil mark, clearly made by accident, and not design, or a stain of tobacco,—will not avoid the ballot.

There are fifteen ballots numbered as follows: 45, 49, 50, 78, 68, 73, 74, 53, 27, 72, 59, 75, 40, 36, 66, to which these objections were made, and we think that all of them should be counted for the appellant. But blurred spots, plainly made by a lead pencil, which may have been made for the purpose of canceling a cross, but which might have been made also for identification, or a cross not opposite the name of any candidate, or two or more crosses instead of one, or a number of crosses in a bunch, or a mark not a cross, or the use of a blue lead pencil instead of a black one, or a straight line, thus, ———, over the word "No," or writing a word instead of employing a cross,—are grounds for rejecting the ballot. There are seventeen ballots to which these objections apply, and we think the court properly rejected them. These ballots were numbered as follows: 30, 39, 44, 69, 33, 38, 60½, 71, 41, 48, 66½, 37, 52, 35, 54, 57, 77. The district court found that Hayes was entitled to 558 votes, and Caughlin 561. Adding to Hayes' vote the fifteen votes that we have found for him changes the result of the election.

Similar motions were made in this case as those in *Buckner* v. *Lynip*, 22 Nev. —, and upon the authority of that case the motions are dismissed.

Judgment reversed and cause remanded for a new trial.

Bonnifield, J., concurs.

Bigelow, Ch. J., concurring:

As held in *Buckner* v. *Lynip*, 22 Nev. —, the spirit and purpose of the ballot law were to exclude only ballots bearing distinguishing names, words, or marks, and not those where it satisfactorily appears that the marks were not intended for distinguishing marks, and were not placed thereon with the knowledge or consent of the voter. Doubtless, in the first instance, the presumption should be that all marks not authorized by law were placed thereon for the purpose of identification, and, in the absence of satisfactory evidence to the contrary, should exclude the ballot from the count. But clearly it was not the intent of the lawmakers that marks that do not identify the particular ballot, or that clearly appear to have been accidental or inadvertent,—as where made by the slip of a pencil, by soiled fingers, through awkwardness in making the cross, or by other unintentional means,—and that are not such as to be readily used for purposes of identification, should cause the rejection of the entire ticket. On the other hand, where the marks were apparently made intentionally, and are such as to readily distinguish the ticket, and such as may have been made for the purpose of distinguishing it, it should not be counted. Of course, this rule calls for the exercise of some discretion in the canvassers, and is not so simple as it would be to follow the letter of the law, and reject all ballots upon which any unauthorized mark appears; but we believe it to be more in consonance with the spirit of the statute and with the genius of our institutions. Our government is founded upon manhood suffrage, and in the effort to prevent intimidation and corruption in the elections, although a most commendable purpose, and one we would encourage by every means possible, it will not do to adopt rules so strict as to practically disfranchise a considerable number of innocent voters. This would be too heroic a remedy. If the sole, or even the main, purpose be to prevent fraud in the elections, this could be best accomplished by permitting no one to vote. The marking upon a ballot may be such as to prevent its being counted for a particular candidate upon two grounds: Where it is not so marked as to indicate the voter's choice as to that office, and where it bears distinguishing marks. Upon the first ground, no other mark than that of a cross or ×, placed after the candidate's name, will suffice; but a failure to mark upon some office, or a defective marking, should not usually be classed as a distinguishing mark. Probably a cross or an × could be so made as to constitute an identifying mark, but we should be very certain that such was the purpose before we would be justified in rejecting the ballot on that ground. The statute recognizes that there may be defective marking upon some particular office that is still not sufficient to reject the entire ballot, by providing that when, for any reason, it is impossible to determine the voter's choice for any office, his vote for that office shall not be counted. All men do not make crosses and ×'s alike, nor do all possess the same degree of skill in making them. It would seem that any honest attempt to make the proper mark, and nothing else, even if insufficient to authorize counting the vote for that candidate, should not be treated as sufficient to cause the ballot's rejection.

The following examples will illustrate the distinctions we think should be drawn: Ballot No. 27 has a faint cross, very nearly erased, opposite the name of McNees, another candidate for the same office. It is evident that this mark was made inadvertently, and that the voter sought to change his vote from McNees to Hayes. It is perfectly clear for whom he wished to vote, and, as the faint outline of the cross does not constitute a distinguishing mark, no reason appears why it should not be counted as intended. No. 49 has a mark opposite the name of a state candidate, intended for an ×, but the second stroke only comes down to, but does not cross, the first. While this was a failure to make a cross, so that probably the vote should not have been counted for that candidate, it was clearly unintentional. Had the second stroke been extended the thirty-secondth part of an inch, it would have been a cross. No. 50 has a light third line across the × opposite the name of a state candidate, doubtless made through accident or carelessness. No. 53 has a light mark, apparently made by a dirty finger, or in an attempt to erase a cross in a square, but which was again made and allowed to remain. No 73 has crosses made with lines across the top and bottom of the ×'s, intended to be the same as the × is made in the statute. As the act does not provide how the cross shall

be made, we do not see why that is not as correct as one made simply with two straight lines crossing. We think that such ballots as these, and similar ones, should be counted. On the other hand, No. 35 has in two places a number of crisscrossed lines nearly filling a square. No. 37 has the printed word "No" crossed out with a pencil. No. 38 has crosses not opposite the name of any candidate. No. 39 has a heavy round spot, made with a pencil, apparently for the purpose of covering up or blotting out a cross in a square opposite the name of a candidate. Very likely, in all these instances, the marks were made innocently, and not for the purpose of distinguishing the tickets; but they were made intentionally, and not by accident or inadvertence, and are such as might have been placed there for identification. They were, therefore, properly rejected.

All questions concerning the manner of making a cross, or where it shall be placed, can be avoided, and an advantageous change made in the law, by the legislature adopting an amendment providing for the use of a rubber stamp instead of a lead pencil, as is directed by the statutes of Indiana and some other states.

I concur in the conclusions announced by *Justice* Belknap as to the ballots that should or should not be counted.

IOWA SUPREME COURT.

City of OTTUMWA
v.
H. A. ZEKIND, *Appt.*

(.....Iowa.....)

1. An ordinance for the licensing of transient merchants is not to be regarded as discriminating against nonresidents merely because there may not be any resident merchants who are compelled to pay the license.

2. An ordinance applying to all transient merchants, requiring a license fee, is not unconstitutional as class legislation.

3. A license fee of $250 per month, or $25 per day for shorter periods, exacted from transient merchants by an ordinance, is excessive and invalid, amounting to an exercise of the taxing power rather than a police measure.

(October 14, 1895.)

APPEAL by defendant from a judgment of the District Court for Wapello County convicting him of violating a city ordinance against selling goods as a transient merchant without a license. *Reversed.*

The facts are stated in the opinion.

Messrs. **Steck & Smith,** for appellant:

In *Pacific Junction* v. *Dyer*, 64 Iowa, 38, this court held an ordinance void upon the ground that it discriminated in favor of resident merchants of Pacific Junction, and against other resident merchants of Iowa.

The ordinance is in violation of article 1, section 6, of the Constitution of the state, which provides that "all laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

1 Dill. Mun. Corp. 4th ed. § 322; 13 Am. & Eng. Encyclop. Law, p. 534; *Ex parte Frank*, 52 Cal. 606, 28 Am. Rep. 642.

A license fee of $250 per month, or $25 per day for a short period of time, exacted from transient merchants, is unreasonable and unjust, and is in fact prohibitory.

The greatest authority sought to be conferred by the legislature upon municipal corporations, as to auctioneers and transient merchants, is a mere police power, and does not extend to authorizing cities to prohibit sales or to tax the business out of existence.

1 Dill. Mun. Corp. 4th ed. § 367; *Burlington* v. *Bumgardner*, 42 Iowa, 673; 13 Am. & Eng. Encyclop. Law, p. 532; *Brooks* v. *Mangan*, 86 Mich. 576; *Glasser* v. *Cincinnati*, 31 Week. L. J. 243; *Jackson* v. *Newman*, 59 Miss. 385, 42 Am. Rep. 367; *Mankato* v. *Fowler*, 33 Minn. 364; *Sipe* v. *Murphy*, 49 Ohio St. 536, 17 L. R. A. 184.

An ordinance must be certain and definite.

17 Am. & Eng. Encyclop. Law, p. 253.

Mr. **W. W. Epps,** *City Solicitor*, for appellee.

Deemer, *J.*, delivered the opinion of the court:

The ordinance under which defendant was convicted reads as follows:

"Sec. 1. Transient merchants selling, or in any manner offering for sale, any goods, wares, or merchandise, within the city of Ottumwa, Iowa, at auction or private sale, shall pay $250 per month as a license therefor, or $25 per day if such license is issued for short period.

"Sec. 2. Any transient merchant selling either at public auction or private sale, whether holding auctioneer's license or not, shall be deemed a transient merchant.

"Sec. 3. Any person required by this ordinance to procure a license and failing to do so shall be fined in any sum not less than $5, nor more than $50, and costs. Any person continuing business under an expired license shall pay a like fine and costs, and all persons so convicted and fined shall be imprisoned until the fine and costs are paid or until discharged by due course of law."

This ordinance was enacted in virtue of the power conferred upon cities of the first

NOTE—As to reasonableness of license fee, see also Littlefield v. State (Neb.) 28 L. R. A. 588, and cases cited in *footnote*.

See also 39 L. R. A. 245.

class by section 621, McClain's Code (Code 1873, § 462), which is as follows: "They shall have power to regulate and license sales by auctioneers and transient merchants within their corporate limits, provided that the exercise of the power shall not interfere with sales made by sheriffs, constables, coroners, marshals, executors, guardians, assignees of insolvent debtors or bankrupts, or other persons required by law to sell real or personal property."

The case was tried in the lower court upon an agreed statement of facts, the substance of which was that on December 15, 1894, one B. E. Myers shipped to the city of Ottumwa, from Marshalltown, a stock of ready-made clothing, and placed the same in a store building on one of the main business streets, where he offered it for sale. Defendant was an employé of Myers, and, as such, made sales from said stock at retail, in the usual course of trade. Defendant was also manager of the business. It was the intention that the business should be carried on only for such length of time as was required to sell the stock, which was valued at $6,000. Myers and Zekind are residents of Marshalltown, and neither has paid the license required by the ordinance before quoted. It is also agreed that no resident merchant of the city of Ottumwa is required, by any ordinance of the city, to pay a license. The power of the legislature to delegate to a municipality the right to regulate and license auctioneers and transient merchants is not denied. But it is insisted that the ordinance is invalid for the following reasons: (1) Because it discriminates in favor of resident merchants of the city of Ottumwa, and against nonresident merchants. (2) Because it discriminates in favor of one class of merchants, and against another class, engaged in the same business. (3) Because it imposes a license which is unreasonable, unjust, and oppressive. (4) Because it is indefinite and uncertain as to the persons intended to be included in the words "transient merchants."

1. With reference to the first objection insisted upon, it is sufficient to say that the ordinance does not, in terms, discriminate in favor of resident merchants of the city of Ottumwa. It requires a license fee from all transient merchants, no matter where they reside, and imposes a penalty upon the resident, should he become a transient merchant. We do not understand that the term "transient merchant" has reference to the residence of the individual. It more properly relates to the character of the business carried on by him. In the case of *Pacific Junction* v. *Dyer*, 64 Iowa, 38, relied upon by appellant, the ordinance held to be invalid defined a transient merchant to be "every nonresident person who shall sell, exchange, or dispose of any goods, wares, or merchandise of his own or of other nonresident owners." This ordinance was declared to be unconstitutional because it discriminated in favor of resident merchants of Pacific Junction, and against other resident merchants of Iowa. In the case at bar no such discrimination appears on the face of the ordinance, and the fact that no resident merchants are required by the city to pay a license is not controlling.

2. It is said, however, that if the words "transient merchant" should be held to include resident merchants of the city of Ottumwa who might temporarily engage in business, the ordinance is unconstitutional because it is not uniform in its operation, and because it grants to certain citizens, or classes of citizens, privileges or immunities which do not belong equally to all. This objection is not tenable. The ordinance makes no exceptions in favor of or against any one carrying on the business. All transient merchants must pay the fee before engaging in the business. Under numerous decisions of this and other courts, it is uniform in its operation, and is not class legislation. See *Iowa Railroad Land Co.* v. *Soper*, 39 Iowa, 112; *McAunich* v. *Mississippi & M. R. Co.* 20 Iowa, 338; *Mount Pleasant* v. *Clutch*, 6 Iowa, 546.

3. It is contended that a license fee of $250 per month, or $25 per day for a short period of time, exacted from transient merchants, is prohibitory, unreasonable, and unjust, and is a manifest exercise of taxing power, rather than a police measure. The statute confers upon the municipality the power to "regulate and license auctioneers and transient merchants," and we are required to determine what may be exacted by the corporation as a fee for permission to carry on business as a transient merchant. A license must be distinguished from a tax. The power to tax is one of the highest attributes of sovereignty, and, if delegated by the legislature to the municipality, such delegation must be in express terms or by necessary implication, and cannot be implied from such general authority or power as "to license and regulate." *Burlington* v. *Putnam Ins. Co.* 31 Iowa, 103; *State* v. *Herod*, 29 Iowa, 123; *Burlington* v. *Bumgardner*, 42 Iowa, 673; *State* v. *Smith*, 31 Iowa, 493; Cooley, Taxn. 1st ed. p. 387; *Clark* v. *Davenport*, 14 Iowa, 494; *Davenport* v. *Mississippi & M. R. Co.* 12 Iowa, 539; Dill. Mun. Corp. 4th ed. §§ 357, 358; 18 Am. & Eng. Encyclop. Law, p. 532. The municipality, under the authority given it to license, had the right to impose such a charge as would cover, not only the necessary expenses of issuing it, but also the additional labor of officers, and other expenses imposed by the business, but nothing beyond this. As said in *Burlington* v. *Putnam Ins. Co.* *supra*, "Licenses are a part of the police regulations of a city, and should be charged for as such, and only to such extent as may reasonably compensate the city for issuing and enforcing the licenses, and for the care exercised by the city under its police authority over the particular person licensed." See also *State* v. *Herod*, 29 Iowa, 123; Beach, Pub. Corp. § 1255. The amount of the license fee or charge is to be considered in determining whether the exaction is not really one of revenue or prohibition instead of one of regulation under the police power. The charge made will be presumed to be reasonable, and within the authority conferred upon the municipality, unless the contrary

appears upon the face of the ordinance, or is, by evidence, shown to be so. *Burlington* v. *Putnam Ins. Co. supra; Van Baalen* v. *People*, 40 Mich. 258; *Atkins* v. *Phillips*, 26 Fla. 281, 10 L. R. A. 158; *Van Hook* v. *Selma*, 70 Ala. 361, 45 Am. Rep. 85; Beach, Pub. Corp. § 1255. The fee charged by the ordinance of the city of Ottumwa was $250 per month, or $25 per day for a shorter period of time. It seems to us, in view of the nature of the business licensed; the fact that it was in no manner injurious to the public health or morals; that it was confined to a particular place, and was not of such a nature as to become a nuisance; that it did not require the police supervision, and was in no manner calculated to disturb the peace and quietness of the city,—that it is perfectly apparent that the fee exacted in this case was not required as a police regulation, but for the purpose of revenue to the city. It may also have been fixed at this sum to protect, in a measure, the home merchant against the passing one, who otherwise might not be called upon to pay anything to the support of the instrumentalities of government. But such protection, however desirable and just, cannot be afforded under an ordinance passed in virtue of authority given by the state to regulate and license. In passing, we may observe that a comparison of the language used in sections 462 and 463 of the Code clearly demonstrates that the legislature did not intend, by section 462, to confer upon municipalities the right to tax transient merchants, by the use of the words "regulate and license." Our conclusions are supported by the following cases: *Brooks* v. *Mangan*, 86 Mich. 576; *Mankato* v. *Fowler*, 32 Minn. 364; *Sips* v. *Murphy*, 49 Ohio St. 536, 17 L. R. A. 184; *Jackson* v. *Newman*, 59 Miss. 385, 42 Am. Rep. 367.

The case of *Decorah* v. *Dunstan*, 88 Iowa, 96, is relied upon as an authority in support of the validity of the ordinance. In that case the ordinance provided that the fee for the license "shall be not to exceed $20 for the first day of such license, and $20 for each subsequent day included in such license." The exact amount to be charged was apparently left to the discretion of the mayor, and the court says (Cole, *J.*, writing the opinion), "Nor do we regard it as being in restraint of trade, or unreasonable or oppressive;" citing *State* v. *Herod*, 29 Iowa, 123. There are several reasons why we do not regard this as conclusive of the question. The defendants in that case were auctioneers, and not transient merchants. The fee charged an auctioneer may well be larger than that imposed upon a transient merchant, on account of the character of the business, and the greater necessity for supervision over the auctioneer. Again, there was no showing that the fee demanded of defendants in that case was an unreasonable one. Under the ordinance the mayor could have fixed it at any sum under the rates named. Defendants had no license, and were prosecuted for not having obtained one before commencing their business. There was no showing of an unreasonable exaction. Moreover, the question presented in this case, even if determined in that, was not well considered. The whole matter is disposed of in less than two lines, and the authority cited in support of the rule is really against it. See the case before cited in 29 Iowa. And, lastly, the case, on all other points, has been practically overruled in *Pacific Junction* v. *Dyer*, *supra*; *Marshalltown* v. *Blum*, 58 Iowa, 184; *State Center* v. *Barenstein*, 66 Iowa, 249.

Some other questions are presented by counsel, but, in the view we have taken of the case, they are immaterial, and will not be noticed. Our conclusion is that the ordinance exacts an unreasonable fee, and *the judgment is reversed.*

NEBRASKA SUPREME COURT.

Richard ELLISON, *Plff. in Err.*,
v.
Joel T. ALBRIGHT.

(41 Neb. 98.)

***As against strangers thereto, a receipt is incompetent evidence** of the payment thereby acknowledged; for, as against such strangers, such receipt is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination, and independently of the sanction of his oath.

*Headnote by RYAN, C.

(June 6, 1894.)

ERROR to the District Court for Thayer County to review a judgment in favor of

NOTE.—*A receipt as evidence of payment as, against third parties.*

I. *Ordinary receipts.*
 a. *Not admissible.*
 b. *Admissible.*
II. *Receipts in deeds.*

This note does not include that class of cases which involve the question of the admissibility of a receipt as evidence in matters relating to the transactions and dealings of an agent, which must necessarily involve the question of the agent's authority, and depend upon the maxim, *qui facit per alium facit per se.*

As to the construction of the consideration clause in a deed, and the parties' rights thereunder, see *note* to Dodge v. Boston & P. R. Co. (Mass.) 13 L. R. A. 818 (1891).

Upon the question of evidence as to the consideration of a deed, see *note* to Velten v. Carmack (Or.) 20 L. R. A. 101 (1892).

I. *Ordinary receipts.*

a. *Not admissible.*

As shown by the case of ELLISON v. ALBRIGHT, *supra*, the general rule with respect to receipts as evidence of payment as against third parties is that such receipts are not *per se* admissible in evidence, and that as against such parties direct evidence of the payment must be given by the party giving such receipt, provided such party is alive and competent to testify, such being the best evidence that the nature of the case admits of.

A man's receipt is not evidence to prove a payment against a third person; it is evidence against himself, but not another, and the persons giving such receipts must be called. Cutbush v. Gilbert, 4 Serg. & R. 551, 556 (1818); Ferris v. Boxell, 34 Minn. 262, 264 (1885); Morton v. Morton, 13 Serg. & R. 108 (1825).

So it has been stated that the receipts of third persons are not evidence of the payment of money, unless such persons are either officers of the law or agents of the parties against whom they are offered. Lloyd v. Lynch, 28 Pa. 419, 424, 70 Am. Dec. 137 (1857).

A plaintiff's receipt for money paid by a third person was held to be no evidence of payment by a defendant in the absence of explanation. Murphy v. Richardson, 33 Pa. 235 (1859).

If the receipt offered in evidence is the receipt *simpliciter* of a stranger, and is put in evidence to prove the fact of payment against defendants, it is incompetent. Ferris v. Boxell, *supra*.

And this is so for the reason that if such evidence were received against strangers for the purpose of extinguishing their equitable rights, hearsay evidence would be substituted for testimony under the sanction of an oath, and the advantages of cross-examination would be swept away and no equitable title could be protected. Lloyd v. Lynch, *supra*.

The acknowledgment of an assignor that he has been paid his debt is no evidence against the assignee, unless made anterior to the assignment, whether such acknowledgment be oral or written. Wilcox v. Pearman, 9 Leigh, 144 (1838).

In a case where plaintiff offered in evidence a receipt of a third party as rebutting evidence, and the defendant objected on the ground that the testimony of such third person was the primary evidence, the court held that such receipt was evidence of payment against nobody but such third person, being only his written declaration of the fact without oath, which could be attested by him in court or by deposition in the ordinary way. English v. Hannah, 4 Watts, 424 (1835).

Where defendant introduced receipts of a third party to prove payment made to such party by defendant, on the joint account of plaintiff and defendant, for a proportion of which it was claimed that the plaintiff was liable to defendant, it was held that such receipts were mere secondary evidence; the best evidence being the sworn testimony of such third party as to the payments made to him, or of any one else who saw the money paid. Ford v. Smith, 5 Cal. 314 (1855).

And in an action in assumpsit, where plaintiff claimed to be the proprietor of a certain tract of land, and contended that the defendants had received money for the use of the proprietors, the court held that a receipt signed by the plaintiff and another was not evidence to prove that the plaintiff was not a proprietor. Root v. Bull, 3 Day, 227 (1808).

So, in an action brought to recover for work and labor done and materials furnished upon defendant's property, the court rejected as evidence certain receipts signed by third parties, introduced by plaintiff, the parties giving such receipts being alive and competent to testify. Printup v. Mitchell, 17 Ga. 558, 63 Am. Dec. 258 (1855).

In Davidson v. Berthoud, 1 A. K. Marsh. 353 (1818), the question was whether, in an action of assumpsit for money laid out and expended, a receipt signed by a third party for money alleged to have been advanced by the plaintiffs to the defendant could be given in evidence. The court held that such receipt was improperly received, and that in order to prove the payment of the money in such a case the person who made it, or he by whom it was received, should be called as a witness, for the reason that the receipt or acknowledgment of such person was no evidence against the defendant, as proof of the acknowledgment of the person who received the money would only be hearsay evidence, the receipt of such person being nothing more than written evidence of his acknowledgment, and whether in writing or by parol, hearsay evidence is equally inadmissible.

In order to prove the payment of money to a third person, in an action to recover such payment against the defendant, the party to whom such payment is made must be examined as a witness, and his receipt, executed after action brought, is not admissible. Davis v. Shreve, 3 Litt. (Ky.) 260 (1823).

And in Dunn v. Woodward, 11 La. Ann. 265 (1856), it was held that an acknowledgment of a receipt of

plaintiff in an action brought to recover the alleged unpaid portion of the purchase price of certain real estate. *Reversed.*

The facts are stated in the commissioner's opinion.

Mr. **W. H. Morris,** with *Messrs.* **C. L. Richards** and **Marquett, Deweese & Hall,** for plaintiff in error.

Messrs. **W. P. Freeman and B. S. Baker** for defendant in error.

Ryan, *C.*, filed the following opinion:

In this action, as originally brought in the district court of Thayer county, Joel T. Albright was plaintiff, and Richard Ellison was defendant. Except where otherwise expressly noted, the same designation will be applied to the respective parties. In his petition, plaintiff, Albright, alleged "that on the 19th day of February, 1886, the plaintiff, then being the owner of the S. W. ¼ of Sec. 28 and the N. E. ¼ of Sec. 34, all in Twp. 4 N., range 1 W., 6th P. M., in Thayer county, Nebraska, sold and conveyed the same to said defendant, for which defendant agreed to pay plaintiff the sum of $6,400 at

money by a husband from a wife was not evidence against a third party not a party thereto, and that a judgment rendered against the husband in favor of the wife had no more effect against third persons than such acknowledgment.

Again, in Boisse v. Dickson, 32 La. Ann. 1150 (1880), where a receipt given in full by an heir to his father's administrator was sought to be avoided by a creditor of such heir, the court held that it could not be contested by him, and that his only right was to require proof of its genuineness.

In Craig v. Lewis, Barrett v. Lewis, 110 Mass. 377 (1872), the owner of land gave a receipt under seal acknowledging full payment of all debts or demands for damage done by the flowing of a dam, and discharging the owner of the dam from all liability for any flowage. He subsequently conveyed the property free from encumbrance, except the right of flowage, but without admitting any such right. In an action brought by the grantee, it was held that such receipt was no estoppel to his claim for damages incurred subsequent to the receipt of his conveyance, neither was such a receipt notice to the grantee that there had been a payment for all future damages by the mill owner to the grantor.

So also, in Snow v. Moses, 58 Me. 546 (1866), where the defense alleged payment by the defendant's grantor to the complainant's grantor of a gross sum in full of all damages past and future, and the question was whether such payment was a bar to the complainant's right to recover, the court held that, although such an adjustment was good as between the parties, it was no bar to the right of a subsequent owner to recover damages, and that the receipt of the sum mentioned in full for all such damages was not evidence, and constituted no defense.

And again, in an action in assumpsit on an account, the certificate of a third party, not called as a witness, directed to the defendant, as to the number of days the plaintiff had labored with him, was held not admissible as against the defendant, although it was proved that the co-owner had settled upon the basis of such certificate and communicated the fact to the defendant. Sutherland v. Kittridge, 19 Me. 424 (1841).

Where, in an action for money had and received, or money paid or money lent, defendant offered in evidence a certain receipt for money paid to one by the defendant for the plaintiff's use, a witness being ready to prove such person's signature to the receipt, although such party was living, the court held that such evidence could not be received, the party receiving it being alive, and that such party was the best evidence of the receipt of the money. Leatherbury v. Bennett, 4 Harr. & McH. 392 (1799).

So where, in an action of ejectment to recover an undivided moiety, the receipt of the lessor of the plaintiff to his guardian was offered in evidence, with the sole object of showing a privity or connection between plaintiff's lessor and the proceeding for partition, the receipt containing no reference to the real estate in controversy, but purporting to be "in full for my share of the personal estate which fell due to me from the estates of my grandfather,"—the court held that such receipt had no resemblance to that class of incidental admissions which do not differ from direct admissions, and did not amount to such conduct as constituted evidence between the parties, and that to allow a receipt from a ward to his guardian to operate as a direct or incidental admission of all the facts introduced into the account of the latter without specific reference to them is a dangerous matter. Burke v. Chamberlain, 22 Md. 298, 307 (1864).

In Ferris v. Boxell, 34 Minn. 262, 264 (1885), a principal, and the plaintiffs as his sureties, gave a bond conditioned for the faithful performance of such principal's duties as agent for the obligee, and at the same time the defendants agreed to become responsible to the plaintiffs for all losses they might sustain on account of such bond. Subsequently the obligee brought suit against the principal and the plaintiffs to recover moneys which should have been accounted for, and plaintiffs also brought suit against the defendants upon their agreement, and while both actions were pending defendants entered into a written agreement with plaintiffs in accordance with which the action against the defendants was dismissed and judgment was rendered in favor of the obligee against the principal and the plaintiffs. Plaintiffs afterwards brought action upon the agreement, alleging payment of the judgment, the payment being put in issue by the answer, but the only evidence of the payment of the judgment introduced by the plaintiffs was the assignment thereof, which recited that it was executed in consideration of a certain sum paid by the plaintiffs, the receipt whereof was acknowledged. The court held that, even assuming that the taking of the assignment, if plaintiffs actually paid the money, was equivalent to paying the judgment, yet it was clear that the receipt contained in the instrument was incompetent against the defendants as evidence of the fact of payment, as it was *res inter alios acta*, a person's receipt not, alone, being evidence to prove payment against a third party.

Where, in an action upon a bond to indemnify a township, it was sought to give in evidence receipts by different persons for money which they had paid for the maintenance of a child, the subject of the bond, the court held that such receipts would be competent evidence against the person signing them, but were not so against the third party. Roll v. Maxwell, 5 N. J. L. 498 (1819).

Where a husband insured his life for the benefit of his wife, and gave notes for the premium, which were accepted and received by the company, and were receipted on the payment as cash, and there was no evidence that the wife had any knowledge that her husband gave the notes for the premium instead of cash, and one of such notes was not paid at maturity, the insured dying before payment, it was held, in an action by the wife upon the policy, that the receipts so indorsed upon the policy as cash, estopped the company from denying the pay-

that date; that the defendant has paid plaintiff, as part consideration for said real estate, the sum of $3,930, as follows: The sum of $1,200 thereof by assuming and agreeing to pay one half part of a mortgage for $2,400 which had been previously given by plaintiff on said northeast quarter of said section 34, and other land of plaintiff; also, by assuming and agreeing to pay a mortgage for $1,600, which had been previously given by plaintiff on said southwest quarter of said section 28, and which said mortgages, with interest and taxes on said land, then amounted to the sum of $2,930, and also the further sum of $1,000 thereof in cash. The plaintiff further says that the sum of $2,470 of said sum of $6,400,—the purchase price which defendant agreed to pay plaintiff for said lands,—with interest thereon at the rate of 7 per cent per annum from the 19th day of February, 1886, is unpaid, and now due from the defendant to the plaintiff." Following the above language, there was set out in the petition what was termed a "second cause of action." This appears to have been but another statement of the same cause above set

ment, the receipts so indorsed upon the policy being part of the agreement. Baker v. Union L. Ins. Co. 37 How. Pr. 126, 6 Abb. Pr. N. S. 144 (1868).

The court in the above case placed its decision upon the ground that where one by his own words or conduct causes another to believe the existence of a certain state of things, and induces him or her to act on that belief, the party so doing is concluded from averring or proving a different state of things as existing at the time he made such representations. In such a case it would be a fraud to allow the insurance company to show that such an indorsement upon the policy was untrue as against a third party, and one who has acted upon the faith of the statement.

The above case of Baker v. Union Mut. L. Ins. Co., was, however, reversed upon appeal, 48 N. Y. 283 (1871), the court holding that the acknowledgment or receipt of the money indorsed upon the policy was but a mere admission, and as such liable to be contradicted, and that the wife, accepting such policy and suing upon it, was subject to the same stipulations and conditions that her husband was.

In a case in which plaintiff sought to charge defendant for the board of his wife, defendant proved personal notice not to trust her, and offered in evidence certain receipts, referring to a previous agreement of separation, and for monthly allowances paid to the wife, which were said to be signed by persons authorized by the wife to receive them, but the court disallowed the receipts. Cutbush v. Gilbert, 4 Serg. & R. 555, 556 (1818).

In Farmer's Mut. F. Ins. Co. v. Bair, 82 Pa. 33 (1876), property owned by a judgment debtor was insured in the insurance company for three years, and a receipt given for the premiums on a certain date, and part of the property was subsequently destroyed by fire. In an attachment in execution the judgment creditors sought to recover the amount from the insurance company, which at the trial sought to prove that the date of the receipt had been altered. The court held that the question whether or not such receipt had been altered was for the jury upon the evidence, and that the court below erred in taking the matter from the jury.

So, in an action to recover a legacy by an assignee thereof, it was held that the receipt for such legacy given by the original legatee was no evidence as against such assignee, unless proved to have been before the assignment, as such receipt could not prove itself or its genuineness nor the truth of the date. Wilcox v. Pearman, 9 Leigh, 144 (1838).

In Hughson v. Richmond & D. R. Co., 2 D. C. App. 98 (1894), action was brought to recover for injuries received on the road of the latter company, and the court below admitted, as evidence of an agreement or release of the plaintiff, a receipt signed by him in favor of the Pullman Car Company, which was executed after the alleged injury. The court held that such receipt was wrongly admitted as evidence and had no retrospective operation.

In Newell v. Roberts, 13 Conn. 63 (1839), action was brought by a partner upon a covenant contained in a deed of dissolution, whereby the defendant undertook to pay all debts due by and against the late firm, plaintiff producing in evidence a receipt of a third party for certain accounts paid by him owing by the late firm which he claimed should have been paid by defendant. The court held such receipt was not admissible, being merely the written declaration of a third party who should be produced as a witness, stating that if such a receipt were admissible it was only upon the ground that it was the admission of a person interested in the subject against his interest, or of an agent of the defendants.

b. *Admissible.*

Cases exist, however, where a receipt by a third party in connection with other facts may be competent evidence,—as, where the person to whom the payment is made is pointed out by law, as in case of the payment of taxes to a public officer; and so when the person to whom the payment is to be made is designated by the contract of the defendant, as in case of an order on the plaintiff in favor of such person. Ferris v. Boxell, 34 Minn. 262, 264 (1885).

In Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490 (1870), in an action of assumpsit brought to recover damages for breach of contract in the sale and conveyance of land, the plaintiff was allowed to produce in evidence the official receipts for taxes paid by him upon the property.

In Locke v. Porter Gold & S. Min. Co., 41 Cal. 305 (1871), the controversy was between the creditors of the company, the principal question being as to the validity of a note given by the company to the plaintiffs with a mortage upon the company's property to secure its payment, which mortgage the plaintiffs sought to foreclose, the other creditors, who had levied attachments, alleging and giving evidence showing that the debt secured by such mortgage was fictitious. Plaintiffs claimed that the mortgage was executed to them to secure creditors of the company, and, in particular, the claim of one creditor who had since died, and offered, in support of the bona fides of the claim, a receipt acknowledging payment of such sum, which receipt was objected to as irrelevant, not being the best evidence the nature of the case admitted of. The court held that such receipt was admissible in evidence for the purpose of showing that the parties for whose benefit the mortgage was given had paid such money for the grantor's benefit, although the fact of the indebtedness of the company to the parties receiving such money was to be shown by other evidence than the receipt.

In *Re* Minors of Smith, 22 La. Ann. 253 (1870), error was assigned in the judgment of the court below, upon the ground that there was no proof to establish the claim of paraphernal property of a wife al-

out, with some slight variations, unimportant to note, since Albright, in this court, disclaims any reliance on said so-called "second cause of action." In the petition, there followed the so-called "second cause of action" this language: "(3) That at the instance and request of the defendant, and relying on the defendant's promise to reimburse plaintiff therefor, the plaintiff has incurred expense, costs, and attorney's fees, in endeavoring to sustain his title and claim to said stock of goods, wares, and merchandise, amounting to the sum of $337.46, an itemized bill and statement of said expenses, costs, and attorney's fees being hereto attached, marked 'Exhibit A,' and made a part hereof." On the trial there was introduced no testimony to sustain the above claim for attorney's fees, costs, and expenses. Hence, this part of the petition will be dismissed from further consideration.

Plaintiff alleged that he had sustained damages in the premises in the sum of $3,500, no part of which had been paid, and he prayed judgment in the sum named, with 7 per cent interest on $2,470 from February 19, 1886.

leged to have been received by the husband and credited to his minor children in the account complained of, the only proof in support of the item being an entry in the inventory of the wife's estate, to the effect that the husband acknowledged "to have received the sum of $4,000 separate paraphernal funds of his said deceased wife," the contention being that acknowledgments of the receipt of money by the husband from the wife were not evidence against third persons. The court held that, although such contention was good law and supported by the authorities, yet it was applied in this and other similar cases to evidence adduced contradictorily with third persons, or where the husband or wife was called on to administer proof contradictorily with them, but not where the proof adduced was between the parties or their heirs; that in such a case slight proof was sufficient, and that, the acknowledgment being made at the time, not suspicious, was full proof between the parties and prima facie proof as to all until in a regular proceeding and under proper allegations higher proof was admitted.

In Smith v. Aldrich, 12 Allen, 553 (1866), the action was in trover for conversion of property, the plaintiffs being executors of deceased persons who claimed the title by purchase. The defendants contended that the purchase was merely made by the purchasers as a committee of the parish, and that the title therefore was in the parish, producing in evidence a receipt in the handwriting of one of the deceased testators, found among parish records, acknowledging the receipt of the purchase money and signed by the vendor. The court held such receipt was admissible in evidence, the same having reference to the property in controversy, being signed by a person under whom the plaintiffs claimed title, and placed the competency of such evidence upon two grounds, namely, that the receipt was in the nature of an admission respecting the subject-matter of the suit by the persons whose immediate representatives were plaintiffs in the action; and that it was also a link in the chain of evidence relating to a transaction directly connected with the title to the property, the transaction having taken place nearly forty years prior to the action, and for the reason that the point of time when the original owner parted with the property, which was not proved or agreed by the parties, was a material fact in issue, the evidence tending to show that the title claimed by the plaintiffs did not accrue at the time they alleged.

Where, in an action to recover a legacy, the defendant offered in proof of payment a receipt of one of the plaintiffs for the amount of the legacy, which was expressed to be in full thereof and to be paid by a party misled therein, such receipt was rejected on the ground that the action was not between the party giving such receipt and the plaintiff, and for the reason that it bore date two years prior to the defendant's being appointed trustee and was therefore no act or payment of his, and upon the further ground that the whole was repugnant to the New Jersey Act of November, 1806; but upon appeal the court held that the receipt ought to have been received in evidence. Connelly v. Kendle, 2 N. J. L. 306 (1807).

In Sherman v. Crosby, 11 Johns. 70 (1814), a defendant authorized a third party to settle an action brought by the plaintiff against such defendant, and it was held that the receipt signed by such plaintiff, stating that he had received of the defendant through such third party a certain amount in full of the judgment and execution in the action, was prima facie evidence of a payment of so much money by such third party so as to authorize him to set it off against a demand of such defendant against him, unless the latter could show fraud or abuse of authority on the part of such third party.

In Marco v. Fond du Lac County, 68 Wis. 212 (1885), the fact that the grantor of land held a receipt for taxes assessed thereon during a certain year, was held not to estop the city from asserting as against a grantee, who had no knowledge of such receipt at the time of the purchase, that a portion of such taxes had not been paid. In that case the taxes assessed had been declared void, but there had been a subsequent reassessment and the purchaser was presumed to have knowledge of such facts.

II. *Receipts in deeds.*

The question of a recital in a deed as evidence of payment of the consideration as against third parties will form the subject of a future note.

It has been held that the receipt in a deed for the purchase money paid is not evidence to support this material averment against third persons, but only as against parties to the deed, or persons who subsequently derived title from the grantor. Lloyd v. Lynch, 28 Pa. 419, 424, 70 Am. Dec. 137 (1857).

So the receipt in a deed is not evidence of payment of purchase money as against creditors who attack it by evidence tending to show that it was made to defraud them. *Ibid.*; Clark v. Depew, 25 Pa. 509, 515, 64 Am. Dec. 717 (1855).

For the reason that a receipt for purchase money at the foot of a deed has been held to be evidence of the lowest order, even against the parties signing it, being an every-day practice to have such receipt on a deed, even where no money passed. Lloyd v. Lynch, *supra*.

But in Foster v. Beals, 21 N. Y. 247 (1860), it was held that a mortgagee's receipt, which was proved by the date of the mortgage itself, was not evidence of the payment by a mortgagor as against a subsequent assignee of the mortgage.

Where a conveyance acknowledging the receipt of the purchase money is given, of land on which there is an unregistered mortgage, it is prima facie evidence, as against the mortgagee and in favor of one who claims as a bona fide purchaser and all claiming under him, that the consideration was actually paid, but it would not be so in equity upon a bill filed to set aside the conveyance as fraudulent, for in such case defendant must plead actual payment before notice of the plaintiff's right, and show it in proof. Jackson v. M'Chesney, 7 Cow. 360, 17 Am. Dec. 521 (1827). E. W.

In the brief filed on behalf of the defendant in error, Albright, his counsel summarize the facts constituting plaintiff's cause of action in this language: "Albright sold and conveyed the land before described to Ellison for $6,400, which fact is admitted by all. That Albright received $1,600 and $1,200 (being the mortgage on the quarter in section 28, and one half of the mortgage on the quarter in section 34, with other lands, with some accrued interest), and the further sum of $1,021 (or $1,023), there is no dispute. Allow us to say the mortgages assumed, with accrued interest, and the cash paid, left only $2,470 of the purchase price of the land, to wit, $6,400. It was this balance of the purchase money for which suit was commenced."

This concise statement of the matters in issue, limiting as it does the inquiry to the item of $2,470, will be accepted as correct; for thereby, without prejudice to the rights of either party, is avoided a tedious recitation of the matters presented by the answer and reply. To an understanding of the matters involved, it will be necessary to explain the transactions which gave rise to the alleged indebtedness for the sum last mentioned. For this purpose the evidence on this point, of Mr. Albright, summarized, was as follows: On February 19, 1886, Albright sold the S. W. ¼ of section 28 and the N. E. ¼ of section 34, Twp. 4 N., range 1 W., 6th P. M., situate in Thayer county, to Richard Ellison, for $6,400. On one of these quarter sections there was a mortgage of $2,400, with some interest due, one half of which principal and interest was assumed by the grantee. On the other quarter there was a mortgage of $1,600, with some interest due, the payment of the entire amount of which was assumed by Ellison. In addition to assuming payment of the above amounts, Ellison was to pay Albright either $1,021 or $1,023,—there is some uncertainty as to the exact amount,—which left to be provided for the $2,470 above referred to. Albright agreed, for this $2,470, to accept a stock of goods owned by a Mr. Brown. On this stock, Ellison held a chattel mortgage, and a bill of sale answering the purposes of a chattel mortgage. It was agreed between Ellison and Brown that the amount due on the notes secured by these two instruments was $1,800. Before negotiations were consummated, however, the sheriff of Thayer county levied on the stock of goods, and garnished Ellison for the satisfaction of a claim due from Brown. These proceedings by the sheriff caused a delay in closing up the trade. It was finally arranged, however, that the difference between the $1,800 and the estimated value of the stock of goods, which was $2,470, should be paid by Ellison to Brown, less the amount of the two executions, which left $418 going from Ellison to Brown. Following this adjustment, Albright sent a note by Mr. Brown to Mr. Ellison, wherein he said for Ellison to settle with Brown according to the agreement; that the stock had fallen a little short, but that would be fixed in rent with Mr. Brown. There was a defect in the title to the land which was to be conveyed to Ellison, and therefore, when this order was presented to him, he refused to pay it. Subsequently, the defect in title having been obviated, the land was conveyed by Albright to Ellison, and Albright took possession of the goods. Ellison indorsed to Albright, without recourse, the notes of Brown, on which was due the sum of $1,800, together with the chattel mortgages securing payment of that amount. These notes and the mortgages were left in a bank at Alexandria, and Mr. Albright had no knowledge that either had been indorsed to him. After Albright had taken possession of the goods, Brown surreptitiously obtained possession thereof, whereupon Albright brought a replevin suit, and thereunder, having obtained possession of the stock, sold it. The replevin action resulted in a verdict and judgment for Brown, and others who were joined with him as defendants, against Albright, for the sum of $2,421. The opinion directing an affirmance of this judgment was reported in 23 Neb. 136. The foregoing statement, as indicated, is compiled from the testimony of Albright, and is given that his version of the affair may appear. It is not to be understood, however, that by this court any attempt has been made to weigh the testimony, or settle controverted fact propositions, for no such effort has been made. As was said in the brief for defendant in error, this suit was brought to recover the $2,470 item, to which reference has already frequently been made. It can scarcely escape observation that the defendant in error went into possession of the stock of goods which this $2,470 represented; subsequently, such possession was resumed by Brown; and that, thereby, there was necessitated a suit on the part of Albright to regain his lost possession. Concededly, the only circumstance which could justify Brown's resumption of possession was that Ellison had failed to pay him the balance of $418—or, as Brown figures it, $425—due him from Ellison. Even as to this, Brown's testimony was that, after his own resumption of possession, Ellison tendered this balance to him, which he refused to receive, and refused to deliver up the stock of goods unless he was also paid for the trouble and expense he had been put to. Under these circumstances this action was brought by Albright for the recovery of the $2,470. In his testimony, Mr. Albright said that he replevied the stock on the suggestion of Ellison that he should do so, and that he (Ellison) would sign his replevin undertaking to enable Albright to replevin. This was denied by Ellison, and in this connection it is noteworthy that, as a matter of fact, Ellison's name does not appear on the copy of this undertaking set out in the bill of exceptions. It is difficult to conjecture how the alleged encouragement of Albright by Ellison could become important in this case, for the proof necessary to sustain the plaintiff's allegations was of the failure of the consideration alleged. The petition was not framed upon the theory that Ellison was liable upon the warranty of his title as to the stock of goods transferred to Albright, but was for a failure of consideration for land

transferred to Ellison by Albright. The possession of the goods was transferred to Albright in pursuance of the terms of a contract under which Ellison became the owner of Albright's land. This possession was afterwards interrupted by one who, at most, could justify his interruption of such possession to the extent, in amount, of $425. In the case of *Albright* v. *Brown*, reported in 23 Neb. 136, it seems that Albright, as absolute owner, claimed the right of possession of the entire stock. It admits of grave doubts whether under these circumstances Ellison could in any event be held liable for more than the amount he had failed to pay to Brown; that is, according to the evidence of Albright, $418. *Vide Aultman* v. *Stout*, 15 Neb. 586; *Sycamore Marsh Harvester Mfg. Co.* v. *Sturm*, 18 Neb. 210; *Hadley* v. *Baxendale*, 9 Exch. 341. It appears from the evidence of Albright—though this may admit of doubt—that Brown predicated his right to resume possession upon the fact that there remained due him, as Brown claimed, $425. Under the rule laid down in *Long* v. *Clapp*, 15 Neb. 417, a serious question might be made as to whether or not it was the duty of Albright to have paid this amount; his recovery against Ellison, in that event, being limited to the amount so paid. If this petition had presented Albright's cause of action as one for damage for failure of Ellison's title to the stock of goods, it would, to say the least, have better comported with the proofs offered, and would have afforded an opportunity to try the question of the amount and nature of the damages sustained by the defendant in error. It is quite evident that the matters in controversy herein can never be satisfactorily determined on the issues heretofore presented on the pleadings. For our present purpose, however, we shall proceed as though the evidence introduced was strictly relevant to the issues joined.

There was a judgment in the replevin suit, which was afterwards affirmed in this court. The cause was then remanded to the district court. The theory of the defendant in error in the trial of this case was, that Ellison was liable for the amount paid by the defendant in error for the satisfaction of the judgment in the replevin action. For the purpose of showing this payment, there was introduced in evidence a page of the judgment docket No. 1 of the district court, on which there appeared the name of Joel T. Albright as judgment debtor, and the names of the parties to the suit; the kind of action; the date of judgment (April 21, 1886); the page of the journal; and the amount of the judgment ($2,421). The matters described were followed by this writing: "August 14th, 1889. Received of Joel T. Albright full satisfaction and payment of this judgment, interest, and costs, and the same is hereby satisfied and discharged in full. J. L. Brown, Clara A. Brown and James Lockwood, Defendants, by W. O. Hambel, their Attorney." There was no evidence of the alleged payment, other than above given. Indeed, on May 20, 1889, there was, in said replevin action, returned an execution *nulla bona*. In the suit which we have now under consideration there were examined as witnesses the above named J. L. Brown and Clara A. Brown, as well as Joel T. Albright, but by neither of these was there an attempt made to prove the amount paid in satisfaction of the judgment rendered in the replevin action. The plaintiff in the district court relied upon the sufficiency of the above receipt, entered, as it doubtless was, on the original judgment docket. To the introduction of the receipt proper objections were made, and exceptions taken. There is therefore now presented the competency of this receipt as against Ellison, who was not a party to the action in which the judgment was rendered, of which satisfaction and payment are attempted to be shown by the receipt. In *Davidson* v. *Berthoud*, 1 A. K. Marsh. 261, the case was for money paid out and expended by the defendants in error to the use of the plaintiff, and for work, labor, etc. The language used in discussing the effect and nature of a receipt was as follows: "The only question material to be decided is whether the circuit court erred in admitting as evidence a receipt signed by A. Woolford for $222.11, alleged to be advanced by the defendants in error to the plaintiff's use. It is explicitly laid down by Peake, in his treatise on Evidence (page 254), that, to prove the payment of money in such a case, the person who made it, or he by whom it was received, should be called as a witness, for the receipt, or acknowledgment of the person will be no evidence against the defendant. And of the correctness of this doctrine, on principle, there can be but little reason to doubt, for proof of the acknowledgment of the person who received the money would only be hearsay evidence, and the receipt of such person is nothing more than written evidence of his acknowledgment, and, whether in writing or by parol, hearsay evidence is equally inadmissible. Phil. Ev. 174." In *Lloyd* v. *Lynch*, 28 Pa. 419, 70 Am. Dec. 137, there was under consideration the effect to be given a receipt on a deed, as against one not a party to the deed. Having premised that such receipt was competent evidence against the grantor, and all who derived title from him, and was such evidence as to pass the grantor's title, the opinion continued in the following language: "But it is no evidence whatever of the fact of payment against a stranger, or even against one who derived title from Thomas Farrel [the grantor] previously to the date of the conveyance to Lloyd. Against them it is nothing but hearsay. It is a mere *ex parte* declaration, not under oath, taken without any opportunity to cross-examine. It has been long settled that such declarations are not evidence against strangers. . . . If such evidence were received against strangers for the purpose of extinguishing their equitable rights, the salutary rules established for ages would be subverted, hearsay evidence would be substituted for testimony under the sanction of an oath, and all the advantages of a cross-examination would be swept away. Under such a system no equitable title could be protected. But it is urged that there is a presumption that the grantor and grantee have acted with integrity. This may be so.

but that is no reason why their declarations should be given in evidence against persons who have no connection with them. If they are acquainted with material facts, they are as much bound to deliver their testimony under oath as other persons, if competent witnesses." Other authorities might be cited to sustain this proposition, but this is hardly necessary; for, on reflection, it is very clear that a receipt signed by Mr. Hambel as attorney could have, as against strangers to it, no greater effect than would his oral utterances made to the same parties. If Albright paid the amount of the judgment, it is no hardship that he be required to so testify; giving thereby an opportunity for an examination as to the *media* and time of payment, as well as to other material circumstances. Certain it is there was no competent proof of payment, and without such proof of this essential fact the judgment is unsupported in a very important respect.

The judgment of the District Court is reversed.

Rehearing denied.

ALABAMA SUPREME COURT.

CAPITAL CITY WATER CO., *Appt.*,
v.
STATE of Alabama *ex rel.* Gordon MACDONALD.

(.....Ala.....)

1. **A proceeding in the nature of quo warranto** for the dissolution of a corporation need not be commenced by summons and complaint under Code, §§ 2651, 2652, requiring all "civil actions," except as otherwise provided, to be so commenced.

2. **The relator in a proceeding in the nature of quo warranto** for the dissolution of a corporation need not obtain leave or an order of court to institute and prosecute such proceedings.

3. **An irregularity in commencing a proceeding in the nature of quo warranto** for the dissolution of a corporation before giving security for costs is waived, where such security is subsequently given and the respondent files a demurrer and motion to quash, and afterwards its pleas, and no motion to dismiss on that ground is made until nearly two years after the commencement of the action, when the case comes on for hearing.

4. **The relator in proceedings in the nature of quo warranto will not be required to give additional security** for costs on the ground that the security given is insolvent, where the evidence in support of the motion only shows that according to the tax records of the county the security has only $320 of taxable property.

5. **A plea in a proceeding in the nature of quo warranto for the dissolution of a corporation,** alleging that respondent has fully performed all its duties arising out of its charter by providing a system of waterworks of sufficient capacity and power to furnish the city an abundant supply of water, does not deny an allegation in the petition that respondent failed to supply the city and its inhabitants with such water.

6. **A waterworks company whose charter makes it its absolute duty to supply pure, wholesome, deep-well water,** is not justified in failing to supply such water by the fact that extra expense would be required in digging the necessary deeper wells, for which the city would not have to pay if it should ever elect to purchase such works, which it has the right to do.

7. **The right of the state to declare the forfeiture of the charter of a waterworks company** for infractions of duty imposed by its charter and contract is not taken away by a provision in the contract that the city may rescind the contract if the company's works fail to meet the requirements of the contract.

8. **A provision in the contract of a waterworks company, that if any "unforeseen or inevitable accident"** shall happen to any part of its system of works the company shall have a reasonable time to repair injuries resulting from the accident, and that such accident shall not be construed to be a breach of the contract, does not apply to an insufficiency of water during a drought caused by the failure of the company to bore wells necessary to an adequate supply in such seasons.

9. **The charter of a waterworks company which supplies river water, instead of pure, wholesome, deep-well water,** as required by its charter and contract, during four droughts in two years, and refuses for a wholly insufficient reason, to sink additional wells in order to furnish a proper supply of water, will be annulled, where the only reason for not annulling is that if the charter is vacated all water supply will cease, and a promise by the company after suit is begun that it will sink the additional wells necessary to afford an adequate supply of water.

(December 21, 1894.)

APPEAL by defendant from a judgment of the City Court of Montgomery in favor of relator in a quo warranto proceeding to annul defendant's charter. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. **J. M. Falkner,** for appellant:

The giving of security for costs was a condition precedent to the right of relator to bring this action.

Ala. Code, § 3168; *Taylor* v. *State*, 31 Ala. 383; *Tuscaloosa Scientific & Art Asso.* v. *State*, 58 Ala. 54.

NOTE.—A valuable addition to the rapidly growing subject of municipal water supply is furnished by the above case.

As to liability for failure of supply, see *note* to Howsmon v. Trenton Water Co. (Mo.) 23 L. R. A. 147.

As to municipal condemnation of waterworks, see *Re* Brooklyn (N. Y.) 26 L. R. A. 270.

29 L. R. A.

Relator could not give the security for costs after the suit was commenced.

Taylor v. *State* and *Tuscaloosa Scientific & Art Asso.* v. *State, supra.*

Sections 22 and 23 of the ordinance contract furnish a full, complete, plain, and adequate remedy for any violation or breach of duty on the part of this appellant.

The election by the city council of Montgomery to purchase its works furnishes abundant reason why appellant should not change the character of its works in any respect pending such election, or add to the amount which the city council would have to pay appellant for the same.

Linn v. *McLean*, 80 Ala. 364.

A charter will not be revoked for every wrongful act committed by a corporation. A single act of abuse or wilful nonfeasance may be a ground for a forfeiture; but where an act of nonfeasance has not been committed wilfully or negligently, and does not injure any one, and is not expressly forbidden by the charter, the courts will not, in general, apply the severe remedy of a judgment of forfeiture.

4 Am. & Eng. Encyclop. Law, p. 306, par. 8.

A writ of quo warranto or a writ issued in the proceedings in the nature of a quo warranto was not a writ of right. The issuance of the writ did not end the discretion of the court.

Com. v. *Cluley*, 56 Pa. 270, 94 Am. Dec. 76.

Mr. **Gordon Macdonald**, for appellee:

Wilful neglect, abuse, misuse, or nonuser of its franchises by a corporation, or failure to discharge the obligations to the public imposed on it, either expressly or by implication in its charter, constitutes grounds for the forfeiture thereof.

High, Extr. Legal Rem. § 606; *People* v. *North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33; *People* v. *Kingston & M. Turnp. Road Co.* 23 Wend. 198, 35 Am. Dec. 551; *Folger* v. *Columbian Ins. Co. & Trustees*, 99 Mass. 267, 96 Am. Dec. 747, *note; People* v. *Hillsdale & C. Turnp. Road*, 23 Wend. 254; *Washington & B. Turnp. Co.* v. *Maryland*, 70 U. S. 3 Wall. 210, 18 L. ed. 180; *People* v. *Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Atty. Gen.* v. *Tudor Ice Co.* 104 Mass. 239, 6 Am. Rep. 227; Beach, Priv. Corp. § 54 d, *note 3.*

The same principles involved in determining the forfeiture of private grants for nonperformance of conditions are applicable to the forfeiture of charter grants to corporations.

People v. *Kingston & M. Turnp. Road Co.* 23 Wend. 193, 35 Am. Dec. 551; *People* v. *Kankakee River Imp. Co.* 103 Ill. 491; *State* v. *Brown*, 5 R. I. 1; *State* v. *Pennsylvania & O. Canal Co.* 23 Ohio St. 121; *Com.* v. *Tenth Massachusetts Turnp. Corp.* 5 Cush. 509; *Chesapeake & O. Canal Co.* v. *Baltimore & O. R. Co.* 4 Gill & J. 1.

The neglect or refusal to perform any of the duties to the public enjoined on the corporation by its charter, or by general laws, is sufficient to work a forfeiture of its charter.

Lombard v. *Stearns*, 4 Cush. 60; *People* v. *Hillsdale & C. Turnp. Road, supra; Washington & B. Turnp. Road* v. *State*, 19 Md. 239; Beach, Priv. Corp. §§ 53, 54, and *notes; Paschall* v. *Whittsett*, 11 Ala. 472; *Terrett* v. *Taylor*, 13 U. S. 9 Cranch, 51, 3 L. ed. 663.

The courts have no discretion and must declare a forfeiture where sufficient grounds are shown.

State v. *Minnesota C. R. Co.* 36 Minn. 245; *People* v. *Northern R. Co.* 53 Barb. 123; *State* v. *Pennsylvania & C. Canal Co.* 23 Ohio St. 121.

Excuse for failure to perform corporate duties are no reply to facts showing wilful, deliberate abuse.

People v. *Kingston & M. Turnp. Road Co.* 23 Wend. 206, 35 Am. Dec. 551.

Cause of forfeiture, once committed, cannot be attoned for by any subsequent good conduct.

People v. *Hillsdale & C. Turnp. Road*, 23 Wend. 258.

The state is not required to prove an actual injury to the public as a result of the corporation's wrongful acts. It is sufficient if their tendency be injurious.

Beach, Priv. Corp. § 54; *Commercial Bank* v. *State*, 6 Smedes & M. 599, 45 Am. Dec. 290.

The difference and litigation between the city of Montgomery and the appellant, and the acts of the city council, can furnish no excuse for the nonperformance of duties to the public enjoined on appellant by its charter.

Hart v. *Boston, H. & E. R. Co.* 40 Conn. 524; *Washington & B. Turnp. Co.* v. *Maryland*, 70 U. S. 3 Wall. 210, 18 L. ed. 180.

McClellan, J., delivered the opinion of the court:

This is a proceeding in the nature of quo warranto, prosecuted by the state on the relation of Macdonald against the Capital City Water Company, a corporation, under sections 3167 *et seq.* of the Code, for the dissolution of said corporation. It was commenced by petition or information addressed to the judge of the city court of Montgomery. The petition avers that said company is an organized body acting as a corporation, and claiming to be chartered under the laws of this state, and to have the franchise for the business of furnishing water through its system of waterworks to the municipality and residents of Montgomery for domestic and other uses, and is now engaged in that business, in which it operates steam pumps, and uses the streets of the city for the purpose of running its pipes for the passage of its water to the consumers thereof; that it is the clear and imperative duty of said company, under and by the expressed terms of the charter, under which it is claiming and exercising the franchise to own and operate said system of waterworks, to furnish to the city of Montgomery and the residents thereof at all times a sufficient supply of pure, wholesome water for the use, domestic and otherwise, of said city and the residents thereof, which duty is the principal object and purpose of said company's corporate existence, and for the performance whereof it claims to be authorized to, and does, charge certain rates to the city and its inhabitants; that, "notwithstanding the clear and obvious duty of said Capital City Water Company, undertaking to exer-

cise and exercising said corporate franchise as aforesaid, as to furnishing pure and wholesome water to said municipality and the residents thereof, yet in open and flagrant violation of said duties and wilful misuse and abuse of the corporate franchises exercised by said Capital City Water Company, said company has for, to wit, three years last past, persistently refused and failed to perform said corporate duty of furnishing said municipality and the residents thereof for any purpose whatsoever any supply of pure and wholesome water, and said company still persists in refusing and failing to perform its said duty;" that said company "has and does still misuse and abuse, as aforesaid, the franchise operated by it as aforesaid, though frequently admonished of such failure in its duty, and requested to obey and observe its corporate duties aforesaid." And the petition further avers and concludes as follows: "That by reason of the use and exercise of the franchise aforesaid by said Capital City Water Company and its contract with the city of Montgomery as to furnishing good, pure, and wholesome water to said city and its inhabitants, said municipality and its inhabitants are now almost wholly dependent on said company for their supply of water for domestic and other uses; that by reason of said Capital City Water Company's persistent misuse and abuse of its franchises and duties aforesaid in failing to supply said municipality and its inhabitants with a sufficient supply of pure and wholesome water, as aforesaid, the health and comfort of the inhabitants of said city are greatly impaired and most seriously endangered, to the great and incalculable damage of said city and its inhabitants, and they are wholly without any due and adequate remedy at law in the premises." The prayer of the petition is for "a writ of quo warranto, or some other appropriate writ, directed to said Capital City Water Company, commanding it to appear . . . and show under what warrant of law it exercises the corporate franchises as aforesaid and acting as a corporation, and also show cause, if any it can, why its said charter, if it hath any such, should not be forfeited and annulled, and its corporate existence, if any such it hath, should not be dissolved." Upon presentation of this petition to the judge of the city court this order was made by him: "To the Clerk of the City Court of Montgomery: Let an alternative writ issue according to the prayer of the petition, returnable on the 10th of May, 1892." And thereupon the petition and order were filed with the clerk of the city court, and on the same day a writ was issued in accordance with the prayer of the petition, addressed to the water company, reciting the allegations of the information, and commanding said company to appear and show "under what warrant of law you exercise the corporate functions and franchises herein above set out, and also to show cause, if any you have, why your charter should not be vacated and your corporate existence annulled." The respondent company appeared, and interposed a demurrer to the complaint or petition, and also a motion to quash the writ. All the assignments of demurrer which are insisted on in argument are also set down as grounds of the motion to quash, and are available to the appellant, if at all, as well upon that motion as on demurrer to the petition. We therefore need only review the action of the trial court in overruling said motion.

The first ground of the motion proceeds on the theory that this proceeding should have been commenced by summons and complaint, under sections 2651 and 2652 of the Code, which provide (sec. 2651) that all civil actions in courts of record, except as otherwise provided in the Code, must be commenced by the service of summons, and (sec. 2652) that the summons must be issued by the clerk of the court, and be accompanied by the complaint, signed, etc., setting forth the cause of action. This position is, in our opinion, untenable. The statutory provisions in question have reference solely to the ordinary civil actions for the recovery of property or money, as is clearly demonstrated by a reference to the original statute, as found in the Code of 1852 (sec. 2160) and as carried into the Revised Code (sec. 2558) and into the Code of 1876 (sec. 2924), which provides: "All civil actions in the courts of record of this state for the recovery of real estate, or any interest therein, or for waste or trespass on land, or for the recovery of money or personal property, or for the recovery of damages (except in such cases as is otherwise provided by the code), must be commenced by the service of a summons." The omission from the statute in the codification of 1886 of the specification of the civil actions covered by it manifestly was not intended to either enlarge or narrow its operation, but only to express the same proposition more concisely; and there is nothing in its present context requiring or justifying an extension of its provisions to any case not originally within its terms, or to any action except those for the recovery of property or money. The sole purpose of the statute at first, all along, and now was, and has been, and is to substitute a summons and complaint for the common-law writ and declaration, and not to require proceedings which at common law were prosecuted by information or petition and the like, such as mandamus, prohibition, certiorari, supersedeas, habeas corpus, etc., to be commenced by the service of summons and complaint. This view is strengthened by reference to the provisions of the code in respect of the form of the summons required to be issued and served in "all civil actions," as well by the present as all former codes, and by the forms of complaint found in all the codes. None of these forms are adapted to other actions than those for the recovery of property or money or damages, and it has never been supposed that any of the extraordinary proceedings noted above should or could be commenced by a summons accompanied either by a common-law declaration or by a complaint in any form analogous to those given. Moreover, quo warranto was not even a civil proceeding at the common law, but criminal in its nature, involving severe pains and penalties; and, now that it has been shorn of these consequences,

it still cannot be said to be a "civil action," within statutes like section 2561 of the Code, which is defined: "An action which has for its object the recovery of private or civil rights, or compensation for their infraction." Bouvier, Law Dict.; 3 Am. & Eng. Encyclop. Law, p. 257. And, beyond all this, it may well be said to be the settled practice in this state to commence proceedings under sections 3167 *et seq.* of the Code by information or petition in the nature of an information setting forth the facts, and praying a writ of quo warranto, as in the case at bar (*Tuscaloosa Scientific & Art Asso.* v. *State*, 58 Ala. 54; *State* v. *Webb*, 97 Ala. 111); and this practice is expressly approved, with reference to similar statutory provisions, by the supreme court of New Jersey (*Vanatta* v. *Delaware & B. B. R. Co.* 38 N. J. L. 282), where it is also decided that this proceeding is not "an action" within statutes like section 2651 of our Code. *State* v. *Roe*, 26 N. J. L. 215.

It was not necessary for the relator to obtain leave or an order of any court to institute and prosecute this proceeding before filing the information, or at all, as is insisted by the second ground of the motion to quash. *Tuscaloosa Scientific & Art Asso.* v. *State* and *State* v. *Webb*, *supra*.

The remaining grounds of the motion to quash are obviously ill taken, and, as they are not insisted upon by appellant's counsel, we shall not discuss them. The motion to quash the writ was properly overruled.

The respondent also moved to dismiss the proceeding for that the relator did not give security for costs before filing the information. It is quite true that in such cases security for the costs must be given before the proceeding is instituted, and cannot afterwards be supplied, if seasonable objection be made. *Taylor* v. *State*, 81 Ala. 383. But it is equally well settled that where the security is in fact given after the suit has been commenced, the respondent may waive the irregularity, and that he does waive it by proceeding with the cause and omitting to move with reasonable promptness for a dismissal on account of it. This proceeding was begun on April 27, 1892. The security for costs was approved and accepted by the clerk of the court on May 2, 1892. The respondent filed his demurrers and motion to quash on May 10, 1892, and afterwards its pleas, to which the petitioner demurred; and when the case came on for hearing, in February, 1894, this motion to dismiss on the ground that security for costs was not given before the commencement of the proceeding was for the first time interposed. Under these circumstances the court properly overruled it. *Duncan* v. *Richardson*, 34 Ala. 117; *Weeks* v. *Napier*, 38 Ala. 568; *Heflin* v. *Rock Mills Mfg. & L. Co.* 58 Ala. 613. We cannot affirm that the trial court should have granted respondent's motion "to require the relator to give other or additional security for costs of this suit, for the reason that the security given by the relator, to wit, T. Gardner Foster, is insolvent," because the evidence adduced in support of the motion only went to show that, according to the tax records of the county, he had only $320 of taxable property. He may have been perfectly solvent notwithstanding he had only that amount of taxable property in the county of Montgomery.

The respondent filed several pleas to the information and writ of quo warranto. Demurrers were interposed to each of these pleas, and sustained by the court; and, the respondent declining to further plead, judgment was entered dissolving the corporation. We are now to consider the sufficiency of said several pleas, and, before proceeding to that, it is to be recalled that the information avers a charter duty upon the respondent to supply the city of Montgomery and the residents or inhabitants thereof with pure and wholesome water sufficient in quantity at all times for domestic and other uses, and that said corporation had failed, and persistently fails and refuses, to perform this duty, which was the chief object and end of its creation and existence, and to supply said city and its people at all times with pure and wholesome water sufficient for their uses. The several pleas of the respondent admit that it was the duty of the Capital City Water Company, under its charter, "to supply the city of Montgomery and its inhabitants with clear, wholesome, and deep-well water, suitable for all domestic and ordinary manufacturing purposes, and sufficient in quantity for all uses of said city and its inhabitants," and they severally set forth as an exhibit the declaration and certificate of incorporation of said company, constituting and being the act or charter creating said corporation, wherein the objects, powers, and duties of said corporation, so far as they are involved in this case, are declared, granted, and imposed in the following language: "The object for which this corporation is formed is to supply water to said city of Montgomery, and to build, construct, lay, set, use, and operate pumps, reservoirs, mains, pipes, hydrants, wells, and the necessary fixtures in and near said city of Montgomery; and to supply to said city and its inhabitants clear, wholesome, and deep-well water, suitable for all domestic and manufacturing purposes, and sufficient in quantity for all uses of said city and its inhabitants, as set forth and provided in a certain ordinance contract ordained by the honorable city council of said city on, to wit, the 7th day of October, 1885, granting to Arthur H. Howland, his associates, successors, and their assigns, the right to lay down, use, and maintain water mains, pipes, and aqueducts and other fixtures pertaining to supplying a water supply to and in the city of Montgomery, . . . and to carry out and perform said contract in all respects and particulars according to the true meaning and intent thereof on the part of the said Arthur H. Howland, his associates, successors, and assigns, and to use, exercise, and enjoy all the rights, franchises, and privileges at any time owned, possessed, or enjoyed by said Arthur H. Howland, his associates, successors, or assigns, under and by said ordinance." The ordinance contract referred to in the declaration of incorporation is also made an exhibit to and set out in the pleas, and it is claimed that certain provisions thereof, taken in connection with cer-

tain action or omission to act on the part of the city council under such provisions, qualify the otherwise absolute duty of the corporation to furnish, at all times, water of the prescribed quality and quantity to the city and its inhabitants, and justify whatever of failure may have occurred in that behalf; and it is also claimed that certain of said provisions in and of themselves afford an adequate and indeed the only remedy for an abuse of its franchise by the corporation. Upon the information and the writ, therefore, as also upon the confessions of the pleas and the provisions of respondent's charter exhibited by the pleas, the case presented involves a charter duty resting on the Capital City Water Company to supply water of the prescribed quality and adequate quantity to the city and its inhabitants at all times; and upon the information and writ the case presented involves a wilful failure on the part of said company to discharge and perform this duty. The duty is obviously a public one and of vast importance to the municipality and people of Montgomery. It is of no less consequence in respect of the quality of the water to be supplied than in respect of its quantity and the constancy of the supply. The "act creating the corporation" is equally imperative in respect of the quality and the quantity and the continuity of the supply of the water for the furnishing of which to the city and the residents thereof the corporation was organized, chartered, and invested with the valuable franchise of constructing and operating a system of waterworks in the city of Montgomery. Nay, more, it is readily conceivable that, to supply the city and its inhabitants with impure, unwholesome, and polluted water would be more disastrous than to supply an insufficient quantity of pure water, or even none at all. And so in respect of the constancy of the supply, the charter requires the prescribed water to be furnished at all times without exception; and to fail in this duty for any material length of time is as much a breach of corporate duty, as much an offense against the charter and abuse of the franchise granted, as a total failure in that regard, though not so mischievous in results. Hence we feel no hesitation in affirming that a failure to constantly furnish water of the prescribed quality is an offense against the act creating this corporation, within the terms of section 8167, clause 1, of the Code, unless justification or excuse for such failure on the particular facts under which it occurred can be found in the charter of the corporation.

Recurring to the pleas of the respondent, it is to be considered whether they severally either negative the charge of failure made by the petition and recited in the writ, or, without such negation, present facts which excuse or justify such failure in such sort as to strip it of the essentials of an offense against the charter of the respondent company; or, failing this, whether they present a case which addresses itself to the discretion of the court, and requires an exercise of that discretion in the respondent's favor. Respondent's first plea does not negative the failure of corporate duty laid in the information. Construing it, as all pleas must be construed, most strongly against the pleader, it, in the first place, only claims that the water company discharged the duty in question for the first five years after its organization and incorporation and the completion of its works,—that is, down to the year 1890; and this is to be taken as a confession that it has not performed that duty during the two years elapsing from 1890 to 1892, when this proceeding was commenced. And the plea proceeds, upon the assumption of failure to supply pure and wholesome water continuously during said last-named period, to state facts which are intended to afford justification or excuse for such failure, thus emphasizing the admission of its failure. After this it proceeds to aver that the city and its inhabitants are entirely dependent upon the respondent for a supply of water for fire and sanitary purposes, and that, should the company's charter be taken away from it, the city will be left without any supply of water for either of said purposes; and further, "that many of the inhabitants of said city are now depending solely upon the defendant for their water supply, and they are now, and have been at all times since the construction of defendant's works, furnished with an abundant supply of pure, wholesome, and deep-well water, and sufficient in quality and quantity for all the wants of the city and its inhabitants; and defendant avers that if its charter was forfeited it would have no right to supply either the city of Montgomery or its inhabitants with water, or to operate its works in any way, and it would result in irreparable injury, and in probable devastation and ruin to this city and its inhabitants." It was not intended by the pleader in the above excerpt from the first plea to allege that the respondent had at all times supplied pure and wholesome deep-well water to the city and its inhabitants, and counsel for the defendant do not at all insist upon that interpretation of the plea. To give it that construction, moreover, would render the plea duplex, and inconsistent with itself, for that in the first part of it the respondent confesses failure to supply water as prescribed in its charter, and attempts to excuse and justify such failure. But, more than this, in the averment quoted it is not stated that the respondent company has at all times furnished the prescribed water supply, but only that such supply has been furnished, and this not to the city of Montgomery and its inhabitants, but to "many of the inhabitants of the city of Montgomery" only. This whole averment was obviously intended as a mere basis for the further conclusion, stated in the plea, that to dissolve the respondent corporation would stop all supply of water and "result in irreparable injury, and with probable devastation and ruin to this city and its inhabitants;" and so it seems to be considered by counsel. There is, then, we conclude, no denial in this plea of the failure to supply water of the prescribed quality charged in the petition and set out in the writ. Nor is there any denial of the charge of failure to supply water of the prescribed quality made by the petition and recited in the writ at-

tempted in respondent's second plea, and the fourth expressly admits that the respondent has not at all times since the completion of its works supplied the city of Montgomery and its inhabitants with pure and wholesome water, as required by the charter of the corporation.

Respondent's fifth plea contains this averment: "And defendant avers that it has from the beginning until now complied in all respects with all the terms and conditions" of the ordinance contract between it and the city, "and has fully performed all its duties arising out of its charter by providing a system of waterworks of sufficient capacity and power to furnish the city of Montgomery an abundant supply of pure, wholesome, deep-well water, sufficient for all the purposes of the city and its inhabitants. And it avers that each and every assignment of breach in this respect as set forth in plaintiff's alternative writ, heretofore served upon this defendant, are wholly untrue." It is insisted by counsel for appellant that this averment is a denial of the charge that the company has failed to supply the city and its inhabitants with pure and wholesome water, and that this plea presents the general issue upon said charge. The position is not tenable. The plea does not allege facts showing that the pleader has performed its charter duty in the respect in question, but only a general conclusion of compliance with its engagements to the city, and performance of all its corporate duties. This conclusion may be based, and, indeed, as appears from the plea itself, is based, upon a wholly unwarranted and erroneous construction of the charter by the pleader. The plea sets forth that the company has performed all its charter duties, not, indeed, by the construction of suitable works of adequate capacity, and by furnishing the city and its inhabitants at all times with a sufficient quantity of pure, wholesome, deep-well water, but only that it has performed its charter duty, and complied with all the requirements of the act creating it, "by providing a system of waterworks of sufficient capacity and power to furnish the city of Montgomery an abundant supply of pure, wholesome, deep-well water, sufficient for all the purposes of the city and its inhabitants." It is not averred in this plea that the water company has in fact supplied water of the requisite quality and quantity to the city and its inhabitants at all times, or, indeed, at any time, but only that it has a system of works capable of supplying water according to the charter. On the construction which we are asked to put upon this plea the whole charter duty of the respondent would be fully performed by the building of its system of works, though no drop of water ever passed through the system to the city of Montgomery and its inhabitants. And the concluding sentence of the plea is, in effect, merely an averment that all charges of the petition and writ in respect of the construction of a system of waterworks of adequate capacity are untrue. The gravamen of the petition and writ is a failure, not to construct the works, but to supply pure and wholesome water; and the fact of the construction is no answer to the charge of a failure to operate the works so as to supply the water required by the charter to be supplied, but on the contrary goes in aggravation of such failure.

The sixth and only other plea of respondent makes no pretense of denying the charge that the corporation has failed to supply water as required by the charter at all times to the city of Montgomery and its inhabitants, but admits, as does the fourth plea, "that on a few occasions, to wit, four times, after a protracted drought, for which the company was in no way responsible, and which it could not anticipate, it has been compelled to obtain a part of its water supply from the Alabama river; but that this character of water was furnished only for a short period of time, and only so long as there was an absolute necessity therefor, resulting from a failure of its artesian wells to supply the usual amount of water." It is thus seen that none of the respondent's pleas deny, and some of them expressly, and all except the fifth inferentially, admit that the corporation has not at all times supplied the city and its inhabitants with pure and wholesome water, etc. Several matters are set up in justification of this failure, and in avoidance of the consequences thereof. These are all based, as we have seen, upon certain provisions of the contract between the city and the company, and referred to in the declaration of incorporation. First, it is insisted by the pleas that the fact that the city had and exercised an election to purchase respondent's works in 1890 excused the company from all duty to increase the supply of pure, wholesome, deep-well water to meet the wants of the city and requirement of the charter, and justified the furnishing of river water for the two years or more ensuing, during which time the city and the company were disputing over the price the former should pay for the works; the company having the while the full possession and control, and being in undisturbed operation, of its works, and presumably in the receipt of the full rates of compensation fixed by the contract for supplying the city and its inhabitants with pure, wholesome, deep-well water sufficient at all times for the uses of the municipality and the residents thereof. The essence of this plea is that, notwithstanding the absolute charter duty of the defendant to supply pure, wholesome, deep-well water, and notwithstanding there is not one word in this contract which qualifies that duty, yet the company need only perform it when the circumstances are such that to do so will entail no expense upon it except such as the city would have to pay should it ever elect to purchase the works. The principle of the plea would justify the company in supplying polluted, pestilential water to the people for years, and charging and receiving compensation as for pure and wholesome water, solely upon the ground that to supply the water the corporation was chartered to supply, contracted with the city to supply, and which it is at all times paid to supply, would entail some expense upon the company. This, with what was said of

this defense when the case was formerly here, will suffice to dispose of it. *State* v. *Capital City Water Co.* (Ala.) 14 So. Rep. 652.

Again, it is stipulated in said ordinance contract that the ordinance may be repealed on ninety days' notice to said corporation, "if at any time the works herein provided for to be constructed by the said Arthur H. Howland, his associates, successors, or assigns, shall in any substantial or material particular fail to meet the requirements of this contract, unless within said ninety days" said works shall have been made to conform to the provisions of the contract. And it is claimed that this right of the city to rescind the contract is the remedy, and the only remedy, for an abuse by the corporation of the franchises which the state has granted to it for the public good. This right of rescission does not, upon its face, as given in the contract, import any power in the city to vacate the respondent's charter, or to disturb in any way its corporate existence, but only to avoid a contract which, so far as it was of benefit to the respondent, authorized it to charge certain rates for water furnished by it to the city and its inhabitants. So that, if it be conceded that this ordinance contract becomes a part of the charter of the respondent corporation because of the reference to it in the declaration of incorporation, this power of annulling the contract would not be the power of vacating the corporation. Whatever the city's competency to make this contract, it had not the sovereign power of breathing life into the corporate entity; and, whatever its right to annul the contract, it was impotent to take away the life of the corporation. The state gave, and the state only can take away, that life. Considering the contract as part of the charter, the state might declare forfeiture of the charter for infractions of duty imposed by the contract; but it by no means follows that the city, having powers only in respect of that part of the charter embraced in the contract, could exert any influence upon the vital principle of corporate existence which emanated from the state. The case is analogous to the turnpike cases to which we have been referred, in which it was insisted that the right vested by the charters or general statutes in supervisors to throw open toll gates on the roads of the corporations upon their failure to construct and maintain roads of a certain character prescribed in the charters, and the fact that this had been done by the supervisors, precluded the state from enforcing forfeitures of the charters for such failure. But the position was held unsound, the court in one case saying: "That the inspectors may throw open the turnpike gates is no argument against forfeiture for nonrepair. The application to them is but a cumulative remedy. . . . But the statute does not forbid the remedy by information, any more than the statute giving a summary remedy to the landlord against his tenant may be said to inhibit the action of ejectment." *People* v. *Hillsdale & O. Turnp. Road*, 23 Wend. 254. And in another case: "I am entirely satisfied that it could form no bar to this proceeding, even admitting . . . that the gates were opened under a judicial order of an inspector of turnpikes, pursuant to the statute. Such a step, if noticeable at all, would operate rather to ascertain and strengthen the case against the company than as furnishing matter of defense." *People* v. *Bristol & R. Turnp. Road*, Id. 247.

There is another provision of this ordinance contract to the effect that, if any unforeseen or inevitable accident should happen to any part of the respondent's system of waterworks, the company should have a reasonable time to repair injuries resulting from such accident, and that such "accident and the reasonable time rendered necessary to repair or provide for the same as aforesaid shall never be construed to be a breach of this contract, or any cause for repealing this ordinance," etc.; and this stipulation of the contract is set up in defense to the writ in this case. As no "unforeseen or inevitable accident" is averred, it is difficult to see what pertinency this stipulation has to the issue in the case. Surely a drought is not an "accident," and a failure of the company to bore wells shown to be necessary to an adequate supply in seasons of drought can in no sense be charged to an "unforeseen or inevitable accident."

So much for the matters relied on in justification of the failure of respondent to supply at all times the water prescribed by the charter, or as qualifying the corporate duty in that regard. Very clearly, we think nothing which is alleged or which appears by the ordinance contract either qualifies in any degree the absolute corporate duty in that behalf, or justifies the failure to perform that duty, averred in the petition, and not denied in the pleas. It only remains to be considered whether, on the case presented by the petition and writ on the one hand and the pleas on the other, we should, in the exercise of a sound judicial discretion, refuse to declare respondent's charter forfeited, notwithstanding the failure of duty and consequent abuse of franchise which it admits, or rather whether we should hold that its pleas were sufficient to invoke an exercise of that discretion in its favor by the court below. These pleas show that, commencing the latter part of 1890 or in 1891, and extending down to the time of plea filed in February, 1894, there have been four periods during which river water, and not pure, wholesome, deep-well water, was supplied to the city of Montgomery and its inhabitants. It is said that these periods were "short," but how short or long is not shown. For aught that is alleged, they may as well have covered a month or more on each occasion as a day. It is shown that these periods occurred during protracted droughts, which almost always occur in the heated season, when it is fair to assume river water is specially impure, and the use of impure water is especially dangerous. It is shown that the respondent was fully conscious of the incapacity of its wells to meet the requirements of its charter duty certainly as early as the year 1890, and then, after resolving to sink additional wells in order to perform the duty resting upon it, failed, for a wholly insufficient reason, to make any effort in that

direction, and went on in disregard of its said duty, without other effort or purpose to meet its obligations to the public for more than two years, meantime failing to supply for indefinite periods, in the most unhealthy seasons of the year, the pure, wholesome, deep-well water required both by the grant of the state and the contract with the city. It is not pretended that the respondent was unable for any reason to supply the water. There seems to be no question at all but that an abundant supply of this water could have been reached and utilized by the company. If it were unable to supply the water, that itself would be a ground for vacating its charter. Knowing all this time—from 1890 to 1892—the urgent necessity for additional wells, having the ability to sink them, and thereby secure and furnish to the city an abundant supply of pure and wholesome water, and having failed for so long to make any effort to that end, it would be a confusion and a misuse of terms to say that this default in respect of a plain, absolute, and practicable duty was other than a wilful abuse of the franchise granted by the state, and a wilful offense against the act creating the corporation. Why should not the penalty for this offense be visited upon the respondent? What facts are set forth in the pleas to challenge the discretion of the court in favor of continued corporate existence, and to furnish reasons for allowing the company to further exercise the franchise which it has abused? For one thing it is said that, if the charter is vacated, all water supply will at once cease, and the city will be exposed in consequence to utter devastation and ruin. There is nothing in this dire prognostication. The law is not wanting in means and instrumentalities for the administration of the affairs and the carrying on of the business of this company *ad interim*, and ultimately winding it up, and passing its system of works into other hands, charged with a more faithful performance of the great public duty of supplying the city and its people with wholesome water, and thereby subserving the end for which this company was brought into existence, and which it has failed to meet.

Again, it is said that the respondent is now, or was when the case was heard in February last, after having pretermitted all effort in that direction for more than two years, and until, and even for a year after, this proceeding was begun, exerting itself to sink a sufficient number of additional deep wells to furnish the water supply required by its charter; and the promise is made by the pleas that these efforts will be continued unremittingly, and with the greatest diligence and skill, until they are crowned with success. That this fact, transpiring after the franchise has been sufficiently abused to authorize and require the forfeiture of corporate existence, and after proceedings for forfeiture had commenced and been pending for a year, and this promise of the performance of corporate duty in the future, can exert no influence by way of curing the abuse already committed, or of absolving the company from responsibility for the offense of which it has already been guilty, constituting a legal ground of forfeiture, is most clear. *People* v. *Hillsdale & C. Turnp. Road*, 28 Wend. 254, 258. And this fact and promise are equally impotent and vain as an invocation to judicial discretion. The fact is not a new one in the history of this company, developed in the pleadings here. There have been former occasions, according to the pleas, when the company had resolved upon the sinking of additional wells, and set about the execution of that purpose, only to turn away from it upon wholly insufficient considerations. And the promise is no greater obligation than has all along rested upon the company to do the very thing it now promises to do; and, as that obligation has not sufficed in the past to keep the corporation up to the mark of this most vital duty, it would not be wise to rely upon the promise for the future. And as the company has in the past, with full consciousness of duty unperformed, been easily diverted from its tentative resolution to discharge it, it is not harsh to say the future cannot be contemplated without grave apprehension that when the sword of this writ no longer hangs over its life the present resolution to discharge its duty would lose its force, the present night and day effort to sink wells would lose its energy, and upon some entirely insufficient consideration, invited to lodgment in the mind of the company by the abortion of this proceeding, there would be another default of duty, the resolution would become infirm, the work would cease, the town would continue to be supplied with impure and unwholesome water, and the object and end of corporate existence would go unaccomplished and unattained. There are averments of good faith, of great skill and perfection in the construction by the respondent of its system of waterworks, of the use of the most approved machinery and appliances and the most expert human skill in the service of the city and its people; but all these have fallen short of meeting the plain and simple requirement of the chart of respondent's life—that it should furnish the city of Montgomery and its inhabitants with pure, wholesome, deep-well water sufficient at all times for their domestic and other uses. We have, and in the nature of things can have, no sufficient assurance that this duty will be performed in the future. The interests involved are most vital and important, involving the health and lives, it may well be, of the inhabitants of the city and the public. We feel that a sound judicial discretion requires the removal of this corporation from the important work it has so illy performed, that it may be committed to other agencies having a juster appreciation of the trusts imposed, and a quicker sense of the duties to be discharged. None of the pleas, we therefore conclude, present any denial of the abuse of franchise charged by the petition and writ, nor any justification or excuse for such abuse, nor set up any fact which should have challenged the discretion of the city court to a denial of the prayer of the petition, notwithstanding the charges made were confessed. The city court properly sustained demurrers to

each of the pleas. The respondent declining to plead further, nothing was left to the trial court but to enter a judgment forfeiting the respondent's charter and ousting it of the franchises thereby granted, and that *judgment is affirmed.*

Rehearing denied July 21, 1895.

CALIFORNIA SUPREME COURT.

R. K. STEPHENS *et al., Respts.,*
v.
SOUTHERN PACIFIC COMPANY, *Appt.*

(..... Cal.....)

1. **A provision in a lease of property owned by a railroad company and adjoining its railroad grounds,** that such company shall not be responsible for any damage to buildings thereon caused by fire, is not void as against public policy, on the ground that the property of the public will thereby be in danger.

2. **A contract valid when made cannot be rendered invalid** by a general statute subsequently passed.

(September 7, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Tulare County in favor of plaintiffs in an action brought to recover the value of property destroyed by fire alleged to have been set out by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **Foshay Walker,** for appellant:

Why should a different rule be applied to defendant, with regard to the exemption provided for in this lease, from what would be applied if defendant had taken out a policy of insurance to protect it against damage from negligence of the same employés? Such a contract is everywhere held to be valid and as not violating any rule of public policy.

Civil Code, §§ 2629, 2755; *Patapsco Ins. Co.* v. *Coulter,* 28 U. S. 3 Pet. 222, 7 L. ed. 659; *Columbia Ins. Co.* v. *Lawrence,* 35 U. S. 10 Pet. 507, 9 L. ed. 512; *Waters* v. *Merchants' Louisville Ins. Co.* 36 U. S. 11 Pet. 213, 9 L. ed. 691; *Orient Mut. Ins. Co.* v. *Adams,* 123 U. S. 67, 31 L. ed. 63; *Liverpool & G. W. Steam Co. (Limited)* v. *Phenix Ins. Co.* 129 U. S. 438, 32 L. ed. 788; *California Ins. Co.* v. *Union Compress Co.* 133 U. S. 387, 33 L. ed. 730.

It is not pretended that defendant was under any public obligation to lease, either to respondent Stephens or any other person, the land upon which the warehouse stood.

As to whether it would lease its land, it stood in the same position as any owner. It had the undoubted right to make its own terms.

Even a common carrier may lawfully contract, when not forbidden so to do by statute, with the donee of a free railroad pass, so as to relieve the carrier from all injury resulting from any sort of negligence, however gross, of its employés.

Welles v. *New York C. R. Co.* 26 Barb. 641, 24 N. Y. 181; *Bissell* v. *New York C. R. Co.* 25 N. Y. 442, 82 Am. Dec. 369; *Ulrich* v. *New York C. & H. R. R. Co.* 108 N. Y. 80; *Kinney* v. *Central R. Co.* 32 N. J. L. 407, 90 Am. Dec. 675; *Griswold* v. *New York & N. E. R. Co.* 53 Conn. 371, 55 Am. Rep. 115; *Quimby* v. *Boston & M. R. Co.* 150 Mass. 365, 5 L. R. A. 846.

Where the contract is not forbidden by statute, nor by the declared policy of the state, the master may, by contract with his servant, relieve himself from all liability to the servant for damage because of the negligence of any of the employés of the master.

Western & A. R. Co. v. *Bishop,* 50 Ga. 465; *Western & A. R. Co.* v. *Strong,* 52 Ga. 461; *Hendricks* v. *Western & A. R. Co.* 52 Ga. 467; *Galloway* v. *Western & A. R. Co.* 57 Ga. 512; *Mitchell* v. *Pennsylvania R. Co.* (Pa.) 1 Am. L. Reg. 717.

In *Griswold* v. *Illinois C. R. Co.* (Iowa), 24 L. R. A. 647, the question arose upon a covenant in a lease precisely similar to the one in question here, and the action, like the present one, was brought by the lessee in conjunction with the insurance companies who had paid the loss under policies issued by them. Every point made by respondents here was made in that case, and the cases relied on by respondents were cited there. But the validity of the covenant was upheld.

Messrs. **Van Ness & Redman,** for respondents:

Where insured property is destroyed through *Hale* v. *Washington Ins. Co.* 2 Story, C. C. 176.

Insurance against fire covers loss by fire through negligence of assured or that of his servants, even though not expressly provided for in the policy.

Patapsco Ins. Co. v. *Coulter,* 28 U. S. 3 Pet. 222, 7 L. ed. 659; *Columbia Ins. Co.* v. *Lawrence,* 35 U. S. 10 Pet. 507, 9 L. ed. 512, *Waters* v. *Merchants' Louisville Ins. Co.* 36 U. S. 11 Pet. 213, 9 L. ed. 691; *Orient Mut. Ins. Co.* v. *Adams,* 123 U. S. 67, 31 L. ed. 63; *Liverpool & G. W. Steam Co. (Limited)* v. *Phenix Ins. Co.* 129 U. S. 438, 32 L. ed. 791; *California Ins. Co.* v. *Union Compress Co.* 133 U. S. 387, 33 L. ed. 730.

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In *Griswold* v. *Illinois C. R. Co.* (Iowa), 24 L. R. A. 647, the question arose upon a covenant in a lease precisely similar to the one in question here, and the action, like the present one, was brought by the lessee in conjunction with the insurance companies who had paid the loss under policies issued by them. Every point made by respondents here was made in that case, and the cases relied on by respondents were cited there. But the validity of the covenant was upheld.

Messrs. **Van Ness & Redman,** for respondents:

Where insured property is destroyed through

NOTE.—For validity of contract by railroad company to avoid liability for negligence causing injury when the relation of common carrier to the public is not involved, see also Griswold v. Illinois C. R. Co. (Iowa) 24 L. R. A. 647.

See also 29 L. R. A. 755; 30 L. R. A. 193; 40 L. R. A. 101.

the negligence of a third party, the insurer paying the loss is, to the extent of its payment, subrogated to the rights and remedies of the insured, and may, with the insured, maintain an action against the wrongdoer to recover the value of the destroyed property.

Home Mut. Ins. Co. v. *Oregon R. & Nav. Co.* 20 Or. 569.

The exemption clause is void.

We do not think that a contract insuring a party against loss or damage to his own property, arising exclusively out of negligent conduct on his part, would be upheld.

Waters v. *Merchants' Louisville Ins. Co.* 36 U. S. 11 Pet. 213, 9 L. ed. 691; *Walker* v. *Maitland*, 5 Barn. & Ald. 174.

Public policy is "that principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public or against the public good."

19 Am. & Eng. Encyclop. Law, p. 565; Greenhood, Pub. Pol. p. 2.

The doctrines advanced in the cases involving questions of public policy go far beyond the requirements of the case at bar.

St. Joseph & D. C. R. Co. v. *Ryan*, 11 Kan. 602, 15 Am. Rep. 357; Cooley, Torts, 2d ed. § 687; *Roesner* v. *Hermann*, 8 Fed. Rep. 782, 10 Biss. 486; *Johnson* v. *Richmond & D. R. Co.* 86 Va. 975; 2 Thomp. Neg. 1025; *Lake Shore & M. S. R. Co.* v. *Spangler*, 44 Ohio St. 471.

So far as the consideration of public policy is concerned, it cannot be overridden by any stipulation of the parties to the contract of passenger carriage, since it is paramount from its very nature,

Jacobus v. *St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360; *Mobile & O. R. Co.* v. *Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Pennsylvania R. Co.* v. *McCloskey*, 23 Pa. 526; *Indianapolis, B. & W. R. Co.* v. *Beaver*, 41 Ind. 493; *Illinois C. R. Co.* v. *Morrison*, 19 Ill. 136; *Illinois C. R. Co.* v. *Read*, 37 Ill. 484, 87 Am. Dec. 260.

On petition for rehearing.

The clause that no law shall be passed impairing contract obligations does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts, as to remove them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important.

Cooley, Const. Lim. 5th ed. p. 710, *574; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269; *Buffalo East Side R. Co.* v. *Buffalo Street R. Co.* 111 N. Y. 132, 2 L. R. A. 384; *People* v. *Hawley*, 3 Mich. 330.

The fact that the agreement was made prior to the passage of the act is of no consequence. The parties to the agreement should not be deemed to have intended to cover acts which then, or thereafter, within the life of the agreement, might be declared by law to be criminal.

Buffalo East Side Street R. Co. v. *Buffalo Street R. Co.*, *supra*.

The exemption clause should be held contrary to public policy, in that by having a tendency to lessen the care of the defendant in its use of fire, which, in the absence of such an agreement, it would take in view of the presence of the warehouse upon the right of way and by reason of the increased danger of fire and of the spread thereof by reason of the presence of the warehouse on the right of way, the risk to the property of the public at large would be materially increased.

Roesner v. *Hermann*, 8 Fed. Rep. 782; *Johnson* v. *Richmond & D. R. Co.* 86 Va. 975.

A railroad company will not be permitted to contract with a passenger against liability for injuries resulting from the negligence of itself or employés.

Jacobus v. *St. Paul & C. R. Co.* 20 Minn. 125, 18 Am. Rep. 360; *Mobile & O. R. Co.* v. *Hopkins*, 41 Ala. 486, 94 Am. Dec. 607; *Pennsylvania R. Co.* v. *McCloskey*, 23 Pa. 526; *Indianapolis, B. & W. R. Co.* v. *Beaver*, 41 Ind. 493; *Illinois C. R. Co.* v. *Morrison*, 19 Ill. 136; *Illinois C. R. Co.* v. *Read*, 37 Ill. 484, 87 Am. Dec. 260.

Garoutte, J., delivered the opinion of the court:

The plaintiff Stephens was the owner of a certain warehouse situated upon land adjoining the defendant's depot grounds in the town of Hanford, Cal. The said land was held by Stephens under a lease from the defendant. One of the covenants of said lease was as follows: "And it is further agreed that the said party of the first part [defendant] shall not be responsible for any damage caused by fire, whether from railroad engines or from the buildings of the said party of the first part, or by fires caused from any other means, but the risk and damage, from whatever source, shall be alone sustained by the said party of the second part [Stephens]." Upon August 8, 1891, and while said lease was in force, the said warehouse was destroyed by fire which had been kindled by defendant's employés upon adjoining land for the purpose of burning the dry grass, rubbish, etc., thereon. At the time of said fire, the plaintiff Stephens was carrying insurance on said warehouse, in the two insurance companies, plaintiffs, in the sum of $9,000. The insurance was paid, and this action was brought by the insurers and insured jointly to recover from the defendant the value of the premises so destroyed. The verdict and judgment were for the plaintiffs, from which judgment, and from a subsequent order denying its motion for a new trial, the defendant has appealed.

The trial court held the foregoing provision of the contract of lease void, as against public policy, and our attention shall be addressed to the consideration of that question, for, as we view the case, a solution of it is determinative of the litigation. The fact that the defendant is a common carrier has no place in the case. The rights of parties dealing with common carriers, and the duties of common carriers towards parties with whom they deal, and towards the public in general, are elements foreign to any question here involved. At that time it was not dealing with plaintiff Stephens as a common carrier, nor was Stephens contracting with it upon any such understanding or hypothesis. As far as this transaction was concerned, the par-

ties, when contracting, stood upon common ground, and dealt with each other as A and B might deal with each other with reference to any private business undertaking. It follows that all those principles of law denying or restricting the right of common carriers to limit their legal liabilities for damages arising from injury to person or property stand upon a different plane, and are not controlling here.

Is this provision of the contract void as against public policy? That the principle of law involved is an original one, as applied to the present state of facts, is apparent when we consider that but a single case has been found directly in point, although it is evident from the argument that counsel upon both sides have very industriously sought for precedents. This provision of the contract is declared by respondents to be opposed to public policy, in this: That it has a tendency to lessen the amount of care that defendant would exercise, both in the selection and operation of its machinery, and in the general conduct of its business, through its employés, in respect to the control of fire, the element here involved. That the undoubted effect of a contract exempting a party from damages flowing from his negligent use of fire is to increase the chances of conflagration,—that is, one who is protected by an agreement against the results of his carelessness in this respect will not take the same care as he otherwise would,—and, therefore, carelessness occasioned and caused by the agreement, increasing the probabilities of conflagrations, injuriously operates upon the interests of the public at large.

The foregoing line of reasoning is ingenious, but we cannot indorse it as sound in law. It has been well said that public policy is an unruly horse, astride of which you are carried into unknown and uncertain paths, and here that horse would be carrying us beyond all limits ever reached before, if respondents' position should meet with our approval. While contracts opposed to morality or law should not be allowed to show themselves in courts of justice, yet public policy requires and encourages the making of contracts by competent parties upon all valid and lawful considerations, and courts, recognizing this, have allowed parties the widest latitude in this regard; and, unless it is entirely plain that a contract is violative of sound public policy, the court will never so declare. "The power of the courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *Richmond* v. *Dubuque & S. C. R. Co.* 26 Iowa, 191. "Before a court should determine a transaction which has been entered into in good faith, stipulating for nothing that is *malum in se*, to be void, as contravening the policy of the statute, it should be satisfied that the advantage to accrue to the public for so holding is certain and substantial, not theoretical or problematical." *Kellogg* v. *Larkin*, 3 Pinney, 125; 56 Am. Dec. 164. "No court ought to refuse its aid to enforce such a contract on doubtful and uncertain grounds. The burden is on the defendant to show that its enforcement would be in violation of the settled public policy of this state, or injurious to the morals of its people." *Swann* v. *Swann*, 21 Fed. Rep. 299.

Turning our attention to this provision of the lease, let us concede, for present purposes only, this covenant to be opposed to the policy of the law, if its results are fairly and truly stated by respondents. But we deny that such results would follow. Respondents' argument is, that the inevitable and necessary tendency of the covenant is to reduce in some appreciable degree the quantum of care exercised by the defendant in guarding against the destruction of the property of the public by fire. Not the warehouse of the plaintiff Stephens, for, as between him and the defendant, considered alone, there can be no question as to the validity of the contract under consideration. It is the rights and interests of the public which it is claimed are infringed upon, and a trespass upon their interests and rights must be shown, or a case of the present character is a total stranger to any question of public policy.

Were the dangers and risks to the public as to the destruction of its property by fire in any degree increased by the aforesaid covenants? Answering respondents' argument by a like argument, we say, "No." It may be conceded that the covenant had the effect, as to plaintiff's warehouse, to lessen defendant's care in guarding against fire, but, as defendant's care lessened, the owner's care proportionately increased. Knowing that the defendant was absolutely absolved from any legal responsibility for its destruction by fire, we must assume that plaintiff Stephens, the owner, in the protection of his building from the negligence of the defendant's acts, exercised a degree of care commensurate with the dangers that surrounded it; for it cannot be gainsaid that a man of ordinary business understanding, having bartered away any right of action for damages for destruction of his property by fire which might thereafter accrue from defendant, would increase his care and watchfulness in preserving his property from such destruction. We think it must be assumed that, in proportion as the amount of care exercised by defendant in the protection of this property from fire decreased, the amount of care exercised by plaintiff in its protection increased. Having sold his remedy for damages in case of fire, it behooved him to be ever on the alert in the protection of his property. Under any aspect of the case, this question is only material in view of the contingency of a spreading of the conflagration from the warehouse of plaintiff to the property of the public in general, for the whole argument concedes that, if the danger and risk by fire to the property of the public are not increased, then there is nothing whatever in the contention. And thus it is again made apparent to what distant and untrodden paths that unruly horse, public policy, will carry you, unless he be guided by a steady hand and a strong rein.

The remaining question presents itself: Is the result of this covenant necessarily to

lessen the degree of care formerly exercised by the defendant towards the property of the public, and which the law ever enjoins upon it to exercise? In other words, are the probabilities of the destruction of the property of the public by fire communicated by defendant—not *via* the warehouse of plaintiff, but directly communicated—increased by reason of this covenant in the lease? It is argued that, defendant's losses by fire arising from its negligence being materially reduced, if a large number of these contracts were outstanding it would necessarily become careless in the selection of its servants, and neglectful and over-economical in the selection of modern machinery, and thus the dangers to the public from conflagration would be multiplied. We do not see that such result would follow. It must be borne in mind that the lessees of defendant under these contracts are no part of the public. Each one of them has sold his right as one of the public, and is not in a position to complain as to the burdens cast upon him as an individual. The public here are the people holding no leases. The defendant in this case not only owes the public the same duty after the execution of the lease that it did before, but there is no reason in the world why it would not perform that duty in the same way as it had done in the past, however careful or neglectful that performance might be. Why would not this be so? For the public had the same rights and the same remedies against the defendant after as before the execution of the lease, and, likewise, the defendant was liable for damages in the same amount, upon the same property, and upon the same facts. It thus appears that the contract in no way changed the relations and conditions existing between the defendant and the public; and, such being the fact, no reason exists for a change upon its part in the manner of the conduct of its business. While it is true that the making of this contract withdrew plaintiff as one of the public, and, it may be said, thereby reduced the proportions of the public to that extent, still it would seem the refinement of absurdity to hold, for such reason, that, the public being reduced, the care exercised by defendant towards the public would be reduced *pro tanto*.

The late case of *Griswold* v. *Illinois C. R. Co.* (Iowa) 24 L. R. A. 647, in its facts is fully analogous to the case at bar, and, upon a rehearing and reargument, a similar covenant in a lease was sustained, as in no manner contravening public policy. Especially is this case valuable as precedent when we pause to consider the stringent provisions of the code of that state in dealing with the liability of common carriers for damages to property arising from fire and other causes. And doubly so in view of the further salient fact that the lease in that case upon its face appears to indicate that benefits to the lessor in its capacity as a common carrier would accrue by reason of the making thereof. These matters are not found in the case at bar, and, to that extent, the case occupies much broader ground than we are required here to take. The dissenting opinion of the learned chief justice is based, to some extent at least, upon these provisions of the Iowa code, and the further claim that the railroad company was acting in its capacity as a common carrier in making the lease,—conditions which, we have already suggested, do not surround us here. The remaining objection of the learned chief justice to the validity of the judgment ordered by the majority of that court is in line with these respondents' contention, and, we think, unsound.

Farmer A is in the habit of burning his stubble field in the fall of the year. B leases from him a small portion of his farm for storage or residence purposes, there being a clause in the contract similar to the one here involved. Farmer A, in burning his stubble, allows the fire to escape from his control, and B's property is destroyed. Or A is the owner of a powder factory, and leases to B an adjoining tract of land. This exemption damage covenant is placed in the lease. The powder plant explodes, and B's property is destroyed. These illustrations in principle are parallel with the case at bar. Both the farmer and the factory owner owed the duty to the public of exercising a certain degree of care, one in burning his stubble field, the other in carrying on his factory. If this covenant in the present case had the effect to lessen the degree of care exercised by defendant, it had the same effect in the lease of the farmer and the powder man. If the risks and dangers to the property of the public from fire were increased in this case by reason of the covenant, they were likewise increased in those cases. Yet it would seem a gross trespass upon the rights of parties to make contracts to hold the covenant void, as against the policy of the law, in the hypothetical cases cited. To hold that the interests of the public were of such gravity, and were so interwoven into such a contract, as to vitiate the contract, would carry us far beyond any principle of law yet recognized by courts or law writers.

If the doctrine enunciated by respondents be sound, then a multitude of contracts, covering many and diverse subjects, and which are being entered into every day of the world, and recognized and acted upon both by parties and courts, must fall to the ground. As a striking example, the ordinary contract of fire insurance cannot stand the test, for it cannot be gainsaid that such a contract necessarily has the tendency to lessen the care which the owner would otherwise exercise in the protection of his property from fire. Upon respondents' line of argument, such owner owes a duty to the public, possibly in the protection of his own property from fire, certainly in the protection of the property of the public, and, if his care is lessened in the performance of that duty by reason of the contract of insurance, then, surely, the dangers and risks to the property of the public are increased. Yet, notwithstanding this reasoning, courts everywhere have upheld this class of contracts, and repelled all assaults upon them as being opposed to the policy of the law. While it may not be found in the contract itself that the negli-

gence of the owner in causing the fire shall be no bar to a recovery, it has been held always and everywhere that such is the law, even in the absence of express stipulation to that end; and an express stipulation inserted in the contract in accordance with the general principle would certainly in no wise weaken the doctrine. As sustaining this general principle, see *Patapsco Ins. Co.* v. *Coulter*, 28 U. S. 3 Pet. 222, 7 L. ed. 659; *Columbia Ins. Co.* v. *Lawrence*, 35 U. S. 10 Pet. 507, 9 L. ed. 512; *Waters* v. *Merchants' Louisville Ins. Co.* 36 U. S. 11 Pet. 213, 9 L. ed. 691; and *Liverpool & G. W. Steam Co. (Limited)* v. *Phenix Ins. Co.* 129 U. S. 433, 32 L. ed. 791.

Let us look at another class of contracts which have been sustained by the courts, but sustained wrongfully, if the soundness of the argument advanced by respondents can be maintained. Courts have sustained contracts, made by common carriers with insurance companies, whereby property under their control and in transit has been insured against negligence of their employés. *California Ins. Co.* v. *Union Compress Co.* 133 U. S. 387, 33 L. ed. 737; *Phœnix Ins. Co.* v. *Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873. Following respondents' line of argument, surely such contracts would have a tendency to lessen the care otherwise exercised by common carriers in the transportation of goods, and would thereby trespass upon the rights of the public, and, so trespassing, would render void all contracts of that character. But the courts, after careful investigation, have arrived at a contrary conclusion.

To support the invalidity of this contract, counsel rely upon an act of the legislature, found in the Statutes of 1891 (p. 473), which declares a party guilty of a misdemeanor who starts fires in certain localities (without first taking certain precautions), whereby the property of an adjoining or contiguous owner is injured, damaged, or destroyed. If for no other reason, this act of the legislature cannot be relied upon to assist respondents' case, for it was passed subsequent to the making of the contract, and, if the contract was valid when made, no subsequent act of the legislature can render it invalid. It is laid down as an elementary principle in Greenhood on Public Policy that, if a contract conform to the public policy of the state when made, a change in public policy will not avoid it.

We conclude that the line of reasoning indulged in by respondents to support the invalidity of this contract is more specious than sound; that the interests of the public in the contract are more sentimental than real; and that such a contract violates no statute, conflicts with no principle of law, and in no way infringes upon public policy.

For the foregoing reasons, *the judgment and order are reversed*, and the cause remanded.

We concur: Van Fleet, J.; Harrison, J.

Petition for rehearing denied.

29 L. R. A.

Charles KING *et al.*, *Respts.*,
v.
SOUTHERN PACIFIC CO., *Appt.*

.....Cal.....)

1. **A covenant in a lease of railroad property used for warehouse purposes,** relieving the company from liability for loss by fire, does not bind an agent of the lessee in charge of the property, a stranger to the lease, who stores his own property in the warehouse.
2. **The allowance of interest** upon the value of property destroyed by negligence must be left to the discretion of the jury, under Civ. Code, § 3288.
3. **A judgment upon a verdict for a lump sum** of damages and interest will not be modified to exclude the interest which is found to be erroneous, but a reversal is necessary.

(September 7, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Tulare County, in favor of plaintiff in an action brought to recover the value of certain property destroyed by fire which was alleged to have been set out by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **Foshay Walker** for appellant.

Messrs. **Van Ness & Redman,** for respondents, in support of petition for rehearing:

Where, as in this case, the appellate court can determine from the record with certainty in what amount a judgment is excessive, it will remit the excess and affirm as to the balance.

Hayden v. *Florence Sewing Mach. Co.* 54 N. Y. 221; *State* v. *Hope*, 121 Mo. 84; *Western U. Teleg. Co.* v. *Jobe*, 6 Tex. Civ. App. 403; *Hazard Powder Co.* v. *Volger*, 58 Fed. Rep. 152; *Markell* v. *Matthews*, 3 Colo. App. 49; *Salida* v. *McKinna*, 16 Colo. 523; *Gerber* v. *Jones*, 36 Neb. 126; *Emerson* v. *Schoonmaker*, 135 Pa. 437; *Wilson* v. *Troy*, 60 Hun, 183; *Gansevoort Freezing & C. S. Co.* v. *Wessels Co.* 60 N. Y. S. R. 611; *Taylor* v. *Coolidge*, 64 Vt. 506; *Ballard* v. *Burton*, Id. 387, 16 L. R. A. 664; *Warder* v. *Henry*, 117 Mo. 580; *Boehm* v. *Shedlinsky*, 15 N. Y. Supp. 974; *Durie* v. *Anderson* (Tex.) 16 S. W. Rep. 845; *Bank of Kentucky* v. *Ashley*, 27 U. S. 2 Pet. 327, 7 L. ed. 440; *People* v. *Sierra Buttes Quartz Min. Co.* 89 Cal. 511; *Ward* v. *Clay*, 82 Cal. 502.

Garoutte, J., delivered the opinion of the court:

In an action entitled *Stephens* v. *Southern P. Co.* (Cal.) (No. 18,369; this day decided) *ante*, 751, damages were sought to be recovered from this defendant for the destruction of a certain warehouse by fire engendered by the negligence of defendant. The plaintiff and respondent King, in this case, had charge of this warehouse, as the agent of Stephens, the owner, at the time of the fire, and now seeks to recover from defendant damages for the destruction by that fire of certain prop-

NOTE.—For interest on sum allowed as damages, see *note* to Wilson v. Troy (N. Y.) 18 L. R. A. 449.

As to contracts against negligence, see also Stephens v. Southern P. Co. (Cal.) *ante*, 751.

erty belonging to him, and then stored in said warehouse. Judgment went against defendant, and this is an appeal from such judgment, and from an order denying the motion for a new trial.

At the trial defendant offered to prove that the plaintiff King had actual notice of the covenant, in the lease to Stephens, exempting defendant from liability for property destroyed by fire, which covenant we have considered at length in the above-mentioned case of *Stephens* v. *Southern P. Co.* Under objection, defendant was not allowed to make the proof, and the ruling of the court in this regard forms the main ground for the present appeal. Was the question of plaintiff's knowledge of the existence of such a covenant material to the merits of this litigation? We fail to see its materiality. It is not necessary to determine the length and breadth of this covenant, for, of itself, it could in no way bind third parties. Whatever liabilities Stephens assumed thereunder were a matter solely with him and the defendant. And the defendant's primary liability to third parties was the same after as before the making of such a lease. Conceding that all property stored in the warehouse, as between the parties to the lease, was the property of Stephens, yet, as to third parties, such contention avails defendant nothing. Plaintiff King, as the agent of Stephens, received goods in storage, and we do not see that he can be in a different position by reason of having stored his own goods therein than though he had received upon storage the goods of other parties. These goods were not stored by King as Stephens' goods, but rather by Stephens, through his agent, as King's goods. King's agency would seem to be an immaterial element in the case, and no principle of law is cited that would bar a recovery from the defendant, for the destruction of goods arising from its negligence, by any person storing goods in the warehouse under contract with the owner. The question of notice as to this covenant would be immaterial, as a matter in which third parties had no interest. Let us suppose a party storing goods had notice of the lease in this particular. It would put him upon notice of what? Why, simply that by the lease, in its widest possible sense, Stephens would indemnify the defendant against any loss from the destruction by fire of property situated upon the leased land,—a matter certainly of no interest or moment to a party contemplating a storage of his goods in the warehouse. Stephens could not recover for the destruction of his warehouse, or his property stored therein, nor could his lessee, having notice of the covenant. *Thomas* v. *Hannibal & St. J. R. Co.* 82 Mo. 588; *Nolon* v. *Chicago & A. R. Co.* 28 Mo. App. 355. But plaintiff King occupied no such position. He was no lessee. No rights or interests ever passed to him under the lease, and he was in no sense in privity with Stephens. His right to recover grows out of, and is based upon, the fact that he was lawfully entitled to store his goods in the warehouse, without any regard to the exemption clause of the lease made by the owner, and that, while so stored they were destroyed, through the negligence of the defendant's employés. The cases relied upon to support appellant's contention fall short of the mark. *McCoy* v. *Southern P. Co.*, 94 Cal. 568, is based upon a section of the civil code, and must be read in the light of that section. If the plaintiff in that case had been a tenant of the Boyds, without notice as to their agreement with defendant regarding the opening in the fence, then the doctrine of the Missouri cases above cited would probably have been applicable, and a recovery sustained; but the status of plaintiff was held to be that of a mere licensee of the Boyd Bros., they being at all times in the actual possession of the land, and for the purposes of the statute heretofore referred to, the owners thereof.

The court gave the jury the following instruction: "If, from the evidence, you are satisfied that the plaintiff King had in the warehouse and addition thereto, referred to in the testimony as 'Blum's Warehouse,' the property testified to by him; and that the value of said property was, at the time of its destruction by fire, of the value testified to by him; and that said fire and the destruction of said property were caused by the negligence of the defendant,—you will find a verdict for plaintiffs for $5,500, with interest thereon at the rate of 7 per cent per annum, from the date of the fire." This instruction is clearly erroneous in this, that it arbitrarily required the jury to add interest from the date of the fire to such sum as they might find to be the amount of the damage caused. In a case of this character, the question of interest must be left to the discretion of the jury. Section 3288, Civ. Code, provides: "In an action for the breach of an obligation arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury." We think the exception to the instruction sufficiently full and explicit, and, the verdict being for a lump sum, a modification of the judgment cannot be made.

For this reason, *the judgment and order are reversed*, and the cause remanded for a new trial.

We concur: **Van Fleet, J.; Harrison, J.**

Rehearing denied.

OHIO SUPREME COURT.

LAKE ERIE & WESTERN R. CO., *Plff. in Err.*,
v.
Joseph MACKEY, by His Next Friend.

(.....Ohio.....)

(October 29, 1895.)

*1. **It is not error for a reviewing court to refuse to treat as part of a bill of exceptions** a deposition claimed to be the identical deposition given in evidence at the trial, where such deposition is attached to the bill only by being placed between the pasteboard back and the stenographer's report (although held with sufficient tenacity to retain its place), and not marked as an exhibit, or identified by either the trial judge or the stenographer, or by any one.

2. **Where a petition in an action against a railroad company for personal injuries charges** that defendant negligently and unlawfully stopped a freight train across a public highway for a period of more than five minutes, and that while plaintiff, after the expiration of that period, was attempting to cross the street between the cars, defendant, without warning, wrongfully and negligently backed the train, causing plaintiff's injuries, such two charges of negligence are not separable in the sense that one only would be the proximate cause of the injury; taken together they constitute a sufficient allegation of negligence as against a general demurrer.

3. **A child nine years of age is not guilty of negligence** if he exercises that degree of care which, under like circumstances, would reasonably be expected from one of his years and intelligence. Whether he used such care in a particular case is a question for the jury. And even though the petition might, if the plaintiff were an adult, be construed as disclosing contributory negligence, an averment that the plaintiff was at the time a child nine years of age, and of immature experience and judgment, is sufficient to rebut the presumption of contributory negligence.

4. **Where, in such case, the evidence at the trial tends to show that a freight train has been permitted to stand** across a public street beyond the period of five minutes to the hindrance or inconvenience of travel thereon, in violation of section 6960, Revised Statutes, and persons rightfully on the street are passing between the cars of the train, it becomes a question for the jury whether or not it is negligence for the company's servants to move the train without giving timely warning of their intention to do so.

5. **Whether, under such circumstances, a child of nine years** who attempts to cross, and in doing so climbs upon the coupling of a car, is a trespasser or not, is a question for the jury.

6. **It is also a question for the jury** whether or not the mere presence of the train is to be taken as notice to such child that the train is likely to be moved at any time.

*Headnotes by the COURT.

ERROR to the Circuit Court for Mercer County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Marsh & Loree, W. E. Hackedorn,** and **John B. Cockrum,** for plaintiff in error:

The pleading says the train was set in motion "without care," "without notice," "without warning," "imprudently," "carelessly," "negligently," "wrongfully." These are mere epithetic statements and not the statement of the omission of any duty as the proximate cause of the injury. They are not statements of any facts and are not admitted to be true by the demurrer.

Faurot v. *Neff*, 32 Ohio St. 44; *Peterson* v. *Roach*, 32 Ohio St. 374, 30 Am. Rep. 607.

Negligence cannot be alleged without setting forth the acts and omissions of the defendant upon which the right of recovery is based, and then showing by appropriate averments that they occurred through the negligence of the defendant.

2 Kinkead, Code Pl. p. 885.

The petition must show a legal duty or obligation imposed on the defendant towards the person injured, existing at the time and place of the injury, which the defendant failed to perform, by reason of which the injury was occasioned.

Thiele v. *McManus*, 8 Ind. App. 132; *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 221; *Sweeny* v. *Old Colony & N. R. Co.* 10 Allen, 368, 87 Am. Dec. 644; Black, Proof & Pl. § 188.

It is not sufficient to allege that a duty existed and that the defendant violated it, but all the facts showing the duty should be stated.

Angus v. *Lee*, 40 Ill. App. 304; *Clark* v. *Dyer*, 81 Tex. 339; *Davis* v. *Guarnieri*, 45 Ohio St. 470.

There was no imposed duty to send employés to Main street crossing to relieve persons from any perilous position that their curiosity or rashness had led them to, before such employés could start their freight train upon its mission for the public.

Morrissey v. *Eastern R. Co.* 126 Mass. 380, 30 Am. Rep. 686; *Gay* v. *Essex Electric Street R. Co.* 159 Mass. 288, 31 L. R. A. 448; *McGuiness* v. *Butler*, 159 Mass. 288; *Pittsburgh, Ft. W. & C. R. Co.* v. *Bingham*, 29 Ohio St. 364.

Defendant in error contributed to his own injury.

Had Joseph Mackey been an adult there certainly would be no question but the act of crossing a train occupying a street crossing by climbing upon and over the coupling of two freight cars would be an act of such rashness as, if injured in the attempt to cross, would bar a recovery.

Corcoran v. *St. Louis, I. M. & S. R. Co.* 105 Mo. 399; *Howard* v. *Kansas City, Ft. S. & G.*

NOTE.—For negligence in passing between or under cars, see Central R. & Bkg. Co. v. Bylee (Ga.) 18 L. R. A. 634, and *note*.

For duty as to children on railroad track, see Bottoms v. Seaboard & R. R. Co. (N. C.) 25 L. R. A. 784.

See also 38 L. R. A. 633.

R. Co. 41 Kan. 405; *Atchison, T. & S. F. R. Co.* v. *Plaskett*, 47 Kan. 112.

Joseph Mackey being nine years of age was not *per se non sui juris*. Therefore his petition must be as free from disclosing contributory negligence as in a case of an adult.

Mad River & L. E. R. Co. v. *Barber*, 5 Ohio St. 541, 67 Am. Dec. 312; *Street R. Co.* v. *Nolthenius*, 40 Ohio St. 376; *Robison* v. *Gary*, 28 Ohio St. 241; *Baltimore & O. R. Co.* v. *Whitacre*, 35 Ohio St. 627; *Voss* v. *Young*, 10 Week. L. Bull. 292; *Cincinnati Street R. Co.* v. *Fullbright*, 7 Week. L. Bull. 187; *Hays* v. *Gallagher*, 72 Pa. 140; *Hoth* v. *Peters*, 55 Wis. 405; *Engel* v. *Smith*, 82 Mich. 1; *Mathews* v. *Cedar Rapids*, 80 Iowa, 459; *Guess* v. *South Carolina R. Co.* 30 S. C. 163; *Oil City Fuel Supply Co.* v. *Boundy*, 122 Pa. 449.

A railroad is liable to trespassers upon its premises only for wanton or wilful acts of negligence. The rule applies to a child of tender years as to an adult.

Morrissey v. *Eastern R. Co. supra; Moore* v. *Pennsylvania R. Co.* 11 W. N. C. 310; *Frost* v. *Eastern R. Co.* 64 N. H. 220; *Nolan* v. *New York, N. H. & H. R. Co.* 58 Conn. 461; *Gay* v. *Essex Electric Street R. Co.* 159 Mass. 238, 21 L. R. A. 448.

If a child trespass on the premises of the defendant, and is injured by something which he does while trespassing, he cannot recover unless the injury was wantonly inflicted by, or was due to the recklessly careless conduct of, the defendant.

McGuiness v. *Butler*, 159 Mass. 283; *Daniels* v. *New York & N. E. R. Co.* 154 Mass. 349, 13 L. R. A. 248; *McEachern* v. *Boston & M. R. Co.* 150 Mass. 515; *McAlpin* v. *Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *Lake Shore & M. S. R. Co.* v. *Bodemer*, 139 Ill. 596; *Wabash R. Co.* v. *Norway*, 7 Ohio C. C. 449.

Messrs. **Mattingly & Kenney** and **Edgar B. Kinkead**, for defendant in error:

The petition states a good cause of action.

Rauch v. *Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Burger* v. *Missouri P. R. Co.* 112 Mo. 288; *Henderson* v. *St. Paul & D. R. Co.* 52 Minn. 479; *Schmitz* v. *St. Louis, I. M & S. R. Co.* 119 Mo. 256, 23 L. R. A. 250; *Cleveland, C. C. & St. L. R. Co.* v. *Keely*, 138 Ind. 600; *Angus* v. *Lee*, 40 Ill. App. 304; *Harper* v. *Norfolk & W. R. Co.* 36 Fed. Rep. 102; *Davis* v. *Guarnieri*, 45 Ohio St. 470; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Golley & F. Iron Works* v. *Callan*, 9 Ohio C. C. 217.

Where a railroad company by leaving its trains on a street crossing has negligently and unlawfully taken the exclusive possession thereof, and unlawfully holds the same as against persons who are congregated at the crossing to pass such point, and some are crossing over the cars in view of the engineer and other servants in charge of the train, it is a question for the jury whether or not the company may suddenly remove such train without first giving some warning to apprise persons who may be in positions of danger induced by such obstruction of the highway.

Barkley v. *Missouri P. R. Co.* 96 Mo. 378; *Burger* v. *Missouri P. R. Co.* 112 Mo. 288; *Philadelphia, B. & W. R. Co.* v. *Layer*, 112 Pa. 414; *Eaton* v. *Fitchburg R. Co.* 129 Mass. 364.

The degree of care required to be exercised by a child of tender years, and the omission of which will constitute negligence on his part, is to be measured in such case by the maturity and capacity of the individual, the law only requiring that degree of care to be reasonably expected in view of the particular situation and the age and capacity of the particular individual.

Cleveland Rolling Mill Co. v. *Corrigan*, 46 Ohio St. 283, 3 L. R. A. 385; *Bellefontaine & I. R. Co.* v. *Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Clark* v. *Chambers*, L. R. 3 Q. B. Div. 327; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Rauch* v. *Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Pennsylvania R. Co.* v. *Kelly*, 31 Pa. 372; *Philadelphia & R. R. Co.* v. *Spearen*, 47 Pa. 300, 86 Am. Dec. 544; *Glassey* v. *Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172; *North Pennsylvania R. Co.* v. *Mahoney*, 57 Pa. 187; *Burger* v. *Missouri P. R. Co. supra.*

When the petition charging the negligence is sufficient, and the evidence tends to prove the allegations thereof, the question of negligence is to be left to the jury.

Thurber v. *Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326; *Sioux City & P. R. Co.* v. *Stout*, *Washington & G. R. Co.* v. *Gladmon*, *Rauch* v. *Lloyd*, and *Burger* v. *Missouri P. R. Co. supra; Milwaukee Nat. Bank* v. *City Bank*, 103 U. S. 668, 26 L. ed. 417; *Marietta & C. R. Co.* v. *Pickeley*, 24 Ohio St. 654.

Where the statute declares the obstruction of a street crossing by railroad cars or trains for more than a determinate period unlawful, and requires the same to be opened after that period; and declares any obstruction of a street or crossing a nuisance,—it is within the design of such statutes to require the railroad company to observe certain rules of care and precaution to provide against injuries to the public or any member thereof; and for the omission to observe such regulations of the law any person injured thereby may recover.

Hayes v. *Michigan C. R. Co.* 111 U. S. 239, 28 L. ed. 415; *Taylor* v. *Lake Shore & M. S. R. Co.* 45 Mich. 74, 40 Am. Rep. 457; *Eaton* v. *Fitchburg R. Co.* 129 Mass. 364; *Barnes* v. *Ward*, 9 C. B. 392; *State* v. *Morris & E. R. Co.* 25 N. J. L. 437; *Continental Imp. Co.* v. *Stead*, 95 U. S. 161, 24 L. ed. 403; *Beisiegel* v. *New York C. R. Co.* 40 N. Y. 9; *Black* v. *Burlington, C. R. & M. R. Co.* 38 Iowa, 515; *Pittsburg, Ft. W. & C. R. Co.* v. *Maurer*, 21 Ohio St. 421; *Robinson* v. *Western P. R. Co.* 48 Cal. 409.

A general allegation of negligence without stating the particulars is sufficient as against a general demurrer, and is equivalent to whatever degree of negligence is necessary to sustain the pleading.

Harper v. *Norfolk & W. R. Co.* 36 Fed. Rep. 102; *Davis* v. *Guarnieri*, 45 Ohio St. 470; *Nolton* v. *Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623; *Rockford, R. I. & St. L. R. Co.* v. *Phillips*, 66 Ill. 551; *Angus* v. *Lee*, 40 Ill. App. 304; *Atchison, T. & S. F. R. Co.* v. *O'Neil*, 49 Kan. 367.

The allegation of the age of a child, taken with the allegation of want of capacity to ap-

preciate the act committed, brings the case squarely within the rule announced in—

Lynch v. *Nurdin*, 1 Q. B. 29; *Rauch* v. *Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Bellefontaine & I. R. Co.* v. *Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Harriman* v. *Pittsburgh, C. & St. L. R. Co.* 45 Ohio St. 11; *Cleveland Rolling Mill Co.* v. *Corrigan*, 46 Ohio St. 283, 3 L. R A. 385; *Burger* v. *Missouri P. R. Co.* 112 Mo. 238; Patterson, Railway Accident Law, §§ 71–73, and authorities cited.

It is unnecessary to allege the duty where it follows from the facts alleged.

Angus v. *Lee, supra; Gulf, C. & S. F. R. Co.* v. *Washington*, 49 Fed. Rep. 349, 4 U. S. App. 121; *Gurley* v. *Missouri P. R. Co.* 93 Mo. 445; *Sullivan* v. *Missouri P. R. Co.* 97 Mo. 113.

The matter of contributory negligence is one of defense to be made out by the defendant.

Street R. Co. v. *Nolthenius*, 40 Ohio St. 376; *Robison* v. *Gary*, 28 Ohio St. 241; *Voss* v. *Young*, 10 Week. L. Bull. 292.

Between seven and fourteen years of age children are prima facie incapable of exercising judgment and discretion, but evidence is received to rebut the presumption of incapacity.

1 Bishop, Crim. L. § 368; 1 Whart. Crim. L. § 58; *Schmidt* v. *Milwaukee & St P. R. Co.* 23 Wis. 186, 99 Am. Dec. 158.

The question of capacity is for the jury, and not one of law to be determined by the court.

Washington & G. R. Co. v. *Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; 1 Thomp. Neg. 452; 2 Thomp. Neg. 1182; *Byrne* v. *New York C. & H. R. R. Co.* 83 N. Y. 620; *Dowling* v. *New York C. & H. R. R. Co.* 90 N. Y. 671; *O'Mara* v. *Hudson River R. Co.* 38 N. Y. 445; *Mowrey* v. *Central City R. Co.* 51 N. Y. 666; *Thurber* v. *Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326.

A child is not guilty of contributory negligence if he exercises that degree of care which, under the same or similar circumstances, would be reasonably expected from one of his age and capacity; and where the petition charging the negligence is sufficient, and the evidence proves its allegations, the question is properly left to the jury.

Pennsylvania R. Co. v. *Kelly*, 31 Pa. 372; *Rauch* v. *Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Philadelphia & R. R. Co.* v. *Spearen*, 47 Pa. 300, 86 Am. Dec. 544; *Washington & G. R. Co.* v. *Gladmon, supra; Burger* v. *Missouri P. R. Co.* 112 Mo. 238; *Corcoran* v. *St. Louis, I. M. & S. R. Co.* 105 Mo. 399; *Hudson* v. *Wabash Western R. Co.* 101 Mo. 13; *Milwaukee Nat. Bank* v. *City Bank*, 103 U. S. 668, 26 L. ed. 417.

A wrongdoer is responsible for the damages caused by his misconduct.

Ehrgott v. *New York*, 96 N. Y. 264, 48 Am. Rep. 622.

The defendant owed a public duty at this crossing that was almost quasi contractual.

The provision was for the benefit of the public, including every person lawfully using the particular highway.

Hayes v. *Michigan C. R. Co.* 111 U. S. 228 28 L. ed. 414.

Whether the train could be moved under such circumstances without some notice is a question for the jury.

Ibid.; Eaton v. *Fitchburg R. Co.* 129 Mass. 364; *Philadelphia, B. & W. R. Co.* v. *Layer*, 112 Pa. 414; *Burger* v. *Missouri P. R. Co.* 112 Mo. 238.

A child is not negligent if he exercises that degree of care which, under like circumstances, would reasonably be expected of one of his years and capacity.

Spillane v. *Missouri P. R. Co.* 111 Mo. 555; *Lynch* v. *Nurdin*, 1 Q. B. 29; *Clark* v. *Chambers*, L. R. 3 Q. B. Div. 327; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Rauch* v. *Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Burger* v. *Missouri P. R. Co.* 112 Mo. 238; *Harlan* v. *St. Louis, K. C. & N. R. Co.* 64 Mo. 480; *Mangan* v. *Atterton*, L. R. 1 Exch. 239; *Hughes* v. *Macfie*, 2 Hurlst. & C. 744; 4 Am. L. Rev. 405.

Spear, J., delivered the opinion of the court:

1. A preliminary question is made with respect to the action of the circuit court in overruling a motion to reattach certain depositions to the bill of exceptions. It is recited in the bill that depositions of the witnesses named were given in evidence, and that they are attached marked respectively Exhibits "E" and "F." Proof was heard for and against the claim that the depositions were ever part of the bill. Giving to the testimony a construction most favorable to the plaintiff in error, the question, reduced to its last analysis, is whether a paper claimed to be the identical paper given in evidence at the trial, which was attached to the bill of exceptions only by being placed between the pasteboard back and the stenographer's report, in which position it was held with sufficient tenacity to retain its place, but which paper was not marked or identified as an exhibit either by the trial judge or the stenographer, or by any one, can be treated as a part of the bill. We think it cannot. The circuit court did not err in overruling the motion, nor in refusing to pass upon the weight of the evidence. *Hicks* v. *Person*, 19 Ohio, 426; *Wells* v. *Martin*, 1 Ohio St. 386; *Busby* v. *Finn*, Id. 409.

2. It is insisted that the petition fails to state a cause of action, and that the trial court therefore erred in overruling a general demurrer to that pleading. The criticisms are that there is no averment that the train was unnecessarily detained on the crossing; that the allegations of negligence are mere epithets, and not a statement of the omission of any duty, and that the presumption of contributory negligence arising from the facts stated is not overcome by proper averments.

Omitting formal parts, the petition alleges in substance that the plaintiff was a minor of the age of nine years; that defendant's track through the village of Coldwater intersects and crosses Main street at grade; that Main street is a common thoroughfare and highway, the principal street of said village, and the point of junction of both a public highway

and street crossing, necessarily much used and frequented by the public. On June 5, 1890, the defendant did negligently and unlawfully, and without due care on the part of the servants of said defendant in charge thereof, leave a long train of freight cars attached to a locomotive, standing upon and over, obstructing and blocking said crossing for a period of more than five minutes, without any attention to said crossing or the consequence to the convenience or life and limb of persons having occasion to pass such obstruction. That at the time aforesaid, during the hour of noon of said day, while said train was so unlawfully standing on said crossing, the plaintiff, a child of tender years and immature experience and judgment, was lawfully passing along said street going to a point beyond said crossing on Main street. When, arriving at said crossing and in full view of the engineer's position, and in full view of any servant being on the lookout or keeping watch over said train, he found said crossing so obstructed and blocked by said defendant's train that after remaining at said crossing for more than five minutes, and receiving no warning, plaintiff, in full view of the engineer's proper position, and within the knowledge of ordinary prudence of defendant's servants, attempted to pass over and cross such obstruction. While so passing over said cars defendant's servants, without any care or attention to said crossing, or the consequence to any one attempting to pass such unlawful obstruction, without due care, without signal, without notice, without warning, did then and there imprudently, carelessly, negligently, and wrongfully start said cars suddenly and violently backward, whereby said plaintiff's right foot was caught between the couplings of two cars, and the injury followed.

If the action were to recover the penalty prescribed by section 4748, Revised Statutes, or to recover damages arising to any person by reason alone of the obstruction, it would be necessary to aver that the obstruction was continued unnecessarily, for that condition is incorporated in the statute. But section 6980, Revised Statutes, which provides that "any person who permits any car or locomotive of which he has charge to remain upon or within 30 feet of the center or across any public road, street, or alley for a period longer than five minutes . . . shall be fined," etc., does not impose the requirement of showing that the cars were so permitted to remain unnecessarily, and the language quoted clearly implies the duty to remove the obstruction after the lapse of five minutes. Notice of this statute being taken, the neglect of duty is implied from the statement of the fact of continued obstruction. So construed, the petition makes a case of violation of duty, and this, with the averment that the act was negligently done and the further allegation that the starting of the cars, by which the injury was immediately caused, was done negligently, without warning and wrongfully, we think is sufficient charge of negligence as against a general demurrer. The general rule is that allegations which adequately state the facts of negligence are sufficient to constitute a good pleading. An allegation specifying the act, the doing of which caused the injury, and averring generally that it was negligently done, states a cause of action, although it be not apparent from the complaint how the injury resulted from the negligence alleged." Boone, Code Pl. § 174; Bliss, Code Pl. § 211*a*; Maxwell, Code Pl. 251; *Gulf, C. & S. F. R. Co.* v. *Washington*, 49 Fed. Rep. 347, 4 U. S. App. 121; *Rushville* v. *Adams*, 107 Ind. 475, 57 Am. Rep. 124. Nor are the two negligent acts independent of each other. Both concur in constituting an act of negligence, viz.: the negligent starting of a train negligently and unlawfully obstructing a street crossing. *Burger* v. *Missouri P. R. Co.* 112 Mo. 238.

Nor is the petition faulty in that it does not sufficiently negative the presumption of contributory negligence. It is well settled that a child is presumed to possess only such discretion as is common to children and is therefore held only to the exercise of such care as is reasonably to be expected from children of his own age and capacity. *Cleveland Rolling Mill Co.* v. *Corrigan*, 46 Ohio St. 283, 3 L. R. A. 385. The law as to personal responsibility of a child for his acts is declared by Bishop, in his work upon New Criminal Law, 8th ed. section 368, in these words: "Since in reason criminal capability depends on the understanding rather than the age, there can be no fixed rule of age which will operate justly in every possible case. But an imperfect rule is practically better than none. Therefore, at the common law, a child under seven years is conclusively presumed incapable of crime. Between seven and fourteen, the law also deems the child incapable, but only prima facie so, and evidence may be received to show a criminal capacity." The rule is sustained by many authorities, and may be regarded as an accepted rule of criminal law; and it would seem that the principle should have application to a case of negligence. Prof. Thompson in his work on Negligence, at page 1181, comments as follows: "Two questions arise: 1. At what age or period of a child's development shall it be held to be *sui juris* for the purpose of cases of this kind? 2. Whether this is a question of law or a question of fact. Where the age of the child admits of no doubt as to its capacity to avoid danger, the court will decide this question as a matter of law. . . . If there is any doubt as to the child being of the age and capacity that in law constitutes one *sui juris*, it should be submitted to the jury to say by their verdict whether he is so or not." The rule is tersely stated by *Mr. Justice* Hunt, in *Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 408, 21 L. ed. 116, thus: "The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case."

Unless, therefore, it can be held as matter of law that the injured person had the capacity to foresee and avoid danger, negligence will not be imputed to him. And inasmuch as this presumption will not be visited upon children under the age of fourteen,

it follows that the averment that the plaintiff was a boy nine years of age, and that he was of immature experience and judg- ficient to rebut any legal presumption tributory negligence from other ing in the petition. Sharswood's 435, 464; vol. 4, 20; *Rauch* v. a. 358, 72 Am. Dec. 747; *Nagle y Valley R. Co.* 88 Pa. 35, 39, 32 118; *Rhodes* v. *Georgia R. & Bkg.* 320; *Thurber* v. *Harlem Bridge,* *Co.* 60 N. Y. 326; *Dowling* v. *J. & H. R. R. Co.* 90 N. Y. 670. dant's counsel asked the court to jury that, "if you find in this the evidence, that defendant's ars occupied Main street crossing ster, Ohio, for a period exceeding tes, and more than the statutory nd you further find that plaintiff, d train so occupied said crossing, up between two of defendant's cars rain, he, by so doing, became and respasser, and while so trespassing dant owed him no duty in moving from such crossing, unless you find evidence that defendant and its operating the train knew of his pres- re,"—which was refused.

request implies that, under the circes stated, the plaintiff would, as f law, be a trespasser if he climbed een two of the cars while attempting over. We think this a question of act and law. The evidence tended that at the time the attempt to cross s made the crossing had been ob- for more than five minutes to the ce of travel thereon, which act of ed obstruction, if proven, was a vio- f law and made the company itself sser. Its cars were where they had no be, while, if the boy was rightfully crossing, as the evidence tended to was, he was where he had a right his attempt to pass the obstruction by climbing upon the cars would not make him a trespasser. It was, we think, for the jury to say whether he was a trespasser or not.

Defendant's counsel also requested the court to charge "that if a public highway is completely blocked by a united freight train, attached to an engine, such possession of the highway by the train, even though such possession extends beyond the statutory time, is notice to all traveling public, children and adults alike, of the presence of such train at such place, and that it is likely to be moved at any time, and such train in that condition is not an invitation to any of the traveling public to pass over the crossing by climbing upon or over such train,"—which was refused.

One objection to this request is that it ignores the difference between the responsibility of adults and children already adverted to. Whether or not the presence of a train upon a crossing should be treated as notice to a child nine years of age that it is likely to be moved at any time depends upon the degree of intelligence and judgment possessed by the child, and that, as we have already found, is a question of fact for the jury. Besides this, it might be argued that the train would naturally furnish temptation to such a child, when desiring to pass, to take great risk in doing so, and that trainmen, as reasonable men, ought to anticipate that children would exercise only the discretion usual among children, and, if circumstances indicated their presence at the crossing, to take reasonable precautions for their safety.

The charge as a whole was excepted to. We think it correctly presents the law, and is as favorable to the defendant below as its counsel could well ask.

Other questions were argued. They have all been considered, but we do not find anything in the record which would warrant a reversal of the judgment.

Affirmed.

ARKANSAS SUPREME COURT.

NK OF NEWPORT, *Appt.*,
v.
Allie E. COOK *et al.*

(60 Ark. 288.)

1. A constitutional provision on the subject of usury must be presumed to have been adopted with reference to an existing custom which permitted interest to be taken in advance.

2. Taking interest in advance on a negotiable note at the highest rate allowed by the constitution is not usury.

3. The fact that a note is payable twelve months after its date does not take

NOTE.—*Lawfulness of taking interest in advance.*

I. *In discounts.*
 a. *In general.*
 b. *By persons other than banks.*
 c. *On instruments other than bills and notes.*
II. *In periodical payments.*
III. *For what length of time allowed.*

I. *In discounts.*

a. *In general.*

It must be regarded as well established that, at least on short-time paper, interest may be taken by way of discount in advance, and at the highest rate allowed by law, although this does in reality make the interest paid, if computed on the amount actually received for use by the borrower, exceed the legal rate by the amount of the interest upon the interest for the time of the debt.

It is said in Bank of Burlington v. Durkee, 1 Vt. 408: "The taking the interest in advance is, in one sense, taking excessive interest, because it gives to the plaintiffs the use of the interest thus taken. But this is scarcely contended to create usury, it has been so long a time sanctioned by judicial adjudications."

"It seems difficult upon principle to sustain such a transaction," says the court in Tholen v. Duffy,

it out of the rule which permits the highest rate of lawful interest to be taken in advance.

(February 28, 1895.)

APPEAL by plaintiff from a decree of the Circuit Court for Woodruff County in favor of defendants in a suit brought to foreclose a mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. **Rose, Hemingway & Rose, J. W. Stayton,** and **J. M. Stayton,** for appellant:

The rules of the bank, whereby interest is taken in advance and taking interest on renewals on the old and new note both, for the day of renewal, and also calculating interest for a day as one three hundred and sixtieth part of a year, etc., are legal, being sanctioned by universal banking usage.

Lyon v. *State Bank*, 1 Stew. (Ala.) 442; *Maine Bank* v. *Butts*, 9 Mass. 52; *Thornton* v. *Bank of Washington*, 28 U. S. 3 Pet. 36, 7 L. ed. 594; *Renner* v. *Bank of Columbia*, 22 U. S. 9 Wheat. 581, 6 L. ed. 166.

Lending is done upon a *per annum* basis, and a discount for a year would therefore be natural and legitimate, and could raise no presumption of a corrupt intent; but if the interest for several years should be taken out in advance, it would be in the nature of compounding interest, and might raise a presumption against the lender.

Tyler, Usury, 155; 1 Morse, Banks & Banking, § 50; Perley, Interest, p. 224; Boone, Banking, § 77; *Lloyd* v. *Williams*, 2 W. Bl. 793; *Agricultural Bank* v. *Bissell*, 12 Pick. 586; *Manhattan Co.* v. *Osgood*, 15 Johns. 162; *New York Firemen Ins. Co.* v. *Sturges*, 2 Cow. 664; *Utica Ins. Co.* v. *Bloodgood*, 4 Wend. 652; *Bloomer* v. *McInerney*, 30 Hun, 201; *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631; *Fowler* v. *Equitable Trust Co.* 141 U. S. 399, 35 L. ed. 790.

The taking of full legal interest in advance on a loan upon note and mortgage, for one year, is not usurious.

Tholen v. *Duffy*, 7 Kan. 405; *Ross* v. *Munford*, 36 Neb. 148; *Brown* v. *Cass County Bank*, 86 Iowa, 527; *Leonard* v. *Cox*, 10 Neb. 541; *Cole* v. *Lockhart*, 2 Ind. 631; *English* v. *Smock*, 34 Ind. 116, 7 Am. Rep. 215; *Bacchus* v. *Moreau*, 7 Rob. (La.) 539; *McGill* v. *Ware*, 5 Ill. 21; *Goodrich* v. *Reynolds*, 31 Ill. 491, 83 Am. Dec. 240; *Mitchell* v. *Lyman*, 77 Ill. 526; *Brown* v. *Scottish-American Mortg. Co.* 110 Ill. 235; *Hoyt* v. *Pawtucket Inst. for Savings*, Id. 390; *Telford* v. *Garrels*, 132 Ill. 550; *McKiel* v. *Real Estate Bank*, 4 Ark. 592; *Thompson* v.

7 Kan. 405, but it adds: "In cases where note or bill is given, it is supported by such an overwhelming current of decision, and is a matter of such universal practice, that it may well be considered as engrafted upon the law as a settled rule." In this case it is held that it is lawful to take interest in advavce on a note and mortgage given for one year.

That the practice of discounting by taking interest in advance is "sanctioned by the courts, rather from necessity than upon principle" is stated in Wetmore v. Brien, 3 Head, 723.

That discount taken in advance by a bank is not usurious when taken at the rate allowed by law, is decided in Fleckner v. Bank of United States, 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

Mr. Justice Story, in writing the opinion of the court in Fleckner v. Bank of United States, says: "If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal; and probably few, if any, charters, contain an express provision authorising in terms the deduction of the interest in advance upon making loans or discounts. It has always been supposed that an authority to discount, or make discounts, did, from the very force of the terms, necessarily include an authority to take the interest in advance. And this is not only the settled opinion among professional and commercial men, but stands approved by the soundest principles of legal construction. Indeed, we do not know in what other sense the word 'discount' is to be interpreted. Even in England, where no statute authorises bankers to make discounts, it has been solemnly adjudged that the taking of interest in advance by bankers, upon loans, in the ordinary course of business, is not usurious."

In Marvine v. Hymers, 12 N. Y. 223, the court, sustaining this practice, said: "I have been thus particular in collating the authorities, for the reason that the position which they establish is at variance with the natural reading of the statute, and because the practice referred to seems to stand altogether upon ground of judicial decision. It does not, however, in my opinion, stand less firmly than it would do if it had the sanction of legislative authority."

In Agricultural Bank v. Bissell, 12 Pick. 586, it is said in respect to taking interest in advance: "We think it too well settled by a series of decisions, both in this and other states, to be now questioned, that such practice is not a violation of the statute and does not render the contract usurious."

In deciding that banks are not exempt from a statute against usury by virtue of "banking principles," it is said in Maine Bank v. Butts, 9 Mass. 49, that this expression, if it has any peculiar meaning, is an authority to deduct the interest at the commencement of loans or to make loans upon discounts instead of the ordinary forms of security for an accruing interest, but that individuals have a like authority, although in both cases the construction is a relaxation of the prohibition of a statute against usury, and allows a rate of interest which may be estimated at a small extent beyond 6 per cent per annum.

That merely discounting a note is not necessarily usury, is also decided in Lyman v. Morse, 1 Pick. 295, *note*, although the court says it might be evidence of a design to evade the statute.

Charter authority of a bank, "to receive for discounts . . . at a rate not exceeding 6 per cent per annum" is sufficient to authorise the bank on discounting a note to retain 6 per cent interest on the face of the note as discount. Bank of Alexandria v. Mandeville, 1 Cranch, C. C. 522. In this case the court distinguishes mercantile discount from cases of loan, and says: "I can find no case in which it was ever made a question whether, in a clear mercantile discount, the taking in advance by way of discount the whole interest, upon the whole sum, for the whole time the bill has to run, was within the statute of usury."

It is said in Manhattan Co. v. Osgood, 15 Johns. 162: "It cannot be questioned that it has been the uniform practice of all banking institutions, since their establishment to exact the payment of interest in advance; and it would be an alarming principle to introduce, that all paper thus held should be usurious and void. The law, however, does not require such a decision. It supports a

Real Estate Bank, 5 Ark. 59; *Reed* v. *State Bank*, Id. 198; *Hogan* v. *Hensley*, 22 Ark. 414.

There must be an intention knowingly to contract for and to take usurious interest, for, if neither party intends it, the law will not infer a corrupt agreement.

Jordan v. *Mitchell*, 25 Ark. 260; *Moody* v. *Hawkins*, Id. 195; *Bank of United States* v. *Waggener*, 34 U. S. 9 Pet. 378, 9 L. ed. 168.

Mr. **J. W. House** for appellee.

Hughes, *J.*, delivered the opinion of the court:

The question in this case is, Does the taking in advance of the highest rate of interest allowed by the constitution upon a negotiable promissory note, payable twelve months after its date, constitute usury? The provision of the constitution upon the subject of usury is (art. 19, § 13): "All contracts for a greater rate of interest than 10 per centum per annum shall be void as to principal and interest, and the general assembly shall prohibit the same by law, but when no rate of interest is agreed upon, the rate shall be 6 per centum per annum." The Act of the legislature approved February 9, 1875, only a few months after the adoption of the constitution, upon the subject of discounting commercial paper, mortgages, or other securities, is as follows: "It shall be lawful for all parties loaning money in this state to reserve or discount interest upon any commercial paper, mortgages, or other securities at any rate of interest agreed upon by the parties, said rate not to exceed 10 per cent per annum, etc. The only limitation in this act is upon the kind of paper, so far as it affects the case at bar, and that is that it shall be commercial paper. In *Vahlberg* v. *Keaton*, 51 Ark. 539, 4 L. R. A. 462, this act is held to be constitutional when the paper discounted, or upon which interest is reserved, is three-months paper, used in commercial transactions; the question in that case having arisen upon, and necessarily been confined to, three-months paper. The act of the legislature passed soon after the adoption of the constitution,—in fact at the first session thereafter,—though not obligatory if it violates the constitution, is entitled to serious consideration as a legislative construction of the above provision of the constitution, and, unless it is clear beyond reasonable doubt that it is in conflict with the constitution, it is the duty of the court to sustain it. It is said in *Vahlberg* v. *Keaton*, *supra*, in reference to the constitutionality of the above statute, that "it is also said to be a correct rule in

different and more salutary principle, and more conducive to mercantile convenience, by allowing bankers to receive interest in advance." This case was reversed on other grounds in 3 Cow. 612, 15 Am. Dec. 304.

This decision was followed in Bank of Utica v. Phillips, 3 Wend. 408; also in Utica Ins. Co. v. Bloodgood, 4 Wend. 652.

Taking sixty-four days' discount upon a sixty-day note is held lawful in Bank of United States v. Crabb, 2 Cranch, C. C. 299, but no discussion of the question is made in the case.

The same decision, without discussion, was made in Union Bank v. Gozler, 2 Cranch, C. C. 349; Thornton v. Bank of Washington, 28 U. S. 3 Pet. 36, 7 L. ed. 594, citing also the unreported case of Bank of Washington v. Eliot.

The custom of banks at Washington in former years to give four days of grace is the basis of these decisions.

Such deduction of discount for sixty-three days on a sixty-day note was held valid in Bank of Alexandria v. Mandeville, 1 Cranch, C. C. 552.

For a bank to take interest in advance in discounting a note, is also held lawful in Second Nat. Bank v. Smoot, 2 McArth. 371; Lafayette Bank v. Findlay, 1 West. L. J. 321.

That taking interest in advance on short loans in the usual and ordinary course of business is not usurious, if the interest reserved does not exceed the legal rate, is declared to be well settled in Mackenzie v. Flannery, 90 Ga. 500.

That interest may lawfully be taken in advance is settled law in Illinois. Brown v. Scottish-American Mortg. Co. 110 Ill. 235; Hoyt v. Pawtucket Inst. for Savings, 110 Ill. 390; McGill v. Ware, 5 Ill. 21; Mitchell v. Lyman, 77 Ill. 525; Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786; Maxwell v. Willett, 49 Ill. App. 564.

It is also held in Virginia that it is lawful to take interest in advance upon the whole amount of a note discounted at a bank. Stribbling v. Bank of the Valley, 5 Rand. (Va.) 132.

In the case of Crump v. Nicholas, 5 Leigh, 251, the legality of taking interest in advance by way of discount is also sustained, although the question was as to the validity of the practice of a bank in receiving double interest for every sixty-fourth day on a renewal of notes.

The right to take advance interest on discounts is also sustained in Newell v. National Bank, 13 Bush, 57; Tholen v. Duffy, 7 Kan. 405.

So the legality of taking interest in advance is sustained in State Bank v. Cowan, 8 Leigh, 238, although the chief question in controversy was as to the right to assume sixty days as one sixth of a year, or ninety days as one fourth of a year.

A bill was discounted at the rate of 1 per cent a month in Planters' Bank v. Rivingsville Cotton Mfg. Co., 11 Rich. L. 677, and it was held not usurious, but no discussion of the right to take interest in advance is made, but the question was whether or not the exchange on the bill might be included.

A deduction of interest on the loan of the face of a note which did not draw interest is also held valid on a note given for three days, in Hawks v. Weaver, 46 Barb. 164.

So, deducting in advance the interest for one year computed at the lawful rate on a note due one year after date, is not usurious. Tucker v. Coffin, 7 Tex. Civ. App. 415.

Charter authority to deal in "bullion, gold and silver coin, promissory notes, mortgages, bills of exchange, public stock, or any collateral security," etc., and a subsequent statute prescribing at what rate the bank shall discount "all *bonds*, *notes*, and *bills*, payable," etc., will sustain the discount of bonds running for twelve months. Reed v. State Bank, 5 Ark. 198.

So, statutory authority to discount or loan money is held to include authority to take interest in advance. Haas v. Flint, 8 Blackf. 67.

And again, in Alabama, charter authority to take interest at a certain rate is held equivalent to authority to discount at that rate and to permit taking the interest in advance. Lyon v. State Bank, 1 Stew. (Ala.) 442.

The right to take interest in advance is also recognized in McKiel v. Real Estate Bank, 4 Ark. 502; Thompson v. Real Estate Bank, 5 Ark. 59; Cameron v. Merchants & Mfrs. Bank, 37 Mich. 240.

Taking interest in advance has been so common that the custom has undoubtedly been acquiesced in without objection in a great number of in-

constitutional interpretation, to construe it, not according to its technical meaning, but according to the acceptation of those who adopted it. . . . It must be presumed that it was framed and adopted in the light and understanding of prior and existing laws, and with reference to them. . . . The Statute of 12 Anne provided, in substance, that no person should take, directly or indirectly, for loan of money, etc., interest at a higher rate than 5 per cent per annum, and that all contracts whereby there was reserved or agreed to be paid interest at a higher rate should be utterly void. The question came before the court of common pleas under this statute, and Sir William Blackstone 'conceived that interest may as lawfully be received beforehand for forbearing, as after the term is expired, for having forborne.' *Lloyd* v. *Williams*, 2 W. Bl. 792." And this was followed in *Auriol* v. *Thomas*, 2 T. R. 52; *Marsh* v. *Martindale*, 3 Bos. & P. 154; and *Floyer* v. *Edwards*, 1 Cowp. 112. But "no shift will enable a man to take more than legal interest upon a loan." So it is settled in our state that it is not usury, under our present constitution, to take interest in advance, and that the above act is valid "so far as it relates to transactions of a commercial kind in short-time paper." It is said in the opinion in *Vahlberg* v. *Keaton* that, "although this relaxation of the prohibition against usury was first sanctioned in the transaction of banks and other corporations authorized to make discount, a distinction could not be made against individuals, and it became universal;" citing 3 Parsons, Cont. p. 181; *Maine Bank* v. *Butts*, 9 Mass. 49; *Marsh* v. *Martindale*, *supra*; *New York Firemen Ins. Co.* v. *Ely*, 2 Cow. 706; *Cole* v. *Lockhart*, 2 Ind. 631; *Parker* v. *Cousins*, 2 Gratt. 373, 44 Am. Dec. 388. In the case of *Vahlberg* v. *Keaton*, it is also said that "the clause of the constitution is no broader in its terms, and seems to reach no further in its purpose than the Act of 1838, the Act of Anne, or the acts of the other states, upon the subject. The framers of the constitution intended only to make the prohibition against usury, as it had formerly been understood, a part of the organic law, and not leave it to depend on the discretion of the legislators, or the chances of party ascendency. Such being the purpose of the constitution, and such the meaning given statutes embodying its terms by previous judicial construction, it follows that it will receive the same construction placed upon the similar statutes. This conclusion receives support in the fact that the legislature meeting very soon after its adop-

stances. Although usury was charged in Leonard v. Cox, 10 Neb. 541, on the ground that the money was not received upon the date that interest began to run, the court says no question was made respecting the payment of the interest in advance.

The taking of interest in advance by way of discount, if it could be held to constitute usury, was held to have been legalized by statute in Savings Bank v. Bates, 8 Conn. 511.

In some cases, banks have been expressly authorized by their charter to take interest in advance. So it is recited in McLean v. Lafayette Bank, 3 McLean, 587, that the charter provision was that the corporation should not "take more than 7 per cent per annum in advance."

A constitutional prohibition of usury does not prevent the legislature from authorizing interest to be taken in advance on commercial paper running for a short time. Vahlberg v. Keaton, 51 Ark. 534, 4 L. R. A. 468; Baird v. Hillwood, 51 Ark. 548.

But the Mississippi Code of 1880, allowing interest only upon the amount of money actually loaned, does not allow it to be retained in advance, and it is therefore held that a national bank in that state is subject to a penalty, under U. S. Rev. Stat., § 5198, when it deducts 10 per cent interest in advance. Timberlake v. First Nat. Bank, 43 Fed. Rep. 261.

The right to take interest in advance is expressly given to national banks by U. S. Rev. Stat., § 5197, which fixes the rate at 7 per cent in cases where no rate is fixed by the laws of the state, territory, or district where the bank is located, but providing that such banks shall not take greater interest than the local laws permit, except where such laws fix a different rate for the state banks of issue, and then such rate is allowed to the national banks. A considerable number of decisions have been rendered interpreting this section, but they are not cited here except so far as they touch on the question of taking interest in advance. In many of these cases interest was in fact taken in advance, but the right to do so was not questioned and the decisions turn on other questions, such as the rate of interest.

Taking a portion of the interest on a five years' note in advance is held lawful in Pierce v. Davey, 43 Neb. 45, where the total interest, including that taken in advance, does not amount to more than 10 per cent, as Neb. Comp. Stat., chap. 44, § 1, expressly permits interest not exceeding 10 per cent to be taken "yearly, or for any shorter period, or in advance, if so expressly agreed." In this case less than 8 per cent was taken in advance and notes given drew interest at 7 per cent.

Under the Nebraska statutes where a note as bonus for obtaining a loan is taken, interest for the time of the loan cannot be added to the note in determining whether the amount exceeds what the statute permits. Tepoel v. Saunders County Nat. Bank, 24 Neb. 815.

Under Minnesota Laws 1879, chap. 66, § 8, allowing interest in advance for one year at a rate not exceeding 10 per cent, if a bonus is exacted by the lender it is to be deducted as of the date when it is payable for the purpose of determining whether the borrower is charged usury, and what the borrower receives and retains is to be taken as the basis for computation if the bonus is paid at the time of the loan. Smith v. Parsons, 35 Minn. 520. A note for $8,880 payable one year from date, given in renewal of a note for $8,000, was held usurious under a statute authorizing 10 per cent interest, although interest could be lawfully taken in advance. First Nat. Bank v. Davis, 108 Ill. 658. Two judges dissented from this decision on the ground that the amount of the note was no more than might have been realized from lawful interest had the interest for one year been paid in advance.

So, under a statute allowing by express written agreement a rate of interest not exceeding 10 per cent, a note with interest at 10 per cent discounted by deducting 10 per cent of the interest to accrue as well as of the principal, was held in Carolina Sav. Bank v. Parrott, 30 S. C. 61, to be usurious, in the absence of an express written agreement that interest should be deducted in this manner from the interest as well as from the principal. In this case the note was for a little less than one year, and the interest upon the interest which was held usurious amounted to $15.72.

Where the maker of a note and mortgage for

tion, dominated by the purpose that controlled in its adoption, and charged with the duty of carrying it into effect, enacted the statute referred to." We have quoted largely from the above case because we consider it a well-considered and sound opinion, throwing much light upon the question under consideration here, supported, as we find it to be, by the numerous cases referred to in it. It will be observed that the opinion is confined to "short-time paper" and in "transactions of a commercial kind." The opinion does not undertake to define "transactions of a commercial kind in short-time paper," because it was unnecessary, for the paper was unquestionably of that kind in that case, being three-months paper,—a negotiable promissory note.

The statute above quoted uses the term "commercial paper," and the note in the case at bar was commercial paper,—a negotiable promissory note, payable in twelve months from its date, for $2,500; and the interest, $250, was taken out in advance, and only $2,250 paid to the borrower. Now, if this transaction was not usurious, by reason of the length of time the note, out of which the interest was taken in advance, had to run, it was not usurious. This is the only possible question in the case. In the following cases taking interest at the highest legal rate in advance, on six-months paper, was held not to be usurious, viz.: *Utica Ins. Co.* v. *Bloodgood*, 4 Wend. 652; *Bloomer* v. *McInerney*, 30 Hun, 201. In the following cases the taking of the highest legal rate of interest in advance on one-year paper was held not to be usurious, viz.: *Cole* v. *Lockhart*, *supra*; *Mitchell* v. *Lyman*, 77 Ill. 595; *McGill* v. *Ware*, 5 Ill. 21. In the following cases the highest legal rate of interest was reserved in advance on paper having from twenty-three months to five years to run, and this is held not to be usurious, viz.: *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 339, 5 L. ed. 631; *English* v. *Smock*, 34 Ind. 116, 7 Am. Rep. 215 (semiannually in advance for five years); *Brown* v. *Scottish-American Mortg. Co.* 110 Ill. 235 (semiannually in advance for five years). See also *Hoyt* v. *Pawtucket Inst. for Savings*, Id. 390; *Bacchus* v. *Moreau*, 7 Rob. (La.) 539 (semiannually in advance for five years). In *McGill* v. *Ware*, 5 Ill. 29, the court, after reviewing the cases in England and America upon this question, said: "I have reviewed these decisions to show that the first impression of the courts was, that it was usurious to take interest in advance, as

$600 under an oral agreement to pay 12 per cent the first year and 9 per cent thereafter, immediately on receiving the money paid back $36 as he was required to do by the lender, and afterwards paid at the rate of 9 per cent per annum, it was held that the contract directly secured the sum of $36, for unlawful interest. Minot v. Sawyer, 8 Allen, 78.

In England, deduction of interest in advance is also upheld, although it was said in an early case to be unlawful.

Thus, that it would be usurious to require advance payment of interest is an *obiter* statement made by Popham, J., in deciding that it was not usurious to make interest payable semiannually. Barnes v. Worledge, Noy, 41, Yelv. 30, and Cro. Jac. 25.

Blackstone, J., said in Lloyd v. Williams, 2 W. Bl. 792: "Interest may as lawfully be received beforehand for forbearing, as after the term is expired, for having forborne." While Gould, J., was inclined to think that the amount of the original loan was only that which was retained by the borrower. But the decision in this case did not turn on the right to take interest in advance.

In Floyer v. Edwards, Cowp. 112, where the actual decision was that a bona fide sale was not usurious, the court declared that bank discount taken in advance is not usurious, although by nice calculation it is in excess of the legal rate, and while it is said that usage will not protect usury, it is admitted that it goes a great way to explain a transaction.

The legality of discount by taking interest in advance is assumed in later cases in which other questions are contested, as, for instance, the effect of giving to the borrower drafts not yet due, instead of cash. Maddock v. Hammett, 7 T. R. 184; Hammet v. Yea, 1 Bos. & P. 144.

b. By persons other than banks.

Individuals as well as banks have the right to take interest in advance. Vahlberg v. Keaton, 51 Ark. 534, 4 L. R. A. 462. It is said in this case: "Although this relaxation of the prohibition against usury was first sanctioned in the transaction of banks and other corporations authorized to make discount, a distinction could not be made against individuals and it became universal."

The right of a private individual to deduct interest at the time of a discount on discounting commercial paper is sustained in Parker v. Cousins, 2 Gratt. 372, 44 Am. Dec. 388.

Taking interest in advance, by an individual as well as by a corporate bank, is held lawful in Anderson v. Schenck, 1 N. Y. Legal Obs. 107.

Taking interest in advance was held lawful in the case of a loan by a private individual, in Cole v. Lockhart, 2 Ind. 631.

The taking as discount on a note of interest in advance is not usury whether it is done by a bank or by corporations or other persons having no banking powers. New York Firemen Ins. Co. v. Sturges, 2 Cow. 664; New York Firemen Ins. Co. v. Ely, Id. 678; Bank of Utica v. Wager, Id. 712, affirmed in 8 Cow. 398; Bank of Utica v. Smalley, 2 Cow. 770, 14 Am. Dec. 526; International Bank v. Bradley, 19 N. Y. 245; Marvine v. Hymers, 12 N. Y. 223.

But, on the other hand, a Connecticut case decides that a charter provision that a corporation shall not be authorized to discount notes or exercise any banking privileges is held to make it unlawful for the company to take a note for a loan and receive the interest thereon in advance. Philadelphia Loan Co. v. Towner, 13 Conn. 249. This decision is based on the theory that, "the discounting of notes by receiving the interest in advance for the time they have to run being one of the peculiar privileges of a banking company," such privilege was one that the legislature intended this company should not possess.

So, in Ohio, express authority by statute given to banks and other corporations to reserve interest in advance was regarded in the case of Penn Mut. Ins. Co. v. Carpenter, 49 Ohio St. 260, as furnishing a strong implication that other persons were not entitled to take interest in this way.

And in Metzger v. Wiechers (Hamilton Co. Dist. Ct.) 4 Cin. W. L. B. 549, a note given to an individual lender calling for 8 per cent interest on its face amount from which the interest was deducted in advance was held usurious.

evidenced by the first *dicta* and decisions; and, also, that the courts very early decided it was not usury, under the Statutes of Henry VIII., and have followed up that decision uniformly down to this period, under all the English and American statutes. Such a long course of uniform decisions, for upwards of two hundred years, ought to settle the question, more particularly so with us, as those decisions were made upon statutes precisely like our own, as to the mode of reserving interest, and which were known before its passage. . . . If the question were now new, and the business of the country not so deeply involved in transactions of the kind before named, I believe it would be differently ruled." The note discounted in that case had one year to run, and interest at the highest legal rate was taken out in advance, and, yielding to authority, the court held that it was not usury. The proof in the case at bar tends to show that it is customary in the vicinity where this note was executed to pay debts in the fall or winter season, when the proceeds of the cotton crop can be realized; and that notes for the payment of money are made in reference to this, for convenience of trade. And it may be supposed that the business of the country is largely involved by reason of this custom, which, in our judgment, ought not to be ignored in this opinion. In *Fleckner* v. *Bank of United States*, *supra*, a note to the bank, dated the 26th of March, 1818, payable the 1st of March, 1820, was discounted for the full term it had to run by taking out or reserving in advance the interest at the highest legal rate allowed by law, and it was held that this was not usury. In discussing the question, *Judge* Story, who delivered the opinion of the court, said: "If a transaction of this sort is to be deemed usurious, the same principle must apply with equal force to bank discounts generally, for the practice is believed to be universal." He also said, in substance, that taking interest in advance is not usury in bankers or others. It is so well settled that we deem it unnecessary to cite the numerous cases to show that it is the consensus of judicial opinion that it is not usury for a bank to discount commercial paper in the usual course of business by taking out the interest in advance, at the highest legal rate, even in the absence of a statute allowing it; this being the universal custom, which has grown into law, and in reference to which the provision of our constitution upon the subject of usury is presumed to have been framed and adopted.

c. *On instruments other than bills and notes.*

A mortgage was upheld in Rose v. Munford, 36 Neb. 148, when it stipulated for interest in advance, but the case turned on the construction of Neb. Comp. Stat., chap. 44, § 1, which expressly authorizes interest in advance.

A bond given to a bank in renewal of previous obligations was sustained in Magruder v. State Bank, 18 Ark. 9, when interest was added to the face of the bond as part of the principal.

Taking interest in advance on a bond and mortgage is also held valid in Fowler v. Equitable Trust Co. 141 U. S. 384, 25 L. ed. 786.

So on bonds it was held lawful to take interest in advance by way of discount, in State Bank v. Hunter, 1 Dev. L. 100; Reed v. State Bank, 5 Ark. 198; Magruder v. State Bank, *supra*.

See the next division as to periodical payments.

II. *In periodical payments.*

Taking interest annually in advance on a note for three years was held usurious in Penn Mut. Ins. Co. v. Carpenter, 40 Ohio St. 260. The court said that express authority by statute in that state had been given to banks and other corporations to reserve interest in advance, and this furnished a strong implication that it was denied to all others.

But nearly all cases have upheld payments of interest in advance when interest was paid periodically.

In Illinois making annual interest on a note payable sixty days previous to the lapse of each year does not make the note usurious, as it is well settled interest may be lawfully made payable in advance. Telford v. Garrels, 132 Ill. 550.

Payment of interest in advance or semiannually is declared not to be usurious, in English v. Smock, 84 Ind. 115, 7 Am. Rep. 215. In that case such interest is held invalid in case of bonds issued under a statute which expressly required the interest to be paid at the end of the year.

A stipulation by a purchaser of property who gives his note therefor, that he shall have the option to postpone payment of the note for five years after its maturity upon paying the interest upon it annually in advance, is not usurious. Bacchus v. Moreau, 7 Rob. (La.) 589.

An agreement in a bond and mortgage to pay interest semiannually in advance, which was not intended to evade the statute against usury and does not name any precise sum, is held valid, but the court raised the question whether or not the interest should be computed at the full rate as if it were paid at the end of the time, or the interest upon the interest for such period be deducted. The court said that the rule in regard to taking interest in advance grew up in regard to commercial paper, and seems never to have been raised as to bonds and mortgages, and adds: "So the courts must now make a rule. And the rule that they make should be in harmony with that which has been made already. Bloomer v. McInerney, 30 Hun, 201.

The fact that interest is paid half yearly in advance on a bond and mortgage is held not to make it usurious, in Hoyt v. Bridgewater Copper Min. Co. 6 N. J. Eq. 253, affirmed in Bridgewater Copper Min. Co. v. Hoyt, Id. 625. In this case the chancellor said: "I am not aware that this question has ever been presented to our courts; and I have found no case in which the distinct question has ever been decided." But he remarked that it was held in New York and Massachusetts that other persons as well as banks might take interest in advance on discounting a note in their usual course of business, "unless the time it has to run is so long as to afford a presumption that usury was intended." He adds: "If the interest for the whole time these bonds had to run was to have been paid in advance, perhaps the court might consider that the parties made the transaction the subject or occasion of a contract between them for the loan or forbearance of money at an usurious rate of interest."

The question of usury in respect to payments on interest semiannually or at other period less than one year is not considered here, except so far as payments in advance are concerned. So with many other questions of usury, such as the withdrawing of the principal from the borrower for a time after the date from which he begins to pay interest, or the giving to him of depreciated money

There are numerous decisions of courts of last resort in other states of the Union which, in effect, hold that there is no distinction to be taken between discounting paper used in commercial transactions, whether it has a long or a short time to run. In the early cases in England, discounting paper in advance was held to be usurious, without regard to the time it had to run; and the right to do so grew out of the custom of banks in commercial transactions, for the convenience of trade. The banks confined their discounts to paper having from thirty to ninety, and sometimes one hundred and twenty, days to run; but it seems that as the commercial transactions became more extended and numerous, and the necessities and convenience of different localities demanded, the custom widened and expanded to meet the growing and ever-changing conditions of commerce and trade. As is shown by many decided cases in other states, the custom of discounting commercial paper having a year, and even more, to run was clearly recognized, and such transactions were held not to be usurious, where the highest legal rate of interest was taken in advance, before the adoption of our constitution. As our constitution was adopted before this question had arisen in our state or in this court, it is not a harsh presumption that the provision of the constitution above quoted was framed and adopted in reference to a custom well established in other states, and recognized as not in violation of laws similar to our own upon the subject of usury. It must be understood that the legislature thought so when the act above quoted was passed. It cannot be presumed that the legislature intended to override the constitution. It is easy to perceive the policy that might have controlled the legislature in passing the act quoted. Our people were an agricultural people almost exclusively. They were engaged in the production chiefly of cotton, the great staple of the south, which as the proof shows, is marketed in the fall and winter seasons; and they were in the habit of making their obligations to fall due at a time of the year when they could realize upon their crops. Their general custom was to make their notes and obligations for the payment of money to become due in the fall and winter, and for the additional reason that it is more convenient and less troublesome to the borrower to borrow money on twelve months' time, and pay the interest in advance, than to borrow on three months' time, and renew every three months for twelve months, and have the interest taken out at each renewal in

which is to be repaid and bear interest as if it were worth its face value.

A note for $500 including promise to pay $15 interest every thirty days in advance was held valid in Reddish v. Watson, 6 Ohio, 510, on construction of the Ohio Act of 1824, which was said not to prevent contracting for any rate of interest. But this case was overruled in Lafayette Ben. Soc. v. Lewis, 7 Ohio, 80, holding that a contract to pay more than 6 per cent per annum could not be enforced under that statute.

An agreement for semiannual interest in advance on a bond given to the internal improvement commissioner in his official character for money borrowed, is held usurious in Hogan v. Hensley, 22 Ark. 413, on the ground that the privilege of taking advance interest has been uniformly confined to bankers and those dealing in bills of exchange or promissory notes by way of trade, while it is the commissioner's duty to loan the public funds and it was not contemplated that bonds taken by him should circulate as negotiable instruments for the benefit of trade.

III. *For what length of time allowed.*

What the effect would be of extending the time of the obligation so long that the interest that would accrue upon it would equal the principal, and then attempting to take the interest in advance, has not been decided. In Pierce v. Davey, 43 Neb. 45, which was a case of taking part of the interest in advance on a five-year note it is said: "Whether the doctrine that interest may be paid in advance or retained from the amount loaned would be held to cover transactions wherein the amount loaned and the time of its existence would, by the application of such rule, and allowing the interest to be paid or retained in advance, at the inception of the loan, take it all, or so near it as to leave very little for the party borrowing, we need not say. Such is not the case before us."

But in Rose v. Munford, 36 Neb. 148, it was held that under Neb. Comp. Stat., chap. 44, § 1, allowing interest at 10 per cent "yearly, or for any shorter period, or in advance, if so expressly agreed," the right to stipulate for interest in advance does not depend upon the time the loan runs. To hold that it does would be interpolating words into the statute. In this case a mortgage running for ten years with one note for the first year's interest which itself bore 10 per cent interest from date, and nine coupon notes each for 10 per cent of the face of the mortgage, one of them due each year thereafter and bearing 10 per cent interest from its maturity, was held not to be usurious, although it is said to be the settled law of the state that no interest would be allowed on such coupons.

So, in Fowler v. Equitable Trust Co., 141 U. S. 384, 25 L. ed. 786, the opinion of the court by *Mr. Justice* Harlan said: "Whether that doctrine would apply where the loan was for such period that the exaction by the lender of interest in advance would, at the outset, absorb so much of the principal as to leave the borrower very little of the amount agreed to be loaned to him, we need not say. The present case does not require any expression of opinion upon such a point, for the interest reserved in advance on the loan . . . was only of 3 per cent out of 10 per cent, and a reservation to that extent, it would seem, is protected by the decisions of the state court."

In holding that it is legal for banks to deduct the legal interest from the face of a note or bill discounted, the court, in Newell v. National Bank, 12 Bush, 57, says: "This practice must be confined to short-time paper, and the instrument discounted or upon which the interest is taken in advance must be such as will circulate in the course of trade, or such as by statute has been placed upon the footing of that character of paper."

In State Bank v. Hunter, 1 Dev. L. 100, holding discount lawful on a bond, the court said: "The rule extended completely shows its impropriety by producing a result perfectly absurd," and instances the case of a note for sixteen years and eight months which would be all absorbed in discount if the interest were taken in advance, but the court held that "an exposition legislative, judicial, and popular has been given to the law which the court is bound to respect."

It has been said that taking interest in advance on paper running for a long time raises a presump-

advance. It may reasonably be supposed that a consideration of the convenience and the saving of trouble to the borrower by making long-time paper and paying interest in advance, and the fact that this was held in other states not to be usurious, under laws similar to our own upon the subject of usury, influenced the legislature to provide that this might be done in discounting any commercial paper. Commercial paper is defined to be "bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of money, which, by their form and on their face purport to be such instruments as are by the law merchant recognized as falling under the designation of commercial paper." Black, Law Dict. 226, *Commercial Paper*. The note in this case falls within this definition, and within the above act of the legislature.

In discussing the question whether it is usurious to take in advance the highest legal rate of interest in discounting commercial paper, *Judge* Brewer said, in *Tholen* v. *Duffy*, 7 Kan. 408: "It seems difficult upon principle to sustain such a transaction. But in cases where note or bill is given, it is supported by such an overwhelming current of decision, and is a matter of such universal practice, that it may well be considered as engrafted upon the law as a settled rule." And he added: "It was so settled before the passage of our interest law; and if the legislature had intended to change this rule of construction, such intention would have been plainly expressed." The same may be said substantially in reference to the custom of discounting negotiable or commercial paper having one year to run by taking out the highest legal rate of interest in advance, as affected by our constitution. The custom was well established before our present constitution was adopted. It will be observed that some of the cases cited in *Vahlberg* v. *Keaton* to sustain the position that it is not usury to take out in advance the highest legal rate of interest on discounting three months' paper equally sustain the position that it does not constitute usury to so discount commercial paper having six months or a year to run. The only question decided in *Hogan* v. *Hensley*, 22 Ark. 413, was that a bond given to an internal improvement commissioner, contracting to pay interest at the rate of 10 per cent semiannually in advance, was not negotiable or commercial paper, and that the agreement was usurious and void. This was the question in that case. The case at bar is entirely different, for there can be no dispute that the note in this case is ne-

tion of usury. Thus, where a right to redeem from an annuity existed on making a payment of £4,083, 6s., 8d., and to this was added a cash loan of £166, 13s., 4d., and then the further addition of £750, as interest for three years on £5,000, and in connection with the redemption of the annuity a bill for £5,000, due in three years, was given, it was held usurious. The court said: "The discount of such a bill as this, not coupled with the transaction respecting the annuity, would have been almost sufficient to have afforded a presumption of usury; but coupled as it is with the redemption of this annuity, it is impossible to wink so hard as not to see what the real transaction is." Marsh v. Martindale, 3 Bos. & P. 154. It will be observed that like other English cases this turns on the corrupt intent of the parties which in some of the American cases is immaterial, although often important in determining whether a transaction fair on its face is really a cover for usury.

Most of the cases actually decided have been cases of short-time instruments.

Thus, thirty-day notes with an agreement to continue the discount for eighteen months were held lawfully discounted by taking the interest in advance in Stribbling v. Bank of the Valley, 5 Rand. (Va.) 132.

While notes for sixty days were discounted in Agricultural Bank v. Bissell, 12 Pick. 586; International Bank v. Bradley, 19 N. Y. 245; Crump v. Nicholas, 5 Leigh, 251; State Bank v. Cowan, 8 Leigh, 238; Parker v. Cousins, 2 Gratt. 372, 44 Am. Dec. 388; Bank of United States v. Crabb, 2 Cranch, C. C. 299; Union Bank v. Gozier, Id. 349; Bank of Alexandria v. Mandeville, 1 Cranch, C. C. 552; Thornton v. Bank of Washington, 28 U. S. 3 Pet. 36, 7 L. ed. 594,—citing also the unreported case of Bank of Washington v. Elliot.

The notes discounted were for ninety days in Second Nat. Bank v. Smoot, 2 McArth. 371; Dyon v. State Bank, 1 Stew. (Ala.) 442; Marvine v. Hymers, 12 N. Y. 223; Manhattan Co. v. Osgood, 15 Johns. 162; Bank of Utica v. Phillips, 3 Wend. 408; New York Firemen Ins. Co. v. Ely, 2 Cow. 678; Bank of Utica v. Wager, Id. 712; Bank of Utica v. Smalley, Id. 770, 14 Am. Dec. 526.

The notes were for three months in Vahlberg v. Keaton, 51 Ark. 534, 4 L. R. A. 462; Baird v. Millwood, 51 Ark. 548.

A bond for eighty-eight days was discounted in State Bank v. Hunter, 1 Dev. L. 100.

The note was for four months in New York Firemen Ins. Co. v. Sturges, 2 Cow. 664; Newell v. National Bank, 12 Bush, 57.

The note was for six months in the case of Utica Ins. Co. v. Bloodgood, 4 Wend. 652; Haas v. Flint, 8 Blackf. 67.

On a note for one year, interest in advance was held lawful in Mitchell v. Lyman, 77 Ill. 525; Cole v. Lockhart, 2 Ind. 631; Tucker v. Coffin, 7 Tex. Civ. App. 415; Maxwell v. Willett, 49 Ill. App. 564.

A note and mortgage were for one year in Tholen v. Duffy, 7 Kan. 405.

A bond due in one year, given to a bank as a renewal of previous obligations, is not usurious because the year's interest is added to the face of the bond as part of the principal, where the bond is made payable without interest until after maturity. Magruder v. State Bank, 13 Ark. 9.

One year's interest was deducted in advance on a note for five years, in the case of McGill v. Ware, 5 Ill. 21, and notes received for the interest of the succeeding years, one of them due at the beginning of each year.

The note was for a little less than two years in Fleckner v. Bank of United States, 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

Notes and a trust deed due in five years were given in Hoyt v. Pawtucket Inst. for Savings, 110 Ill. 390; also in Brown v. Scottish-American Mortg. Co. 110 Ill. 235.

On bonds and mortgage due five years after date interest was taken in advance in Fowler v. Equitable Trust Co. 141 U. S. 384, 35 L. ed. 786.

So, the loan was for five years in Tepoel v. Saunders County Nat. Bank, 24 Neb. 515.

The case of BANK OF NEWPORT v. COOK thus appears to be clearly within the authorities.

R. A. R.

gotiable paper governed by the law merchant. The rule laid down in the American and English cases is that there must be a corrupt agreement by some device or shift to take or reserve a greater rate of interest than is allowed by law, and that payment or receipt of usurious interest is prima facie evidence of a corrupt agreement. *New York Firemen Ins. Co.* v. *Ely*, 2 Cow. 678. The note in this case was drawn by the appellee, or, at her instance, by her attorney, payable twelve months after date, to bear interest at the rate of 10 per cent per annum, after maturity only, and was presented to the bank for discount, and was discounted by the bank, for her convenience, by taking out the highest legal rate of interest in advance. We find that there is no evidence of a corrupt agreement in this case; that the transaction was in accord with a custom well established before our constitution was adopted, and with the act of the legislature. We therefore hold that the taking or reserving of the highest legal rate of interest in advance on negotiable paper having twelve months to run is not usurious.

The decree in this case is reversed, and the cause is remanded to the circuit court, with directions to enter a decree for the foreclosure of the mortgage.

Battle, *J.*, dissenting:

The practice of discounting bills or notes by deducting from their face the highest rate of interest allowed by law for the whole time which must expire before they become due is undoubtedly usurious in the strict sense of the word; for the lender receives interest on the whole amount of the principal for the use of only a part. "But this practice," says Mr. Parsons, in his work on Contracts, "began with our banks, and was soon so firmly established that it was sanctioned by the courts almost of necessity." It was allowed and tolerated by the courts for the benefit of trade, and was confined to such paper as will, and usually does, circulate in the course of trade.

In *Marsh* v. *Martindale*, 3 Bos. & P. 158, *Lord* Alvanley expressly admits this to be the established law in relation to the negotiation of bills of exchange made in the usual course of trade; but he held the transaction in that case to be usurious, principally because the bill discounted was a bill at three years. He says: "The jury were impressed with a notion that a bill at three years was such a bill as no reputable man would discount; though it was said that some East India bills of two years' date had been discounted. Indeed, *Lord Chief Justice* Eyre seems to have thought that the length of the date of a bill was sufficient to afford a presumption that the discount was intended as a cover for a loan. And if we consider the effect of discounting bills at very long dates, the strength of this presumption will be manifest, for, if the practice be carried to a great length, the interest will annihilate the principal."

After a short review of the English cases in *New York Firemen Ins. Co.* v. *Ely*, 2 Cow. 703, *Mr. Justice* Sutherland said: "The principle to be extracted from these cases, and from a variety of others which might be cited in confirmation of them, I hold to be this: That the taking of interest in advance is allowed for the benefit of trade, although by allowing it more than the legal rate of interest is in fact taken; that, being for the benefit of trade, the instrument discounted, or upon which the interest is taken in advance, must be such as will, and usually does, circulate or pass in the course of trade. It must, therefore, be a negotiable instrument, and payable at no very distant day; for, without these qualities, it will not circulate in the course of trade. Under these limitations the taking of interest in advance, either by a bank, or incorporated company without banking powers, or an individual, is not usurious."

In *Vahlberg* v. *Keaton*, 51 Ark. 541, 4 L. R. A. 462, this court said: "As the American states have adopted the English statute as a model, so the American courts have adopted the construction given it by English courts. So we find the statement that 'the courts uniformly hold, at the present day, that the interest for ordinary paper, having the usual time to run, such as is the custom of banks, may be taken in advance, by way of discount, and not subject the paper to the taint of usury.'"

It is obvious that the right to take interest in advance can be exercised to such an extent that any amount of excessive interest may be collected, and our usury laws will cease to be a protection to the necessitous borrower. Thus, if A discounts the note of B for $2,500, payable at ten years, by taking 10 per cent per annum interest in advance for the whole time the note has to run, he would take the whole of the $2,500, and B would not receive a dollar, and A would have his note. There must be some limit to the right. Where shall it be? It seems to me it should be confined within the limits existing when first sanctioned by the courts—that is to say, to such short-time paper as will, and usually does, circulate or pass in the course of trade, according to the long-established custom of banks. It should not be extended further than it was when the courts, constrained by the necessities of trade, first sanctioned it. In speaking of it, Mr. Parsons says: "There seems . . . to be a strong disposition to limit this practice to short paper, or at least not to apply it to long loans or discounts." 3 Parsons, Cont. *131. There is no valid reason for extending it further. *Newell* v. *National Bank*, 13 Bush, 57. We should keep within the limits of the rule established by *Vahlberg* v. *Keaton*, *supra*. See *Smith* v. *Parsons*, 55 Minn. 520.

I think the note and mortgage in question are usurious and void.

Riddick, *J.*, concurs with me in this opinion.

MISSISSIPPI SUPREME COURT.

George M. HODGES, City Tax Collector, *Appt.*,
v.
WESTERN UNION TELEGRAPH CO.

(.....Miss.....)

A city ordinance exacting a specified sum as rent from a telegraph company for the entry upon and occupation of the streets with its poles is void under Laws 1886, p. 93, § 1, authorizing companies to operate telegraph lines on and along all streets, without providing for compensation to the cities.

(May 20, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Lauderdale County, in favor of defendant in an action brought to enforce payment of a tax. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Cochran & Boseman** for appellant.

Messrs. **Mayes & Harris** for appellee.

Whitfield, J., delivered the opinion of the court:

The ground upon which the ordinance of the city of St. Louis, of which the one in this case is said to be a copy, is placed in *St. Louis* v. *Western U. Teleg. Co.*, 148 U. S. 92, 37 L. ed. 380, and 149 U. S. 465, 37 L. ed. 810, is that the city of St. Louis is the absolute owner of the fee in its streets, and the charter powers of the city are "self-appointed." It is expressly declared that St. Louis occupies "a unique position." "It does not, like most cities, derive its powers by grant from the legislature; but it framed its own charter under express authority from the people of the state, given in the constitution." And again it is said: "This charter is an organic act,—so defined in the constitution,—and is to be construed as organic acts are construed. The city is, in a very just sense, an *imperium in imperio*. Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter." Treating the city, therefore, as the absolute and uncontrolled proprietor of its streets, rent, which is, like toll, a "demand of proprietorship," and not like a tax, "a demand of sovereignty," was declared to be within the power of the city to exact. Meridian occupies a very different attitude as to its streets and its power over them. All the power which it has over its streets is derived from the legislature, whose power over them is "supreme and transcendent," to use *Judge* Dillon's language. We are not advised by the record whether the fee in the streets of Meridian is in the city, or whether the city has a mere easement; but it is not denied that the power of the city to deal with the streets is derived wholly from a charter granted by the legislature, and hence, of course, under legislative control. The legislature, by the Act of 1886 (Laws 1886, p. 93), § 1, provided "that any telegraph company, chartered by the laws of this, or any other state of the United States, shall upon making due compensation, as hereinafter provided, have the right to construct, maintain, and operate telegraph lines . . . on, across, and along all . . . streets, . . ." etc., "provided that 'there shall be no interference with the ordinary use of such streets,' etc., or with 'the convenience of any land owner, more than may be unavoidable.'" The following sections provide for compensation to turnpike and railroad companies and private owners for the use and occupation of their "ways," "structures," or lands. No compensation was provided for cities, in case their streets should be used; but the use and occupation of so much of the streets of cities as may be reasonably needed for the construction and maintenance of telegraph poles and telegraph lines is expressly authorized, without compensation to the state or to the cities,—municipal subdivisions of the state. Without this act the appellee could not have entered upon the streets of the city of Meridian for the purpose of constructing and maintaining its telegraph lines; and under it, it could only have so entered and occupied its streets, with its poles, by virtue of the right of eminent domain, upon due compensation first made, had not the terms of the act clearly shown that such compensation was dispensed with. Had such compensation been required, such damages awarded, in such exercise of the delegated right of eminent domain, such compensation would have been made, such damages awarded, for the use and occupation of said streets by said telegraph company with its poles, wires, etc. And it is this identical use and occupation for which the city seeks here to recover rent under the ordinance in question. The ordinance is entitled: "An ordinance to fix the rent charged telegraph . . . companies . . . for the use of the streets," etc. It is manifest that if the state, having "supreme and transcendent" power over the streets of Meridian, granted the appellee the right to so use and occupy the streets without compensation to the state or the city, then the city of Meridian, a political, municipal subdivision of the state, cannot, by ordinance, affect the license thus granted. It is revocable at the pleasure of the state, but not of the city, unless granted such power by the state, so far as affects it.

It is to be noted that this is not a tax. The license is a mere permission to enter the streets of the city, and so use and occupy them, without paying the damages usually assessed and paid, when the right of eminent

NOTE.—That municipal charges for poles and wires of a telegraph company placed in its streets are not precluded by the interstate character of the business, is shown by Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161, and *note*. The Maryland case was affirmed by the Supreme Court of the United States in 156 U. S. 210, 39 L. ed. 399. The present case is in no way inconsistent with the doctrine there declared, as it turns on the relation of the municipality to state authority.

domain is used for condemning rights of way in streets, etc. It is a permissive statute. What it grants is a mere license, revocable by the state. 148 U. S. 102, 37 L. ed. 384. It was not intended to exempt the appellee from the "ordinary burdens of taxation." But this is not a tax, and the scheme for the taxation of telegraph companies is elsewhere fully provided. Code 1892, §§ 3880, 3885. And this scheme is directed to be so arranged that "each municipality shall receive its just share of such taxes, proportionately to the amount of property therein situated."

The act conferring the charter powers, it will be noted, was passed prior to the Act of 1886,—April 9, 1874. We have nothing to do with the wisdom of the Act of 1886, doubtless passed at the instance of telegraph and telephone companies, but under its provisions, feel constrained to affirm the judgment. See Dill. Mun. Corp. 4th ed. §§ 701 *et seq.*; *People* v. *Kerr*, 27 N. Y. 188; *Meriwether* v. *Garrett*, 102 U. S. 472, 26 L. ed. 197; 15 Am. & Eng. Encyclop. Law, p. 988, and authorities cited.

We are not to be understood as denying or restricting the power of the city to regulate the use of its streets within legal limits. See Elliott, Roads & Streets, pp. 332, 333. This is not an ordinance regulating the use of its wires and poles by the company, nor the use of the streets by the company in the occupation of them by poles, but one exacting a certain sum as rent, pure and simple, from the company, for the identical entry upon and occupation of the streets by the company, with its poles, which it was authorized by the Act of 1886 to make, without compensation to the state or city, in the exercise of the right of eminent domain. The act, it will be observed, provides that such use of the streets must not interfere with their ordinary use as such. In *Clinton* v. *Cedar Rapids & M. R. R. Co.*, 24 Iowa, 469, Dillon, *Ch. J.*, speaking for the court, says: "By virtue of these charter provisions, and this ownership of the fee, the city claims that it has the exclusive control of the streets, and therefore it may consent to or prohibit, as by its common council it shall deem best for the public interest, the use of its streets for railway purposes, and that the courts cannot interfere with or control the decision of the common council respecting this matter, whatever that decision may be. If these were all the provisions of the law applicable to this subject, the position of the city might, and, I think, would, be well taken." He then proceeds to notice two other statutes of similar purport with our Act of 1886, *supra*, as affecting this question, and then, at page 473, continues: "But it is a mistake to suppose that, where the fee of the streets is in the city, in trust for the public, the city is constitutionally and necessarily entitled to compensation, the same as a private proprietor holding the fee. . . . The constitutional provision is that private property shall not be taken for public use without just compensation to the owner. . . . The streets of the city are not the private property of the corporation in such a sense that the legislature cannot, so far as regards the corporation, authorize the same to be used for any public purpose for which it may see fit, unless it makes compensation to the city for such use." We refer specially to the entire reasoning in this case. Of course, the use of the streets by the telegraph company is "subject to all reasonable police and other regulations," in *Judge* Dillon's language in another part of this opinion; and, as we have shown, no question of taxation is here involved, nor any private rights of any "land owner." The case of *Donnaher* v. *State*, 8 Smedes & M. 649, though not referred to by counsel, has not escaped our careful attention. We are disposed to think that the decision in that case may possibly be upheld on the ground that, as urged by the distinguished counsel for appellee,—the late *Judge* William Yerger,—the charter of the railroad company expressly stipulated that the company could not make its road "so as to interfere with the passage of any of the public streets of the town;" from which it might have been argued, as he did argue, that the tracks could not be laid in the streets at all, so far as the railroad's charter power to do so was concerned. It would seem that the court, however, went rather on the ground that, as stated in the opinion, "the Statute of 1823 reserved to the legislature the right to dispose of the entire two sections of land designated by the commissioners to locate the seat of government, except the streets," etc., and hence that "this vested the title to the streets in the corporation of the city, and deprived the legislature of the power to dispose of them, except so far as the *jus publicum*, or the right of eminent domain, might authorize it." If the decision is sound,—and it must be remembered that *Mr. Justice* Thacher dissented,—it is only on the first ground. Otherwise the decision, like the general language of the opinion of the majority of the court, speaking through *Mr. Justice* Clayton, is justly amenable to the criticism pronounced on it by *Judge* Dillon in the second volume (4th ed.) of his work on Municipal Corporations (sec. 701, *note 3*, p. 834), where he says: "A different view has been sometimes taken. Thus, in *Donnaher* v. *State*, 8 Smedes & M. 649, the court decided that, where the statute under which a city was laid out vested the title of the streets in the city, such streets cannot be subjected to the use of a railroad without the consent of the city, unless the damages to the city are assessed and paid. In other words, the legislature can only interfere with the use of the streets of the city by its exercise of the right of eminent domain; and if it exercise this right it must compensate the city. But this conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous;" citing authorities. "The ground on which the city of Jackson stands was given to the state of Mississippi by the general government," as said by *Judge* Yerger in his brief; and this fact, connected with the "reservation of the right of the legislature to dispose of the entire two sections of land, except the streets," etc., hereinbefore adverted to as emphasized by the court, seems to have confused *Judge* Clayton,—at least to have left

him with rather indistinct conceptions of the power of the legislature, generally, to deal with the streets of a city. For we find him saying (page 660) that "this principle [of compensation being made for private property taken for public use] applies as forcibly to the streets, in this instance, as to private property in other cases;" seemingly holding that the streets of Jackson are its "private property," in the same sense that any individual's property is his "private property." And the case immediately cites *Tuckahoe Canal Co.* v. *Tuckahoe & J. R. R. Co.*, 11 Leigh, 76, 36 Am. Dec. 374, which is one of a canal company against a railroad company; both private (not municipal) corporations. And a more extraordinary thing still is the announcement, on page 661, that "at present we are strongly inclined to the belief that the owners of lots adjacent to the track of the railroad will have no claim to compensation, because they have no right of soil in the streets,"—a proposition the converse of which is everywhere now established law. We are not, of course, saying here anything as to the streets of Jackson, but are merely putting this *Case of Donnaher* in its only solvable light, as to the particular decision therein made, if in that light it be solvable. In so far as the general language of the opinion of the court in that case conflicts with the views herein announced, it is, as said by *Judge* Dillon, "undoubtedly erroneous," and is to that extent hereby overruled.

Affirmed.

Hon. **J. A. P. Campbell presided, as special judge, in place of Woods, J., sick, during the time this case was decided.**

SOUTH CAROLINA SUPREME COURT.

John A. ARMSTRONG, *Appt.*,
v.
Robert AUSTIN.

(.....S. C.....)

1. **Failure of the officer to index a mortgage is not fatal** to its validity, in the absence of any statute making the indexing a part of the recording.
2. **A mortgage covering both real and personal property was properly recorded** in a lien and mortgage book, under Rev. Stat. 1872, p. 422, chap. 82, § 2, requiring a real-estate mortgage to be recorded in the register's office, without specifying in what book the record should be made.
3. **Failure of a subscribing witness to a mortgage to sign the affidavit** made by him does not invalidate the affidavit, in the absence of a statute or rule of court requiring such signing.
4. **A point as to variance in the clerk's signature** to the certificate of record and to the affidavit attached to a mortgage, not raised before a master or passed upon by him or raised by any exception to his report, cannot be considered by the court in passing upon such report, for the purpose of invalidating the mortgage.

(September 9, 1895.)

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Kershaw County in favor of defendant in an action brought to foreclose a mortgage. *Reversed.*

The master's report was as follows:

"This is an action for the foreclosure of a mortgage on real estate. In 1871 John Goff and others gave a mortgage of the real estate in question to the plaintiff, J. A. Armstrong. Subsequently Goff sold part of the land to the defendant, Robert Austin. The defendant, Austin, sets up the plea—First, that he was a purchaser without notice of encumbrance upon the land; that the mortgage was not recorded in the book, in the office of the register of mesne conveyances, kept for the purpose of recording deeds and mortgages, and that the law required them to be so recorded in separate books. By reference to the mortgage it will be seen that it was recorded in Lien and Mortgage Book No. 2, pages 356 and 357. Now, I can find nothing in the General Statutes of this state in force at that time requiring the clerk to record mortgages of real estate in a book separate from mortgages of personal property. This mortgage is a mixed mortgage, and, by reference to the set of books in which it was recorded, it will be seen that it was the custom at that time to so record mixed mortgages in this set of books. So I hold that Robert Austin had constructive notice of the mortgage, and bought subject to it. Another defense raised by defendant's attorney is that the mortgage was not properly probated, the affidavit not being signed. The following is a copy of the affidavit: 'South Carolina, Kershaw County. Personally appeared Wm. M. Shannon, and made oath that he saw J. A. Armstrong, John Goff, W. W. Goff, Sarah Yates, and Margaret Goff sign and seal the within lien and mortgage, and that he, with Arthur P. Linning, witnessed the execution thereof. Sworn to before me, this 13th day of February, A. D. 1872. C. Shiver, Clerk.' Under the head of '*Affidavits*,' in 1 Am. & Eng. Encyclop. Law, I find it laid down that the signing of an affidavit is not necessary unless it is required by statute that the party making the affidavit sign it. While it is the custom in this state for affidavits to be signed, I can find no statute requiring it. So I hold that the probate of the mortgage in question is properly executed. The case of *Woolfolk* v. *Graniteville Mfg. Co.*, 23 S. C. 333, cited by defendant's attorney, does not apply here. There the party who took the affidavits was not duly qualified to take

NOTE.—For index as part of records, see also Dewey v. Sugg (N. C.) 14 L. R. A. 398, and *note*.

29 L. R. A.

See also 46 L. R. A. 171.

an affidavit in this state. In the Revised Statutes of South Carolina, adopted in 1872, under the chapter on '*Clerks of Court*' (sec. 15), the clerk is invested with the authority to administer oaths, etc. I have made diligent search for the index to Book 2 of Liens and Mortgages, but cannot find it. I found the index to Book 1 of this series, for the year 1871, and also the index from 1876 to the end of the series. The defendant also contends that he entered into an agreement with plaintiff to give plaintiff a certain amount of cotton in satisfaction of his mortgage, and that he did so deliver to the plaintiff the cotton. The evidence shows that Robert Austin did give some cotton to the plaintiff, but it was for rent of the land.

"Therefore I find as matter of fact: (1) That on the 13th day of February, 1872, John Goff and William W. Goff made and delivered to plaintiff their promissory note in writing, and thereby promised to pay to plaintiff the sum of 152 $\frac{10}{100}$ dollars on or before the first of November, 1872, and if not paid at maturity then to bear interest at 2 per cent per month. (2) That at the date of said note, and as collateral for the payment of said note, the said John Goff and W. W. Goff, together with Sarah Yates and Margaret Goff, did grant, bargain, sell, and release, by way of mortgage, to the said plaintiff, the land described in the complaint. (3) That said mortgage was, on the 13th day of February, 1872, recorded in the clerk's office for Kershaw county, in Lien and Mortgage Book No. 2, pages 356 and 357. (4) That there is remaining due and unpaid upon said note and mortgage up to date of this report the sum of three hundred and thirty-five $\frac{40}{100}$ dollars ($335.40). (5) That part of the mortgaged premises were, subsequent to the date and recording of said mortgage, sold and conveyed by the said John Goff, W. W. Goff, Sarah Yates, and Margaret Goff to the defendant, who is now in possession of the premises described in the complaint. (6) That the defendant, Robert Austin, rented the land in question from plaintiff, and paid the rent in cotton for the years 1885, 1886, and 1887, but refused to pay rent in 1888, and has not paid any since.

"I conclude as matter of law:

"(1) That the defendant, Robert Austin, had constructive notice of the mortgage of John Goff and others to J. A. Armstrong, and bought the land subject to said mortgage;

"(2) That the probate of the mortgage in question is sufficient, and that it was not necessary for the affidavit to have been signed by the deponent;

"(3) That, the condition of the mortgage having been broken, the property should be sold, the equity of redemption barred, and the proceeds of sale applied to the payment of the mortgage debt."

To this report the following exceptions were filed:

"(1) That the master erred in holding that Robert Austin rented the land in question from plaintiff, such conclusion being irrelevant to the issue, unwarranted by the allegations of the complaint, and contrary to the evidence. (2) That the master erred in holding that Robert Austin had constructive notice of the mortgage of John Goff and others to J. A. Armstrong, and bought the land subject to said mortgage, as said mortgage was recorded in an improper book, and no proof was adduced to show that said mortgage was ever indexed as required by law. (3) That the master erred in holding that the probate of the mortgage in question was sufficient, and that it was not necessary for the affidavit to have been signed by deponent, as the evidence showed that there was no name signed to said affidavit, and there was no jurat affixed thereto, in that there was no seal, and the name of no officer authorized by law to administer oaths, and that said affidavit is inherently insufficient in itself. (4) That the master erred in his third conclusion of law, because it would be inconsistent and illegal if one, any, or all of the exceptions in the premises are correct."

After hearing argument upon the exceptions BENET, J., delivered the following opinion:

"This is an action for foreclosure of a mortgage on real estate. The cause was heard by me on defendant's exceptions to the report of the master, wherein he decided in favor of the plaintiff, and held that the mortgage should be foreclosed, and the property sold. The testimony on both sides is meager and unsatisfactory, and some of it offered by the plaintiff was inadmissible, but not objected to. The complaint alleges that on 13th February, 1872, John Goff and William W. Goff made and delivered to this plaintiff their promissory note for $152.10, to mature 1st November, 1872, with interest at 2 per centum per month after maturity; that, as collateral for the payment of said note, the said John and William W. Goff, along with Sarah Yates and Margaret Goff, mortgaged to the plaintiff the land in question, some 200 acres; that said mortgage was duly proved and recorded, the mortgage and the recording being of even date with the note; that two payments were made on said note, $45 on 12th November, 1872, and $100 on 9th March, 1875; 'that the mortgaged premises were, subsequent to the date and recording of said mortgage, sold and conveyed by the said John Goff, W. W. Goff, Sarah Yates, and Margaret Goff to the defendant, who is now in the possession of said premises.' Austin, the defendant, admits that the parties named above sold and conveyed the land to him, or, rather, 'a part of the tract of land;' and he avers 'that he was a purchaser for valuable consideration without legal notice of any prior encumbrance, the proper index in the office of the register of mesne conveyances for Kershaw county, relating to real estate, not showing that any mortgage on said tract of land had been recorded in the proper books of said office.' And he 'therefore denies that the mortgage set forth in the complaint was properly or duly recorded,' and 'denies that he had legal notice of the same.' For a further defense he alleges that he learned of plaintiff's claim in 1885, and that he agreed to pay him three bales of cotton to satisfy said claim;

and that he did pay the three bales, in full satisfaction of plaintiff's claim, paying one bale in 1885, one bale in 1886, and one in 1887. The evidence before the master fails to show at what time, or on what terms, the defendant entered into possession; but the complaint alleges that he purchased and had a conveyance from the makers of the mortgage 'subsequent to the date and recording of said mortgage.' The plaintiff in his testimony admits the payment of the cotton, but says it was paid him as rent. If such be the case, no evidence is adduced to show when the plaintiff ceased to regard the defendant as a purchaser in possession, and began to regard him as a tenant. He says: 'I never received anything from him myself from 1871 to 1885. Mr. McDowall did [his agent].'

"My view of the case, however, makes it unnecessary to clear up the confusion as to this payment of cotton, or to decide whether it was paid as rent or as satisfaction of the plaintiff's mortgage claim. The plaintiff's allegation that the land was sold and conveyed to the defendant subsequent to the date and recording of the mortgage leaves only one question to be decided, viz.: Was the defendant, Austin, a subsequent purchaser for valuable consideration without notice? Indeed, the question may be framed more simply still, thus: Was the defendant a subsequent purchaser without notice? For no issue is raised as to the consideration. The master held that the defendant must be charged with constructive notice. From this conclusion of law I am compelled to dissent. The mortgage in question was a mixed mortgage,—a lien and a mortgage,—embracing a lien on crops, a lien on mules, and a lien on real estate. It was an agricultural lien, a chattel mortgage, and a mortgage of real estate, all in one. It was executed in 1872, according to the evidence and the pleadings, although on its face it says 1871. At that time the law with reference to recording required that a book of a certain size be used, and that the proof must be recorded with the writing, and that to the records indexes should be prepared, in books of a size prescribed. The law also required that conveyances of real estate should be recorded in books kept for that purpose. See Rev. Stat. 1872 (chapter on *Register; Mesne Conveyance*) p. 188, § 5. The mortgage shows that it was filed the 13th of February, 1872, and 'recorded same day in Lien and Mortgage Book No. 2, pages 356 and 357.' The report of the master shows that there was no index to this 'Book No. 2,' while there was to 'Book No. 1' and others. There is no evidence that it was recorded in the book kept for the recording of conveyances of real estate. All that is shown by the testimony is that it was recorded in 'Lien and Mortgage Book No. 2,' to which there was no index. As a mortgage of real estate, it surely should have been recorded in the book kept for that purpose. But it is urged that, being a mixed mortgage, it was proper and sufficient to record it in the Lien and Mortgage Book. This view I cannot assent to. It is held that, when a mortgage includes both real and personal property, it should be recorded both as a mortgage of realty and a chattel mortgage. See 20 Am. & Eng. Encyclop. Law, p. 558. The position of the subsequent purchaser is to be considered. When he contemplates purchasing a tract of land, and desires to be informed as to prior encumbrances, does the law require him to look in the books of record of agricultural liens and chattel mortgages? Is it not sufficient that he inspect the records of mortgages or conveyances of real estate in books required by law to be kept for that purpose? It must be great injustice, and an undue and unauthorized stretching of the law of notice, to hold that the defendant, Austin, is to be charged in conscience with constructive notice of the Armstrong mortgage. Had the defendant been purchaser of one of the mules covered by the same mortgage, the case might be different.

"In addition to the foregoing ground, the defendant excepts to the finding of the master that the probate of the mortgage was sufficient. This exception must be sustained, and the master's report overruled, on this ground also. Indorsed on the mortgage is the form of an affidavit of one of the witnesses to the mortgage, the late William M. Shannon, Esq., but it is not signed by Mr. Shannon. And the jurat is signed only 'C. Shiver, Clerk', in handwriting entirely different from the 'C. Shiver, Clerk,' which follows the indorsement of the filing and recording. Yet both indorsements bear the same date,—13th February, 1872. Assuming that one 'C. Shiver' was clerk of the court at that time, it is assuming too much to say that the 'C. Shiver' of the jurat is his signature. There is no proof that it is his signature, and no evidence as to which of the two signatures is his. Nor does it appear that the writer was clerk of the court,—simply 'Clerk;' not even 'C. C. P.' And there is no seal. It may be that the signature of Mr. Shannon is not necessary to make the affidavit sufficient, as seems to be the holding of the supreme court in *Fuller* v. *Misroon*, 35 S. C. 331. It may be that the failure to affix the seal to the signature of the clerk of the court would not prevent due probate. It may be that a court may take judicial notice of the fact that in 1872 one C. Shiver was clerk of the court for Kershaw county. Still, I cannot hold that the mortgage in question was duly and sufficiently probated when the jurat is signed only 'C. Shiver, Clerk,' without any testimony that such was the signature of the C. Shiver who may have been clerk of the court. In the absence of the signature of the affiant, especially, there should be clear proof that the affidavit was made before the officer authorized by law to administer oaths and take affidavits in such cases. There is no such proof. It is therefore ordered, adjudged, and decreed that the report of the master herein be, and the same is hereby, overruled. Ordered, further, that the complaint be dismissed, with costs to the defendant."

The plaintiff excepted to said decree on the following grounds "(1) That his honor erred in holding that the mortgage of plaintiff was not properly recorded, and was not constructive notice to the defendant. (2) That his honor erred in holding that there is

no evidence that the book in which the said mortgage was recorded was a book kept for the record of mortgages of real estate. (3) That his honor erred in holding that the said mortgage was not properly probated for purposes of record. (4) That his honor erred in holding, in effect, that he would not take judicial notice that C. Shiver was clerk of the court at the time of the record of the mortgage, and in holding that his signature, 'C. Shiver, Clerk,' was not a sufficient attestation of the affidavit. (5) That his honor erred in holding that there was no evidence that the signature to the affidavit was in the handwriting of C. Shiver, the clerk, and in partly basing his decree on that ground, when no such question was made before the master, or in the defendant's exceptions to the master's report, and it was never questioned before the master that the signature was that of C. Shiver, the clerk of the court. (6) That his honor erred in overruling the master's report and dismissing the complaint."

Messrs. **J. T. Hay** and **W. D. Trantham,** for appellant:

A failure to enter on the index does not affect the recording.

1 Jones, Mortg. § 553; 20 Am. & Eng. Encyclop. Law, p. 563.

It cannot be contended that Armstrong can be held responsible for the loss of any part of the public records; and because the index was not in the office in 1894, it does not follow that it was not there in 1872.

20 Am. & Eng. Encyclop. Law, p. 602.

Weight must be attributed to usage as to the books in which records are made.

20 Am. & Eng. Encyclop. Law, p. 560.

The statutory duty to record his conveyance, which is imposed upon the grantee for the benefit of subsequent purchasers, is sufficiently discharged when the grantee has duly deposited a valid instrument for record, and the grantee must be protected thereby, even though the recorder incorrectly transcribes this instrument upon the records, or fails to record it at all.

20 Am. & Eng. Encyclop. Law, p. 578; Wade, Notice, § 162.

No question having been made before the master as to the signature of C. Shiver, clerk, or raised by an exception, his honor, the circuit judge, could not entertain such objection when made before him.

Griffin v. *Griffin*, 20 S. C. 489.

Messrs. **B. B. Clarke** and **J. D. Dunlap** for respondent.

McIver, *Ch. J.*, delivered the opinion of the court:

The only question presented by this appeal is whether the mortgage sought to be foreclosed in this action was duly recorded so as to affect the defendant, a subsequent purchaser of the mortgaged premises, with constructive notice of said mortgage. In the complaint it is alleged "that said mortgage was duly proved, and on the 13th day of February, A. D. 1872, recorded in the clerk's office for Kershaw county, in the Mortgage Book No. 2, pages 356 and 357." To this allegation the defendant in his answer responded as follows: "This defendant avers that he was a purchaser of a part of the said tract of land for a valuable consideration, without legal notice of any prior encumbrance on same, the proper index in the office of the register of mesne conveyances for Kershaw county relating to real estate not showing that any mortgage on said tract of land had been recorded in the proper books of said office. The defendant, therefore, denies that the mortgage set forth in the complaint was properly or duly recorded in the office of the clerk for Kershaw county, and that he had legal notice of the same." The case was referred to the master, who made his report, sustaining the validity of the mortgage, and recommending that the mortgaged premises be sold, and the proceeds applied to the payment of the mortgage debt, the amount of which was ascertained in his report. To this report the defendant excepted upon the grounds set out in the "case," and the case was heard by his honor, *Judge* Benet, upon the report and exceptions thereto, who rendered judgment overruling the master and dismissing the complaint. From that judgment plaintiff appeals upon the several grounds set out in the record. We think it due to the parties, as well as to the circuit judge, that the report of the master, together with the exceptions thereto, as well as the decree of the circuit judge and the grounds of appeal therefrom, should be incorporated in the report of the case.

It is very obvious that, if the case should be made to turn upon the only issue (so far as this appeal is concerned) presented by the pleadings, the only question to be decided would be whether the failure to index (if, indeed, there was such failure) would be fatal to the validity of the recording of the mortgage so far as to affect subsequent purchasers with constructive notice thereof. For in the complaint it is distinctly alleged that the mortgage was duly recorded on the day of its date, and that allegation is not denied in the answer, except in the form above quoted, which is based solely upon the ground of the failure to index, as the defendant says that he "therefore" denies that the mortgage was duly recorded; that is, for that reason, alone, is the validity of the recording denied. So that our first inquiry is whether the alleged failure to index is fatal to the validity of recording. So far as we are informed, we have no direct decision upon that question in the state. We must therefore resort to the aid of reason and authorities elsewhere. In the first place, it will be observed that statutes requiring mortgages and like papers to be recorded, so as to operate as notice to subsequent creditors or purchasers, contain no provision requiring such records to be indexed. That requirement is found in another statute, prescribing the duties of registers of mesne conveyances and clerks of court in the counties where such clerks are *ex officio* registers. It would, therefore, seem that when a paper required to be recorded, in order to operate as notice, had been spread upon the books of the proper office, all requirements of the statute have been complied with, and the fact that the clerk or register

has failed to comply with the provisions of another statute requiring such officer to keep an index of such books should not affect the validity or effect of the record. There is nothing in the statute making the indexing any part of the recording; and therefore the failure of the officer to perform a duty imposed upon him by a separate statutory provision, while it may subject him to an action at the instance of a party who may suffer by his default, yet cannot affect the validity or effect of the recording. In support of these views we have been able to find two cases from other states in which the point has been distinctly decided—*Bishop* v. *Schneider*, 46 Mo. 472, 2 Am. Rep. 533, and *Chatham* v. *Bradford*, 50 Ga. 327, 15 Am. Rep. 692. So that we think that, even if the record of the mortgage in question was not indexed, it would still, if properly recorded, operate as constructive notice. But we do not think that it has been made to appear in this case that the record of this mortgage was never indexed. The master certainly does not find that as one of the facts of the case. All that he says upon the subject is: "I have made diligent search for the index to Book 2 of Liens and Mortgages [the book in which the indorsement on the original mortgage shows it was recorded], but cannot find it." It may be, for all that appears, that there was such an index, which has either been lost or misplaced.

While, as we have said, this disposes of the only issue, so far as the present appeal is concerned, which is raised by the pleadings, yet, as other objections were made to the record of the mortgage, which, though overruled by the master, were sustained by the circuit judge, we will proceed to consider them. The first of these objections seems to be that the mortgage was not recorded in the proper book. The certificate which is indorsed upon the mortgage, which was received in evidence without objection, is, after a statement of the names of the parties and the nature of the paper, in the following form: "Filed Feb. 13th, 1872. Recorded same day in Lien and Mortgage Book No. 2, pages 356 and 357. Examined and certified by me,"—and signed "C. Shiver, Clerk." This objection was overruled by the master but sustained by the circuit judge. Section 1, chapter 120, pp. 548, 549, Rev. Stat. 1872, only required that a mortgage of personal property should be recorded in the office of the register of mesne conveyances, without specifying in what book such record should be made, except that in the county of Richland such a mortgage must be recorded in the office of the secretary of state; and by Rev. Stat. 1872, chap. 82, § 2, p. 422, a mortgage of real estate was only required to be recorded in the office of register of mesne conveyances, without specifying in what book such record should be made. This was the law at the time of this transaction, and by that law must its validity be tested. It was not until ten years afterwards that the law was amended by the Act of 1882 (17 Stat. at L. 1053), requiring mortgages of real and personal estate to be recorded in different books. It seems to us, therefore, that this, being a mixed mortgage, covering both real and personal property, was recorded in the proper book under the law as it then stood.

The next objection was that the mortgage was not properly probated, and could not, therefore, be properly recorded. There is no doubt, under the express terms of the statute (Rev. Stat. 1872, chap. 23, § 5, p. 188), that no paper can be properly recorded until its execution "shall first be proved by affidavit of a subscribing witness, taken before some officer competent to administer an oath." *Woolfolk* v. *Graniteville Mfg. Co.* 22 S. C. 332. The affidavit to prove the execution of this mortgage, and indorsed thereon, purports to have been made by one of the subscribing witnesses in the usual form, and sworn to before "C. Shiver, Clerk;" but the affiant does not appear to have signed the affidavit. This does not invalidate the affidavit, as may be seen by reference to 1 Am. & Eng. Encyclop. Law, p. 311, and the cases there cited, as well as the case of *Fuller* v. *Misroon*, 35 S. C. 314, unless there is a statute or rule of court requiring the signature of the affiant: and no statute or rule of court has been brought to our attention making such requirement. The affidavit indorsed on the mortgage was sufficient to warrant its recording, as the clerk before whom it was taken is certainly an officer competent to administer an oath,—indeed, is expressly made so by section 15, chap. 23, p. 180, Rev. Stat. 1872. This objection cannot, therefore, be sustained. The circuit judge bases his conclusion in part, at least, upon a point not raised before the master, and, so far as appears, not touched upon in the argument before him on the exceptions to the master's report, and the point, therefore, was not properly before him. *Griffin* v. *Griffin*, 20 S. C. 486. It may be that, if the point referred to—that is, the supposed variance in the handwriting of the signature "C. Shiver, Clerk," to the certificate of the record of the mortgage, and that of the same signature to the affidavit proving the execution of the mortgage—had been raised, such apparent variance might have been fully explained. But this point was not only made before the master, or passed upon by him, but, on the contrary, the mortgage, with these indorsements thereon, was received in evidence without objection. At all events, we think it clear, under the case just cited, that there was error in considering a point not raised before the master nor passed upon by him and not raised by any exception to the master's report.

We are of opinion, therefore, that the judgment of the circuit court should be reversed; but as there is one issue raised by the pleadings—that of payment of the mortgage debt—which was not determined by the circuit judge, as, under the view which he took of the case, it was not necessary for him to do, the case must go back to the circuit court for the determination of that issue, and for such further proceedings as may be necessary under the views herein announced, in case the issue of payment should be determined adversely to the defendant.

The judgment of this court is that the judg-

ment of the Circuit Court be reversed, and that the case be remanded to the Circuit Court for such further proceedings as may be necessary under the views herein set forth.

MINNESOTA SUPREME COURT.

STATE of Minnesota *ex rel.* REALTY COMPANY, *Respt.*,
v.
Clayton R. COOLEY, *Appt.*

(.....Minn.....)

The language found in section 3 of article 9 of the State Constitution, whereby it is provided that "public property used exclusively for any public purpose" shall, by general laws, be exempted from taxation, and the legislation on the subject (Gen. Stat. 1894, § 1512), cannot be construed as authorizing the exemption of real property owned and leased by a private party who receives and retains all revenues derived from such leasing, although, under a contract with the owners, the authorities of the municipality in which the property is situated have ordained that such property shall be a public market house or place, and shall be exempt from taxation, and it is thereafter exclusively used for such public purpose, the authorities regulating the business to the extent necessary for the public welfare.

(October 2, 1895.)

APPEAL by defendant from an order of the District Court for Hennepin County directing the issuance of a writ of mandamus to compel defendant to place certain property upon the tax list for taxation. *Affirmed.*

The facts are stated in the opinion.

Mr. **C. E. Vanderburgh,** with *Messrs.* **Frank M. Nye** and **Wilson & Vanderlip,** for appellant:

The market in question was a public market, established and regulated by municipal authority, exclusively used for public purposes.

1 Dill. Mun. Corp. § 380; Tiedeman, Mun. Corp. § 128.

If, in consideration of the public services rendered by the market company to the city, and the expenses, risk, and trouble incurred in building and operating the market, the company are entitled to collect certain rents and charges, that is only matter of administration, and in no way affects the question here.

Ramsey County v. *Stryker,* 52 Minn. 144.

Public property owned by the public is impliedly exempt.

Cooley, Taxn. p. 172.

The exemption section of the constitution in question is certainly open to the construction we claim for it, and hence the practical construction which has been adopted and followed in good faith by the legislature and people for many years is always entitled to receive great consideration from the courts.

Ames v. *Lake Superior & M. R. Co.* 21 Minn. 289; Cooley, Const. Lim. 867; *State* v. *Mayhew,* 2 Gill, 487; *Harrison* v. *State,* 22 Md. 468, 85 Am. Dec. 658; *Boyden* v. *Brookline,* 8 Vt. 286; *Rogers* v. *Goodwin,* 2 Mass. 475; *Packard* v. *Richardson,* 17 Mass. 144, 9 Am. Dec. 128; *Stuart* v. *Laird,* 5 U. S. 1 Cranch, 299, 2 L. ed. 115.

Our courts and legislatures have from the outset aimed to construe the exemption provision of the constitution according to its spirit, and to give effect to it accordingly, and no harm has ever come to the public therefrom.

Hennepin County v. *Bell,* 43 Minn. 344; *Ramsey County* v. *Stryker, supra; Harney* v. *St. Louis,* 90 Mo. 218; *LeClaire* v. *Davenport,* 13 Iowa, 212; *Palestine* v. *Barnes,* 50 Tex. 588.

Messrs. **Ripley, Brennan & Booth** for respondent.

Collins, J., delivered the opinion of the court:

This is an appeal from an order directing the issuance of a peremptory writ of mandamus to the respondent county auditor, requiring and compelling him to enter upon the assessment books for taxation certain real property in the city of Minneapolis. There is no dispute over the facts. The real estate in question is owned by the Minneapolis Central City Market Company, a corporation organized and existing under the provisions of Gen. Stat. 1894, § 2794, for the purpose of conducting a wholesale and retail market in said city. It has not been assessed for taxation for several years, because of the provisions of a certain ordinance passed by the city council in the year 1892, and a contract entered into between the city and the market company. This ordinance and the contract provided for the immediate erection of a market house upon the land in question by the company, and the latter agreed, and was given a franchise, to maintain a market house and place on such premises, to be used exclusively as a public market, for the period of twenty-five years. The ordinance also provided that for such period of time the entire premises should be exempt from taxation. It is contended in behalf of the company that, notwithstanding the private ownership of this property, it was and remains exempt from taxation because it has been established as a public market house and place, regulated and controlled by municipal authority, used exclusively by the public as a market house, and thus clearly within the language of the exemption statute (Id. § 1512), which, by its eighth subdivision, exempts from taxation "all public market houses, public squares, or other public grounds, town or township houses or halls, used exclusively for public purposes."

We must concede at the outset that under the terms and provisions of the ordinance the market house and the ground used in connection therewith are as public as if built and

*Headnote by COLLINS, J.

NOTE.—As to exemptions from taxation by municipal corporations, see *note* to Whiting v. West Point (Va.) 15 L. R. A. 861.

owned by the city itself as a market house and place. The statute which we have quoted was designed to harmonize with a clause in article 9, § 8, of our Constitution, and of course it cannot be construed so as to enlarge its operation, and exempt property not clearly contemplated by the fundamental law. Section 8 reads as follows: "Laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise; and also all real and personal property according to its true value in money; but public burying grounds, public school-houses, public hospitals, academies, colleges, universities, and all seminaries of learning, all churches, church property used for religious purposes, and houses of worship, institutions of purely public charity, public property used exclusively for any public purposes and personal property to an amount not exceeding in value two hundred dollars for each individual, shall by general laws be exempt from taxation." The particular clause to which we have adverted is that which authorizes the exemption of "public property used exclusively for any public purpose" from taxation, and it is really this language which we are to construe and apply. The trial court seems to have taken the position that, in order to have the benefit of the exemption clause, the property must be owned by the public; and, further, that it must be exclusively used for a public purpose. We think this interpretation altogether too literal and radical, for, if this construction must prevail, the ownership must not only be in the public, but the property itself must be actually and exclusively used for some public purpose. Under this view this immunity from taxation would be taken away from all property having public ownership while it was unused or while any part of it was used for private purposes under the supervision of the public authorities and by their consent. Nor are we convinced that the exemption might not be as to property owned by private parties under certain conditions. To so construe the constitution would be to compel the owners of property used exclusively by the public with the owners' consent, and from which the latter derived no benefit pecuniary or otherwise, to pay taxes upon the same, or the payment of such taxes would have to be made directly out of the public funds. These suggestions indicate that a reasonable and practical construction must be placed upon the exemption clauses. In the case at bar the facts are that a private corporation has been organized for the specified purpose of erecting a building upon its own land, and in that building, and in the adjoining streets, furnishing a market place. Through the ordinance and the contract it has secured a franchise for the conducting of the business for the period of twenty-five years, and it has also had this place of business declared a public market. We are not to suppose that in making this investment and furnishing a place for the transaction of such a business the company has undertaken and is carrying out an enterprise purely philanthropic, or that the business is not expected to prove fairly remunerative. While the maximum fees and rates for standing room for vehicles in the abutting streets are prescribed by the ordinance, the stalls in the building are annually rented to the highest bidder at public auction, and all fees and rentals are the property of the market company. The city, as a municipality, receives no benefit therefrom, nor do its inhabitants, save in the way of incidental conveniences. And instead of being used for a public purpose exclusively, with all that the term implies, the erection of the market house, and the prosecution of the business there to be transacted, will, in all probability, prove very profitable to the corporation before the expiration of its franchise, while the city is benefited in no other way than it is at the present time. Clearly, the exemption clause in the constitution was never designed to cover such a case. If it was, the legislature could amend the present statute so as to exempt from taxation street-car, water, gas, and electric light companies, and a variety of private enterprises organized and operated for pecuniary gain, but owned by the public in the same general sense, serving the public, and devoted to or used for public purposes, quite as exclusively as is the property in question. We are sure that an amendment to the tax law through which such an exemption was attempted would at once be pronounced unconstitutional. No rule can be formulated by which to determine what is "public property used exclusively" for a "public purpose," within the meaning of the clause in section 8, article 9. But the language there used cannot be construed as authorizing the exemption from taxation of real property owned and leased by a private party, who receives and retains all revenues derived from such leasing, although, under a contract with the owners, the authorities of the municipality in which the property is situated have ordained that such property shall be a public market house or place, and it is thereafter exclusively used for such public purpose, the authorities regulating the business to the extent necessary for the public welfare. The statute (Gen. Stat. 1894, § 1512) which exempts "all public market houses" from taxation must be read and construed in connection with the fundamental law which authorized its passage. Our conclusion is that the court below correctly ordered the issuance of a peremptory writ of mandamus.

Order affirmed.

Michael J. FARRELL, *Appt.*,
v.
City of ST. PAUL, *Respt.*

(.....Minn.....)

***1. In improving the street in front of plaintiff's lot, the city wrongfully graded down the street** below the estab-

*Headnotes by CANTY, J.

NOTE.—The above case is believed to be a novel one on the subject of the conclusiveness of a judgment for an assessment against property as benefited by a local improvement.

lished grade, and wrongfully removed the lateral support of the lot, by reason of which plaintiff was damaged. The city made a special assessment against the lot, to pay for such improvement, and procured a tax judgment against the lot for the tax so levied. The plaintiff did not appear in such proceedings, or defend against the application for judgment. *Held*, this judgment is not against the plaintiff, but against the lot, in the proceeding *in rem*, and does not estop him, only so far as it affects his right to or ownership of the lot, since the same was seized in the proceedings *in rem*, and does not estop him from asserting that such improvement of the street prior to such seizure was tortious.

2. **Whether such judgment would estop him** if such wrongful improvement were made after such seizure,—*quære*.

(October 24, 1895.)

APPEAL by plaintiff from a judgment of the District Court for Ramsey County in favor of defendant in an action brought to recover damages for injuries alleged to have been caused by a change of grade in the street in front of plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. **S. L. Pierce** and **W. L. Pierce**, for appellant:

The owner of property damaged by tortious acts of defendant or its contractor, "arising out of matters or transactions within the general powers of the corporation," has his remedy by action, and is not estopped by failure to object to judgment in special proceedings to assess for benefits resulting from an improvement to the property damaged.

2 Dill. Mun. Corp. § 971.

The facts fail to disclose any of the essentials of estoppel *in pais*.

Chaska Co. v. *Carver County Supvrs.* 6 Minn. 204.

When the acts complained of are tortious, the plaintiff is not bound to "seek his remedy in the same proceeding by appeal or otherwise."

Ovcrmann v. *St. Paul*, 39 Minn. 120.

A judgment is only conclusive of such matters as were necessarily passed upon.

Johnson v. *Johnson* (Minn.) 58 N. W. Rep. 824; *Dixon* v. *Merritt*, 21 Minn. 196; *Washington, A. & G. Steam Packet Co.* v. *Sickles*, 72 U. S. 5 Wall. 592, 18 L. ed. 553.

The power of the court to render judgment in this proceeding is purely statutory, and while, as held by this court, the judgment stands on the same footing as in ordinary cases after it appears the court has acquired jurisdiction, "with such distinctions as are created by statute" (*Dousman* v. *St. Paul*, 23 Minn. 394; *Hennessy* v. *St. Paul*, 54 Minn. 219), the distinction is important.

Ullman v. *Lion*, 8 Minn. 381, 83 Am. Dec. 783; *Corson* v. *Shoemaker*, 55 Minn. 386; *Barber* v. *Morris*, 37 Minn. 194; *Morse* v. *Presby*, 25 N. H. 299; 12 Am. & Eng. Encyclop. Law, p. 276, *note 2*.

Unless the improvement is authorized, the board has no power to assess.

Mayall v. *St. Paul*, 30 Minn. 294.

The authority of municipalities to impose burdens of any kind upon persons or property is wholly statutory, and as its exercise may result in a devestiture and transfer of property, it must be clearly given and strictly followed.

Sewall v. *St. Paul*, 20 Minn. 511.

Messrs. **E. J. Darragh** and **Robertson Howard**, for respondent:

There is no attempt on the part of the appellant to show that there was any want of jurisdiction on the part of the court to render the judgment in the former suit, and therefore that judgment is an absolute bar to his action for the alleged trespass, for it is only when such proceedings are without jurisdiction that an injured party is not obliged to seek his remedy in those proceedings by appeal or otherwise.

Genois v. *St. Paul*, 35 Minn. 330; *Overmann* v. *St. Paul*, 39 Minn. 120.

The judgment could not be collaterally attacked by appellant, and was binding on him and his property.

Black, Judgm. § 261; *Wellshear* v. *Kelley*, 69 Mo. 351; *Chestnut* v. *Marsh*, 12 Ill. 178; *Mayo* v. *Foley*, 40 Cal. 283; *Driggers* v. *Cassady*, 71 Ala. 529; *Chauncey* v. *Wass*, 35 Minn. 1; *Chicago County* v. *St. Paul & D. R. Co.* 27 Minn. 109.

A default judgment stands on the same footing in such a case as any other judgment.

Wallace v. *Brown*, 22 Ark. 118, 76 Am. Dec. 421; *State* v. *Sargent*, 12 Mo. App. 228.

The rule is applied with the same force in the case of a judgment to enforce a special assessment as in the matter of a general tax.

Cadmus v. *Jackson*, 52 Pa. 295; *Hennessy* v. *St. Paul*, 54 Minn. 222; *Dousman* v. *St. Paul*, 23 Minn. 394.

The fact that the judgment in the assessment proceedings was a judgment *in rem*, and not *in personam*, does not affect the operation of such judgment as an estoppel.

Scott v. *Shearman*, 2 W. Bl. 977; *Barton* v. *Anderson*, 104 Ind. 581; *O'Brien* v. *Moffitt*, 133 Ind. 665; *Gelston* v. *Hoyt*, 13 Johns. 561; *Coffey* v. *United States*, 116 U. S. 444, 29 L. ed. 687; *Whitney* v. *Walsh*, 1 Cush. 29, 48 Am. Dec. 590; *Buchannan* v. *Biggs*, 2 Yeates, 232; *Street* v. *Augusta Ins. & Bkg. Co.* 12 Rich. L. 13, 75 Am. Dec. 714; *Croudson* v. *Leonard*, 8 U. S. 4 Cranch, 434, 2 L. ed. 670; *Bradstreet* v. *Neptune Ins. Co.* 3 Sumn. 600; *Bishop* v. *Travis*, 51 Minn. 188; *Thurston* v. *Thurston* (Minn.) 59 N. W. Rep. 1017.

Canty, J., delivered the opinion of the court:

Plaintiff is, and since 1891 has been, the owner of a certain city lot situated in St. Paul, and having a frontage of 40 feet on Wells street. In 1892 the city excavated and graded down the half of said street adjoining said lot, 5 feet below the legal and established grade, and erected a retaining wall in the middle of the street, leaving the other half of the street at the established grade, thereby giving the street a dual grade. In doing the grading the city removed the lateral support of plaintiff's lot where it abuts on the street. This action is brought to recover the damages to the lot caused by so removing the lateral support, and also the damages caused by grading down the street below the natural surface of the lot and the established grade of the street, thereby de-

priving the lot of means of access to the street. On the trial it was stipulated that the judge should determine all questions in the case except the amount of damages, which should be determined by the jury. The jury, by their special verdict, found that plaintiff was damaged by reason of the removal of the lateral support of the lot in the sum of $50, and by reason of the grading down of the street below the established grade in the sum of $225. Thereupon the judge filed his findings of fact and conclusions of law, in which he found for defendant, on the ground that a certain tax judgment entered against this lot, for the tax levied against it on a special assessment to pay for the grading in question, is a conclusive adjudication, so far as the lot and the plaintiff are concerned, that the grading was legally done, and that said judgment is a bar to this action, and estops the plaintiff from asserting that the grading in question was wrongful. From the judgment entered thereon in favor of defendant, plaintiff appeals.

The tax judgment in question was entered in a proceeding *in rem* against the lot, commenced on published notice. Plaintiff was not personally served with notice,—no such service is required by the statute,—and he did not appear in the proceeding, or defend against the application for judgment. It is, perhaps, true, as stated by the learned judge of the court below, that if the work was illegal the city was not entitled to judgment, and if that defense had been made in that proceeding it would have prevailed. But the only consequence flowing from the failure to make such defense is that it has been conclusively adjudicated that the lot in question owes the city of St. Paul $142 for doing this grading, and certain costs, and that the lot is condemned to pay the same. This judgment is against the plaintiff only so far as it affects his right to, or ownership of, the lot since the seizure of the same in the tax proceedings, and does not estop him from asserting that, prior to such seizure, he was the owner of the lot, in full possession thereof, and entitled to all the rights and emoluments of such ownership. The court does not find any facts from which it appears that the lot was seized in the proceedings *in rem* before the trespass in question was committed. What the effect would be if it had so found, we will not now determine, as the point has not been argued. The burden was on the defendant to establish every fact necessary to sustain its defense of former adjudication, and, as far as appears by the record, it has failed to do so. Just how far a judgment *in rem* estops, in a collateral proceeding, the parties immediately interested and their privies, and how far it estops the whole world, are questions hard to determine from the books. Respondent has cited a number of cases in which it has been held that a judgment *in rem* in a court of admiralty, condemning the vessel for reasons appearing in the record, is conclusive against the owner, in a suit by him on the policy of insurance for the loss, that such reasons in fact existed, and if the facts thus established constitute a breach of the warranty of the owner to the insurer, the owner cannot recover. As applied to this class of cases, this is a well-established rule of law. *Croudson* v. *Leonard*, 8 U. S. 4 Cranch, 434, 2 L. ed. 670, and cases cited; *Bradstreet* v. *Neptune Ins. Co.* 3 Sumn. 600, Fed. Cas. No. 1,798; *Street* v. *Augusta Ins. & Bkg. Co.* 12 Rich. L. 18, 75 Am. Dec. 714; *Baxter* v. *New England Marine Ins. Co.* 6 Mass. 277, 4 Am. Dec. 125. But, as establishing a general principle of law, applicable to all classes of cases, this rule cannot be upheld. As the whole world are parties to a proceeding *in rem*, it would amount to saying that, as to the facts necessarily passed upon and adjudged to exist by the judgment *in rem*, there arises an estoppel by verdict against every one in every collateral proceeding, and that every one in the world is conclusively estopped from disputing the existence of such facts. This would amount to saying that a judgment *in rem* has the same effect, in all collateral matters, all over the world, that an edict of the czar has in the Russian dominions,—a result that would be most appalling. But it is said that the cases which we have cited only go to the extent of holding that a judgment *in rem* has this effect as against a party directly interested, and in favor of a party collaterally interested. Let us analyze this proposition. Supposing that, in such a case as those already cited, A is interested directly in a proceeding *in rem*, and is also interested in a collateral matter involving the same facts, in which collateral matter B is also interested. Now, it is well settled that, in subsequent litigation between A and B, B is not bound by the judgment in the proceeding *in rem*, because he had no direct interest which entitled him to appear and defend in that proceeding. Therefore, the judgment in that proceeding cannot estop him. Then, how can it be held that, as between A and B, it estops A? Such estoppels must be mutual. Then, if the estoppel by verdict is not equally binding on every one in the world in all collateral matters, so as to make it mutual, these cases are unsound in principle. The only ground on which they can be sustained is that public policy has attached to the warranty of legality made by the insured to the insurer a further implied warranty that the insurer will defend, so that in fact his undertaking is both to warrant and defend; and this seems to be the opinion of the supreme court of Massachusetts, as expressed in *Brigham* v. *Fayerweather*, 140 Mass. 413, in which that court declined to apply the rule laid down in these cases as a general principle of law. It is true that, in the case at bar, both parties were directly interested in the proceeding *in rem*, and also in the collateral matter on which this action is brought. But why should this change the rule? A proceeding *in rem* assumes the whole world to be interested. It knows no particular party, unless he has appeared, when it may become, as to him, a proceeding also *in personam*. A judgment *in rem* does not concern itself about any particular party in interest who has not appeared. It treats the whole world alike, and is binding on the whole world alike. It

seems to be more binding on the party directly interested, simply because his direct interest is bound. He may be more interested in the result, and have more to lose or gain by the judgment, than the rest of the world; but how does this add to the conclusiveness of the judgment, as against him, more than as against the rest of the world, who are as much parties to the proceeding as he is? The thing in which he is interested is in court, but he himself is no more in court than are all the rest of the world. Unless he appears and becomes a party to the proceeding, he is not a party in any such sense as a party *in personam*. But how can the estoppel as to the collateral matter or thing operate unless it operates through the person? The collateral matter or thing was not seized, and was not in court in the proceeding *in rem*. How, then, can it be affected by that proceeding? To hold so would be to hold that a proceeding *in rem* is, as to collateral matters, a proceeding *in personam;* aye, more than a proceeding *in personam*.

If the tax judgment here in question was entered by default, in an action strictly *in personam*, in which the city of St. Paul was plaintiff, and the plaintiff here was defendant, it would not estop him from asserting, in this action, that the improvement in question was tortious, and injured his lot. This is not the same cause of action as that in the tax proceeding, and the wrongful acts here set up were not set up or litigated as a defense in that action. Under these circumstances, this plaintiff is not estopped. See *Adams* v. *Adams*, 25 Minn. 72; *State* v. *Cooley* (Minn.) 60 N. W. Rep. 338; *Cromwell* v. *Sac County*, 94 U. S. 856, 24 L. ed. 199. The class of cases to which those first above cited belong are the only ones that we can find which sustain respondent's position. It is true that many of those cases lay down the doctrine, generally, that a judgment *in rem* is binding on the whole world in collateral matters, but the authorities cited in these cases do not bear this out. In fact, most of the authorities so cited are not cases of judgments *in rem* at all, but of judgments *in personam*, which for certain purposes are held conclusive upon the whole world. As to such cases, there is a distinction between doing an act and declaring that it has been done. There is a distinction between adjudging what now is and shall hereafter be, and adjudging what has heretofore been. In an action *in rem*, and also in an action *in personam*, when all the parties in interest are before the court, the act which the judgment in itself performs—the legal consequences of the judgment—is binding on the whole world, if for no other reason, for the simple reason that the act is, in fact, performed. Thus, if the court had jurisdiction, a judgment of divorce is conclusive on the whole world that the parties have ceased to be husband and wife, for the simple reason that, if the stranger to the judgment is not able to dispute the existence of a valid judgment, there is nothing left for him to dispute. But, supposing that the judgment also adjudges the prior existence or nonexistence of certain facts, there is no estoppel by verdict as to these facts, except as between the parties *in personam* and their privies. Thus, a valid judgment declaring a marriage absolutely void, and annulling it, is conclusive on the whole world that the parties have not since been husband and wife; but it is only conclusive on the parties and their privies that they never were husband and wife. As to the rest of the world, it has no other effect than that of a judgment of divorce. The following cases illustrate the doctrine that the act performed by the judgment itself is conclusive for and against the whole world. *Frost* v. *St. Paul Bkg. & Inv. Co.* (Minn.) 59 N. W. Rep. 308; *Hood* v. *Hood*, 110 Mass. 463. See also Greenl. Ev. § 538. The following cases illustrate the doctrine that the mere adjudication by the judgment of the existence or nonexistence of prior facts is conclusive only as between parties and privies. *Gill* v. *Read*, 5 R. I. 343, 73 Am. Dec. 73; *Butterfield* v. *Smith*, 101 U. S. 570, 25 L. ed. 868; *Williams* v. *Williams*, 63 Wis. 58, 53 Am. Rep. 253.

But there is another reason why the tax judgment does not, in this action, estop this plaintiff. In a proceeding *in rem* there is a wide distinction between things guilty or hostile, and things indebted. The libelant in the one case claims the *jus in rem;* in the other, the *jus ad rem*. "Decrees against things guilty and things hostile merely declare the status of such things. They do not forfeit anything, but simply declare or pronounce the forfeiture previously incurred. On the other hand, decrees against things indebted, are similar to a judgment for debt against a personal debtor." Waples, Proc. in Rem. § 3, subd. 10. "The object of the action against debtor property is to make the money that is owing by it. When that object is accomplished, any surplus of proceeds inures to the owner of the *res* proceeded against. He may stop the proceedings at any stage by paying the debt, while the owner of a thing guilty or hostile has not this privilege." Id. § 455. In a proceeding *in rem* against a thing guilty or hostile, it is held that the judgment relates back to the time of forfeiture, and devests the title to the thing seized (not to collateral things) from that time. But, in a proceeding *in rem* or quasi *in rem*, against a thing indebted, how can the judgment relate back beyond the time of seizure or attachment? The prior ownership of such property is devested, not merely by the judgment, but by the subsequent sale. In such a case, is anything sold that is not seized? It would seem not. Again, the question in such a case is usually, not the extent or character of the thing seized, but the existence, extent, and character of the indebtedness against it. But it is well settled that the determination of the existence, character, and amount of such indebtedness is *res judicata* only so far as it is satisfied by the condemnation and sale of the *res*. *Bishop* v. *Travis*, 51 Minn. 183; *Thurston* v. *Thurston* (Minn.) 59 N. W. Rep. 1017.

The tax judgment here in question was obtained against a thing indebted, and the adjudication of the existence, character, and amount of that debt in that proceeding, is an

estoppel against all now claiming the thing seized, in so far as the indebtedness so adjudged was satisfied by the condemnation and sale of the thing seized; but we can give that adjudication no other or greater effect. We cannot hold that, in an action in which the title obtained to the thing seized and condemned is not involved, this adjudication now estops this plaintiff from disputing the existence, character, or amount of the indebtedness so adjudged in that proceeding to exist.

The judgment appealed from is reversed, and, on the verdict and findings of fact, judgment is ordered for plaintiff pursuant to this opinion.

ILLINOIS SUPREME COURT.

Joseph R. BICKERDIKE, *Appt.*,
v.
Mary C. ALLEN *et al.*, Exrs., etc., of Edwin C. Allen, Deceased.

(157 Ill. 95.)

1. **A judgment of revival in scire facias to revive a judgment,** based upon notice by mail as well as by publication, to a resident of the state, is prima facie valid in a collateral proceeding.

2. **Mailing to a resident of a state, as well as publishing, a notice** of a proceeding in *scire facias* to revive a judgment, as provided in 2 Starr & C. Stat., p. 1789, where his residence is stated in the affidavit, which shows that he has gone out of the state or is concealed within it so that process cannot be served on him, is sufficient to satisfy the constitutional requirement of due process of law.

3. **A certificate of the clerk that he has mailed a notice** of *scire facias* addressed to the defendant, which, under Rev. Stat., chap. 22, § 12, is declared to be evidence, is prima facie evidence that the notice so sent by mail was received.

4. **An answer under oath** has no greater force as evidence than the bill, under Rev. Stat., chap. 22, § 20, where the bill waives the oath.

5. **The satisfaction or discharge of a judgment** may be shown as a defense against a creditors' bill to enforce the judgment after revival on *scire facias*, as well as to defeat the revival.

6. **An affidavit in which the affiant "on oath states,"** but which the certificate of the notary merely states to have been "subscribed," without saying that it was sworn to before him, on which a *scire facias* to revive a judgment is based, is not so defective as to defeat the judgment of revival in a collateral proceeding, where this recites that it was made on due proof.

7. **A recital in a judgment** that due proof was made is at least prima facie evidence of that fact.

8. **The objection that an affidavit for substituted service was in the disjunctive** in stating that defendant was concealed within the state, or had gone out of the state so that process could not be served upon him, is not well taken where the material fact of the impossibility of finding his whereabouts is alleged.

(April 1, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Cook County in favor of plaintiffs in a creditors' bill to reach assets belonging to defendant in satisfaction of a judgment which had been revived against him upon *scire facias*. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Swift, Campbell, Jones & Martin,** for appellant:

Section 27 of chapter 110, Starr & C. Statutes, is unconstitutional.

The procedure pointed out by the above section does not constitute due process of law within the meaning either of the constitution of this state or the Constitution of the United States.

Pennoyer v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Webster* v. *Reid*, 52 U. S. 11 How. 437, 13 L. ed. 761.

The court acquired no jurisdiction of the person of appellant in the suit to revive the judgment, for the following reasons:

(a). The affidavit upon which the publication notice was based is void because it was not sworn to.

McDermaid v. *Russell*, 41 Ill. 489.

(b). Assuming for the argument that Barbour's affidavit was sworn to, still it does not set up any state of facts which authorized service by publication on appellant.

(c). The affidavit of Barbour was void because in the alternative.

Ranaldson v. *Hamilton*, 5 La. Ann. 203; *Kogel* v. *Schrenkheisen*, 37 Mich. 174; *Dintruff* v. *Tuthill*, 62 Hun, 591; *Dickenson* v. *Cowley*, 15 Kan. 269.

(d). The notice itself was fatally defective.

Haywood v. *Collins*, 60 Ill. 334.

Messrs. **Sleeper, Barbour & Emrich,** for appellee:

The facts stated in the affidavit, the efforts made to ascertain the whereabouts of Bickerdike, and the results of these efforts, tend to prove that he was either out of the state, or that he was concealed within the state.

North v. *McDonald*, 1 Biss. 57; *Hartung* v. *Hartung*, 8 Ill. App. 156.

If there had been no jurat at all attached to the affidavit, but the name of the notary, with his seal, had appeared there, the affidavit itself shows that it was upon oath.

King v. *Emden*, 9 East, 437; *Cook* v. *Jenkins*, 80 Iowa, 452.

This was not the commencement of a new or original suit, but a continuation of one already begun, proceeded in to the stage of entering up judgment, but not executed, the execution of which remained to be done in and by the superior court of Cook county, and no other court.

Wright v. *Nutt*, 1 T. R. 388; *People* v. *Com-*

NOTE.—As to effect of constructive notice to give jurisdiction over residents or nonresidents, see *note* to Moyer v. Bucks (Ind.) 16 L. R. A. 231.

pher, 14 Ill. 447; *Challenor* v. *Niles*, 78 Ill. 78; *Smith* v. *Stevens*, 138 Ill. 191.

The writ of *scire facias* is a common-law writ, issued upon a record, and might have been sued out without any provision of statute whatever, and the court would have had authority to order execution to issue upon the judgment for its execution.

2 Tidd, Pr. 1107.

Magruder, J., delivered the opinion of the court:

This is a creditors' bill, filed on December 17, 1891, in the superior court of Cook county by the appellees as executors of the estate of Edwin C. Allen, deceased, against appellant and others, based upon a judgment recovered by said testator, in his lifetime, on November 20, 1873, against appellant and one Pratt, and claimed to have been revived by judgment of revival entered on December 9, 1891, upon which execution was issued and returned unsatisfied after demand made. Amendments were filed to the original bill, and afterwards a supplemental bill was filed. Answers were filed by the appellant and other defendants alleged to have in their hands stock belonging to appellant. A receiver was appointed by agreement of parties, with directions to sell the stock and hold the proceeds to abide the final disposition of the case. The answer of the appellant here to the creditors' bill below set up, among other things, that in the *scire facias* proceeding to revive the judgment the revival judgment was void because the court obtained no jurisdiction over the appellant by personal service or entry of appearance; and that section 26 of the Practice Act (Rev. Stat. 1893, chap. 110, par. 27; 2 Starr & C. Stat. p. 1789, par. 27) was unconstitutional as being in conflict with section 2 of article 2 of the Constitution of Illinois, which provides that "no person shall be deprived of life, liberty, or property without due process of law," and also as being in conflict with section 1 of the 14th Amendment to the Constitution of the United States. Appellant's answer to the bill admits that the judgment was recovered against himself and Pratt on November 20, 1873, as alleged in the bill, and that on October 1, 1891, appellees instituted proceedings by *scire facias* in said superior court to revive said judgment, and that execution was issued upon the judgment as revived, and returned *nulla bona*. The answer also sets out in full all the proceedings in the suit to revive, from the *præcipe* for a *scire facias* to the judgment of revival. Upon the hearing, appellees introduced in evidence the said proceedings as set out in the answer. The appellant introduced no evidence whatever, but at the close of the evidence introduced by appellees made a motion to dismiss the bill, upon the alleged grounds that the court had no power to enter a judgment of revival for want of jurisdiction over appellant, and that the said section 26 was unconstitutional, as aforesaid; and also because of certain alleged defects in the affidavit for publication and the publication notice in the *scire facias* proceeding. This motion was overruled, but no exception is shown by the bill of exceptions to have been taken to the order overruling it. The court below rendered a decree finding that the original judgment remained due and unpaid; that it had been duly and regularly revived; that the proceedings of *scire facias* to revive it were valid and legal; and directed that there should be paid out of the proceeds of the sale of said stock the original judgment and interest from the date of its rendition, and the costs accrued both in the original proceeding and in the *scire facias* proceeding. From this decree the present appeal is prosecuted.

First, as to the alleged unconstitutionality of section 26. That section is as follows: "It shall not be necessary to file a declaration in any *scire facias* to revive a judgment, or foreclose a mortgage, in any court of record in this state. And in such case of *scire facias* to revive a judgment, where the plaintiff in the judgment sought to be revived, or his attorney, shall file an affidavit in the office of the clerk of the court out of which the writ issues, showing that the defendant in the *scire facias* resides or has gone out of the state, or is concealed within the state, so that process cannot be served on him, and stating the place of residence of such defendant, if known, or that on due inquiry his place of residence cannot be ascertained; then, in such case, notice to the defendant may be given by publication and mail in the same manner as is provided by statute for notice in like cases in chancery." 2 Starr & C. Stat. p. 1789, par. 27; Rev. Stat. 1893, chap. 110, par. 27, § 26. The provision for notice in cases in chancery, so far as applicable, is as follows: "The clerk shall cause publication to be made in some newspaper printed in his county . . . containing notice of the pendency of such suit, the names of the parties thereto, the title of the court, and the time and place of the return of summons in the case; and he shall also, within ten days of the first publication of such notice, send a copy thereof by mail, addressed to such defendant whose place of residence is stated in such affidavit. The certificate of the clerk, that he has sent such notice in pursuance of this section, shall be evidence." Rev. Stat. chap. 22, par. 12, § 12. Where the defendant is a nonresident of the state of Illinois, and the proceeding is not *in rem*, but *in personam*, the publication of notice and the mailing of a copy thereof to an address outside of the state, without personal service or appearance, would not give to a court in this state such jurisdiction over the person of the defendant as to make a judgment *in personam* against him valid and impervious to collateral attack, except in cases affecting the personal or civil status and capacities of the citizen of the state towards a nonresident,—as, for instance, in reference to the dissolution of the marriage relation,—and, except in cases where another mode of service than that of personal service may be regarded as having been assented to in advance,—as, for instance, the appointment of agents in the state to receive service,—and requirements as to service upon corporations created by the state. *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565. A proceeding *in*

rem is not merely a direct proceeding against property, but any action between the parties where the direct object is to reach and dispose of property owned by them or of some interest therein. For example, suits by attachment against the property of debtors, suits for the partition of land, to foreclose mortgages, to enforce liens or contracts respecting property, may be regarded as proceedings *in rem* so far as they affect property in the state. *Pennoyer* v. *Neff*, *supra*. In such proceedings *in rem*, where the object is to reach and dispose of property within the state, or some interest therein, service by publication, or in some mode other than upon the person, may be sufficient. The theory of the law is that when a man's property is brought under the control of the court by seizure, such seizure informs and notifies him of the proceedings taken for its sale or condemnation. In such cases, constructive notice is permitted and becomes effectual solely by reason of the attachment or seizure of the property. The jurisdiction of the court to determine the obligations of the defendant constructively notified is incidental to its jurisdiction over the property. The judgment has no effect beyond the property reached or affected in that suit. "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court." *Boswell* v. *Otis*, 50 U. S. 9 How. 336, 13 L. ed. 164. "But," says *Mr. Justice* Field, in *Pennoyer* v. *Neff*, *supra*, "where the entire object of the action is to determine the personal rights and obligations of the defendants,—that is, where the suit is merely *in personam*,—constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability." See also *Webster* v. *Reid*, 52 U. S. 11 How. 437, 13 L. ed. 761.

So far as section 26 applies to defendants residing out of the state, we do not see how it can be upheld as a valid law, in view of the principles hereinbefore announced. That is to say, where the proceeding by *scire facias* is instituted to revive a judgment rendered against a nonresident, the judgment of revival cannot be regarded as valid, if such nonresident has not been personally served or has not entered his appearance, but has only been served by publication and the mailing of a notice to him to his residence outside of the state. The *scire facias* proceeding to revive a judgment is not a proceeding *in rem*,—certainly not where the original judgment sought to be revived is a judgment *in personam*. Although the nonresident may receive the notice mailed to his residence out of the state, he is not bound to appear, because "no state can exercise direct jurisdiction and authority over persons or property without its territory." *Pennoyer* v. *Neff*, *supra*. We held in *Cloyd* v. *Trotter*, 118 Ill. 391, that service out of the state by copy of the bill and notice in a chancery case, so far as property in this state was sought to be affected, would give the court jurisdiction to decree concerning it, but not to render a personal decree against the defendant for the recovery of money or costs, and to award a general execution against him for the collection of the same. If the statute provided for bringing in a resident of the state by publication of the notice only, without the mailing of any notice to him, the same objection might lie as in case of a nonresident. A judgment *in personam* in the court of a state against one of the citizens who is not served with process, but is served by publication only, cannot be valid, except in cases coming within the exceptions already indicated. In *Webster* v. *Reid*, *supra*, it was said: "These suits were not proceedings *in rem* against the land, but were *in personam* against the owners of it. Whether they all resided within the territory or not does not appear, nor is it a matter of any importance. No person is required to answer in a suit on whom process has not been served, or whose property has not been attached." So, in *Pennoyer* v. *Neff*, *supra*, it was said that such judgments were not binding in the state where rendered, any more than they were outside of such state, and that since the passage of the 14th Amendment to the Federal Constitution their enforcement in the state could be resisted "on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law." But this statute does something more than require the publication of the notice. It requires a copy of the notice to be sent by mail, addressed to the defendant whose place of residence is stated in the affidavit. Suppose that a defendant resides in this state, and has a known residence here, but conceals himself so that process cannot be served upon him, and that the notice specified in the statute is sent to him by mail. If he receives the notice so sent, he has received personal notice just as much as though a summons was served upon him by the sheriff. The certificate of the clerk is made proof of the mailing of the notice. "Proof of the mailing of notices, properly addressed, is prima facie evidence of their having been received by the party addressed." *Meyer* v. *Krohn*, 114 Ill. 574; *Young* v. *Clapp*, 147 Ill. 176, and 193. When, therefore, in any collateral proceeding, a judgment of revival based upon notice given through the mail as well as by publication to a resident of the state is relied upon, it is prima facie valid. In such case the judgment cannot be said to have been rendered without jurisdiction over the defendant. The proceeding by *scire facias* to revive a judgment is not a new suit, but merely the continuation of the old one. It does not determine the obligations of the defendant to the plaintiff as involved in the original controversy and as settled by the

former judgment, but merely seeks a revival of the former judgment in order to have execution of it. The defendant cannot show any matter which was pleaded or might have been pleaded in the former action. The only defenses which can be set up in the *scire facias* proceeding are that no judgment was rendered, or, if one was rendered, that it has been satisfied or discharged. 21 Am. & Eng. Encyclop. Law, pp. 855, 864; *Smith* v. *Stevens*, 133 Ill. 188. Hence we are inclined to think that section 26, taken in connection with section 12 of the Chancery Act, is a constitutional enactment so far as it provides for service by publication of notice and mailing of copy thereof to residents of the state whose residence is stated in the affidavit.

In the case at bar the appellant admitted in his answer that the copy of the notice required by the statute was mailed to him. He sets forth therein *in hæc verba* the certificate of the clerk filed in the *scire facias* proceeding, in which that official certifies that on October 10, A. D. 1891, he sent by mail a notice (of which a copy is thereto attached) addressed to "Joseph R. Bickerdike, Elston Road, near Belmont Ave., Chicago, Ill." This certificate was prima facie evidence that the notice so sent by mail was received by appellant. If it be permissible to introduce evidence in the collateral proceeding to show that the copy of the notice sent by mail was not received, it is sufficient to say that, in this proceeding by creditors' bill, no evidence was introduced to overcome the prima facie case made by the clerk's certificate. It is true that, in his answer to the creditors' bill, appellant states that the notice was not received by him, but the bill waives the answer under oath; and therefore, under the statute, the answer has no greater force as evidence than the bill. Rev. Stat. chap. 22, par. 20, § 20. Where the oath is thus waived, the fact that the answer is sworn to gives it no force as evidence, but it will be deemed as merely a pleading. *Wallwork* v. *Derby*, 40 Ill. 527; *Willenborg* v. *Murphy*, 36 Ill. 344; *Moore* v. *Hunter*, 6 Ill. 317. As to the only defenses which appellant could have made in the *scire facias* proceeding, namely the nonexistence of the judgment, or its satisfaction or discharge, it may be said that, in his answer in the case at bar, appellant admits the existence of the original judgment, and he neither pleads nor attempts to prove any satisfaction or discharge. If the judgment had been satisfied or discharged, such fact could have been shown as a defense against the enforcement of the revived judgment by creditors' bill. It follows that, so far as the justice of the matter is concerned, appellant has been deprived by the filing of this creditors' bill of no defense which he was entitled to make in the *scire facias* proceeding.

Second, it is claimed that, even if section 26 is a valid enactment, the publication and mailing of the notice are not authorized without the filing of the affidavit mentioned in the section, and that the affidavit in this case was so defective as not to warrant the publication and mailing of the notice.

The affidavit which was filed in the *scire facias* proceeding on October 6, 1891, is as follows:

"STATE OF ILLINOIS, *County of Cook* } *ss.* In Superior Court, Oct. Term, 1891.

"Mary C. Allen and Edwin C. Allen, Jr., Executors of the Estate of Edward C. Allen, Deceased, *v.* "Joseph R. Bickerdike and Zacharias I. Pratt. } 135,489.

"James J. Barbour, attorney for above-named plaintiffs, on oath states that Joseph R. Bickerdike, one of the above-named defendants, resides in the city of Chicago, in this state, and that he is concealed within this state or has gone out of this state, so that process cannot be served upon him. Affiant further states that he has made inquiries at the residence of said defendant as to his whereabouts, and the replies received from said defendant's wife were to the effect that he was away, and she could not tell when he would be home; and when asked where said defendant was, she refused to state, and to every question put by this affiant she would make an evasive answer. Affiant further states that his inquiries of the person in charge of said defendant's office in the city of Chicago, in this state, failed to bring any information, further than that Mr. Bickerdike was away and did not wish to have it known where he was. Affiant further states that said defendant's neighbors stated to this affiant that said defendant would conceal himself to avoid service should suit be brought against him, and affiant is utterly unable to find said Bickerdike.

"JAMES J. BARBOUR.

"Subscribed before me this 6th day of October, 1891.

"[SEAL.] JOHN M. MEYER, *Notary Public.*"

It is said that the affidavit is void because the notary whose certificate is attached does not state that it was sworn to before him, but only states that it was subscribed before him. The case of *McDermaid* v. *Russell*, 41 Ill. 489, is referred to in support of the objection. In that case, where the widow of the deceased husband, who had died intestate and childless, filed a bill to have her interest as statutory heir in her husband's estate set off to her, and sought to bring in by publication certain minor heirs at law of her husband, it is said: "The affidavit of nonresidence does not appear to have been sworn to before any officer. For that omission it was no affidavit, and gave no authority to the court to enter an order of publication." The affidavit is not set forth; and how the fact that it was not sworn to appeared is not stated. That, however, was a case where the decree, which was against infants, was brought up for review in a direct proceeding. Here, the attack upon the judgment of revival is made in a collateral proceeding, and it appears that the affiant, whose name is signed to the affidavit, avers therein that what he states, he states "on oath;" and the name of the notary public with his seal appears below the notarial certificate attached to the affidavit; and the judgment of revival entered on December 9, 1891, recites upon its face that there was presented to the court

"due proof of publication of the notice to the defendants." The clerk is directed by the statute to cause publication of the notice to be made, and to mail a copy thereof, where the plaintiff or his attorney files an affidavit. The presumption is that the clerk did his duty, and that he would not have caused publication to be made and notice to be mailed unless such an affidavit as the statute requires was first filed. Here, an affidavit made by plaintiff's attorney was filed in the clerk's office, and it will be presumed that the affidavit was sworn to, or that the statements alleged upon its face to have been made on oath were made on oath. *Non constat* that the clerk himself did not administer the oath before causing the publication to be made. The recital in the judgment that "due proof" was made is at least prima facie evidence of that fact, and it will be presumed that such proof was made to the satisfaction of the court. *Pierce* v. *Carleton*, 12 Ill. 358, 54 Am. Dec. 405; *King* v. *Emden*, 9 East, 437; *Barnett* v. *Wolf*, 70 Ill. 76; *Harris* v. *Lester*, 80 Ill. 307. In *Kruse* v. *Wilson*, 79 Ill. 233, the action was ejectment, and the defendant relied upon a sheriff's deed made in pursuance of a sale under a judgment in an attachment proceeding. The record showed that the jurat attached to the affidavit for the attachment writ was not signed by any officer, and had no signature at all; and it was held that the affidavit was sufficient to authorize the issuance of the writ, and could not be assailed in the ejectment suit. In that case, the clerk recited in the attachment writ that the plaintiff had complained on oath to him; and we said: "It is not to be presumed the clerk has made a false statement in the writ, or that he would have issued the writ without the oath." It is true that here the clerk makes no such recital as that made in the attachment writ in that case. But the presumption that he did his duty is as strong, from the fact that he signed and published the notice and mailed a copy of it, as it would have been had he made a recital that an affidavit had been sworn to and filed in his office. *Cook* v. *Jenkins*, 30 Iowa, 452.

A further objection is made to the affidavit upon the ground that it is in the disjunctive, and cases are referred to where affidavits in attachment proceedings which state two or more statutory causes or grounds of attachment in the disjunctive are held to be defective. We do not think that those cases are applicable here. The material fact was that appellant, being a resident of the state, could not be found in it, so that process could be served on him; and it could not be certainly known, as the facts set up in the affidavit show, whether the impossibility of finding his whereabouts was due to his concealment within the state or to his departure from it. The fact that he could not be found might be due either to his having gone out of the state or to his concealment within it; but the result of either circumstance was the same, namely, ignorance of his whereabouts, making it impossible to serve him with process. The alternative causes are linked by a common and necessary consequence. We think that the notice conforms to the requirements of the statute, as above set forth.

The judgment of the Superior Court of Cook County is affirmed.

Petition for rehearing denied October 15, 1895.

KENTUCKY COURT OF APPEALS.

COMMONWEALTH of Kentucky, *Appt.*,
v.
Ebenezer PETTY.

(.....Ky.....)

A state statute requiring a license for the sale of patent rights is in violation of the rights of the patentee under federal law.

(January 22, 1895.)

APPEAL by the Commonwealth from a judgment of the Circuit Court for Christian County in favor of defendant in a prosecution against him for selling without a license the right to use a certain patent right. *Affirmed.*

The facts are stated in the opinion.

Mr. **William J. Hendrick**, *Atty-Gen.*, for appellant:

The appellee was indicted for unlawfully peddling without a license.

NOTE.—*Power of state to restrict and regulate the sale or enjoyment of patent rights.*

I. *As to sales.*
 a. *Sales of patent rights.*
 b. *Sales of patented articles.*
II. *Police regulations of other business in which patents are used.*
III. *Restricting right of action for infringement.*
IV. *Taxation of patent rights.*

I. *As to sales.*

a. *Sales of patent rights.*

The above case is somewhat different from any others in which the rights of patentees under state laws have been decided, and the decision seems clearly correct by analogy to decisions which have established the unconstitutionality of license fees charged upon interstate commerce. The statute condemned by the court in the present case made it unlawful to sell a patent right or territory for the sale, use, or manufacture of patent rights without procuring and paying for a license for such business. In other states the statutes which have been passed upon have been of two classes, although some statutes combined both: First, those which required certain conditions precedent to the sale of patent rights to be complied with, consisting, in substance, of the placing on file with the clerk of any county in which a sale was to be made of a copy of the letters patent, and obtaining a certificate of the right to sell; second, those which required the words "given for a patent right" to appear on the face of any instrument given for such a consideration. The Kentucky statute involved in the present case of COM. v. PETTY seems to go somewhat further by imposing the burden of license fee upon the owner of a patent as a condition of his right to sell it.

See also 38 L. R. A. 503; 41 L. R. A. 548.

Vendors for patent rights or territories for the sale, use, or manufacture of patent rights, goods, wares, etc., are included in the definition of peddler.

Rash v. *Farley*, 91 Ky. 344; *Rash* v. *Halloway*, 82 Ky. 674; *Com.* v. *Jones*, 7 Bush, 502; *Brown* v. *Young*, 2 B. Mon. 26; *Spadone* v. *Reed*, 7 Bush, 455; *Bull* v. *Harragan*, 17 B. Mon. 349.

Paynter, J., delivered the opinion of the court:

The grand jury of Christian county returned an indictment against the appellee, Ebenezer Petty, charging that he did unlawfully sell and offer for sale the patent right to make and use a certain machine or contrivance called a post and pile driver, and did sell territory for the use, sale, and manufacture of the post and pile driver without first having obtained a license as required by law, and that at the time he was an itinerant person selling and offering to sell the patent right and territory as stated. This indictment is under the statute which imposes a penalty on all itinerant persons who vend patent rights or territory for the sale, use, or manufacture of patent rights, without procuring and paying for a license authorizing such sale. The law fixes the fee for the li-

First, as to the decisions holding the statutes unconstitutional.

A state statute regulating the sale of patent rights was held void in *Ex parte* Robinson, 2 Biss. 309, where the statute attempted to make it unlawful for any one to sell any patent right without first filing with the clerk of the county copies of his letters patent with an affidavit to their genuineness and his authority to make the sale, also setting forth his name, age, occupation and residence. The circuit court said: "If the patentee complies with the law of congress on the subject, he has a right to go into the open market anywhere within the United States and sell his property. . . . The law in question attempts to punish by fine and imprisonment a patentee, for doing with his property what the national legislature has authorized him to do, and is, therefore, void." In this case it will be noticed that the statute applied to a sale of patent rights generally, and was not an exercise of the police power with respect to any particular article or thing.

In Illinois a statute making it unlawful to sell or barter a patent right without first making the affidavit and proof required by the statute, and also requiring the words "given for a patent right" to appear in the note, and making the note subject to the same defenses after transfer as before, is held unconstitutional in Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 68, since the statute is exclusively restricted to notes given in whole or in part for a patent right, and deprives them of one of the important attributes of negotiability.

A similar decision was rendered in Minnesota, in Crittenden v. White, 23 Minn. 24, 23 Am. Rep. 676, in respect to a statute requiring the compliance with certain conditions before a person can lawfully sell a patent right within the state. This decision was based on *Ex parte* Robinson, *supra*.

So the Nebraska Act of February 18, 1873, making it a misdemeanor for any person to sell or barter any patent right until after he has submitted the letters patent, or a copy thereof, and his authority to sell the patent right, to the county judge for examination, and made affidavit as to his name, age, place of residence, and former occupation, was held unconstitutional. Wilch v. Phelps, 14 Neb. 134. The court distinguishes the case from those relating to regulations of sales of manufactured patented articles.

It was also decided in an opinion by Swayne, J., in Woollen v. Banker, 2 Flipp. 33, that the Ohio statute requiring the words "given for a patent right" to be written or printed on the face of any note the consideration for which consisted in whole or in part of the right to make, use, or vend any patent, was unconstitutional.

Such a statute is also declared unconstitutional in Castle v. Hutchinson, 25 Fed. Rep. 394, distinguishing Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, as a case relating to tangible property rather than the right in letters patent.

So the Michigan statute requiring notes or other obligations given for patent rights to have the words "given for a patent right" on the face of the instrument is held unconstitutional in Cranson v. Smith, 37 Mich. 309, 26 Am. Rep. 514, on the ground that it imposes conditions on the transfer of patent rights, which are not applied to the transfer of any other property, thereby interfering with the value and enjoyment of such rights, and treating them as a species of interests to be regarded with disfavor.

In reversing an erroneous conviction in State v. Lockwood, 43 Wis. 403, under a statute making it a misdemeanor to take a note or other written obligation, any part of the consideration of which is a patent right, without inserting in it the words "given for a patent right," the court said if the validity of the statute were properly before it, it would be much disposed to follow the ruling of the supreme court of Michigan in Cranson v. Smith, 5 Cent. L. J. 386, and hold the statute to be an invasion of federal authority and therefore void; citing also Woolen v. Banker, 17 Alb. L. J. 72.

The Indiana statute requiring a patent-right note to have on its face the words "given for a patent right" was also held unconstitutional in Helm v. First Nat. Bank, 43 Ind. 167, 13 Am. Rep. 395, but this case is overruled by later cases in the same state. See *infra*.

But much the larger number of decisions have upheld such statutes.

The validity of the Indiana statute making it unlawful to sell or barter a patent right without first filing with the clerk of the county copies of the letters patent duly authenticated, with an affidavit that they are genuine and have not been revoked or annulled, and that the person selling has full authority to do so, setting forth also his name, age, occupation, and residence, is expressly affirmed in Reeves v. Corning, 51 Fed. Rep. 774, in which the court says that *Ex parte* Robinson, 2 Biss. 309, is overruled by Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, and cites the earlier Indiana cases, which deny the constitutionality of the statute, as overruled by the later cases in the same state. The court also distinguishes Castle v. Hutchinson, 25 Fed. Rep. 394, which denied the constitutionality of a statute making it a criminal offense for the seller of a patent to take a note without the words "given for a patent right" on its face, as this statute discriminated between notes given for patent rights and those given for other considerations.

So, the validity of the Indiana statute requiring persons who sell patent rights to file a copy of the letters patent and an affidavit that the letters are genuine, and that authority to sell exists, is sustained in Brechbill v. Randall, 102 Ind. 528, 52 Am. Rep. 696, declaring that Grover & B. Sewing Mach.

cense that shall be paid. The appeal is taken from a judgment of the court below sustaining a demurrer to and dismissing the indictment.

The sole question is as to the validity of the statute which requires a patentee or his vendee or assignee to first procure and pay for a license before he is authorized to vend his patent right or territory for the sale, use, or manufacture of his patent rights. This statute in effect declares unlawful the sale of any patent right, or the sale of any part of the territory which is covered by such patent right, to any one, unless the vendor first procure from the officials, as provided in the statute, a license authorizing the sale. The 8th clause of section 8 of article 1 of the Constitution of the United States confers authority upon congress "to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." The power thus given to congress has been exercised by it since the organization of the government. Statutes have been enacted relating to the subject, and the provisions thereof fully prescribe the circumstances and the manner of the issual of patents, how they may be transferred, and the character and extent of the rights which they confer on the patentee or his vendee or assignees. The moment the patent is granted,

Co. v. Butler, 53 Ind. 454, 21 Am. Rep. 200, is overruled by Toledo Agri. Works v. Work, 70 Ind. 253, and Fry v. State, 63 Ind. 552, 30 Am. Rep. 238.

The constitutionality of the Indiana statute in its entirety is also affirmed in New v. Walker, 108 Ind. 365, which regards the decision of *Ex parte* Robinson, 2 Biss. 309, as overruled, and says all other decisions against the constitutionality of such statutes were based on that decision.

The validity of the Indiana statute is also sustained in Pape v. Wright, 116 Ind. 502, in which a patent right had been sold without complying with the statutory requirements.

The Indiana statute is also assumed to be valid in Mayfield v. Sears, 133 Ind. 86, where the question involved was as to the sufficiency of the compliance with the statute.

The protection of the citizens from fraud and imposition as an exercise of the police power is the purpose of the Indiana statute as interpreted by Reeves v. Corning, 51 Fed. Rep. 774, and the statute is said to afford protection while it imposes no unjust burden on honest dealers, and to deprive the owner of a patent of no right or immunity justly his own, or discriminate against the owners of patent rights.

The validity of a statute making it a misdemeanor to take, sell, or transfer a negotiable instrument given for a patent right, knowing that fact, unless it has on its face the words "given for a patent right," is sustained in Herdic v. Roessler, 109 N. Y. 127, affirming 39 Hun, 198, on the ground that it in no way interferes with the exclusive right of the patentee, and did not make the note illegal, although the statutory words were omitted, or defeat the rights of a bona fide holder.

A statute permitting all defenses against any assignee, indorser, holder, or purchaser of a note, draft, or bill of exchange given for a patent right which could have been made between the original parties, is held in Tilson v. Gatling, 60 Ark. 114, to be valid, and not to violate the provisions of the United States Constitution giving congress power to secure to inventors exclusive rights in their discoveries.

The court argues in Tod v. Wick Bros., 36 Ohio St. 370, that if the act of congress of its own force secured to the owner of a patent right the right to receive negotiable paper on the sale of his patent, accompanied by such incidents or immunities as would protect it in the hands of an innocent holder against prior equities or defenses, it would seem to require a uniform operation throughout the United States, and would defeat the law of some states in which a transfer of paper which is negotiable in form does not cut off any defenses existing against the payee. That is to say, any variation in the laws of the several states respecting the transfer of negotiable paper and its effect would be impossible so far as applied to notes given for patent rights. The exclusive right of a patentee to make, use, and vend his discovery is declared in Tod v. Wick Bros. to be property in no higher sense, and to possess no greater incidents and immunities, than property acquired by purchase at common law. And it is said that the legislature has as complete power to withdraw from negotiable paper that quality which protects an indorsee against defenses when the note is given for an interest in a patented invention as when given for any other kind of property.

A statute which should make absolutely void all notes given for patent rights, unless the words "given for a patent right" prominently appeared on the face of the instrument, would interfere with the right of a patentee secured to him by the acts of congress to sell and assign his patent, says the court by *Mr. Justice* Sharswood in Haskell v. Jones, 86 Pa. 173. Such a statute he declares would be unconstitutional and void. But the Pennsylvania statute is held not to have this effect, but merely to subject patent-right notes with such words therein to the original defenses after their transfer or assignment as well as before, and the sole object of the legislature is declared to be to secure, so far as could be done consistently with the rights of innocent third persons, that notice of the consideration should be given to all who should take the paper; and it is held accordingly that the rights of bona fide holders are not prejudiced by the omission of the statutory words from such an instrument. The court says: "This very plainly distinguishes our act from the statutes of other states which have been held unconstitutional."

The constitutionality of the Pennsylvania statute requiring the words "given for a patent right" to appear on the face of every note given in whole or in part for a patent right, and that the note shall be subject to the same defenses in the hands of a purchaser as in the hands of the original holder, was again sustained in Shires v. Com., 120 Pa. 368, which was the case of a conviction under an indictment for taking a note in violation of the statute.

The sale of a right to use, and to manufacture for sale and use, the patented article, is a sale of the patent right itself, within the meaning of such a statute. New v. Walker, 108 Ind. 365.

The validity of statutes requiring the words "given for a patent right" in instruments given therefor is also assumed, if not expressly declared, in the following cases construing such statutes and instruments:

That the Pennsylvania act does not apply to non-negotiable notes is decided in Gray v. Mortimer, 7 Pa. Co. Ct. 671.

The same is decided as to the Ohio statute, in State v. Brower, 30 Ohio St. 101.

Although the Indiana statute was applied to a non-negotiable note in Robertson v. Cooper, 1 Ind. App. 78.

It is held that a statute making it a misdemeanor

the rights of the patentee are complete. Even his property rights cannot be destroyed or impaired by congress subsequently repealing the law which authorized the granting of it. *McClurg* v. *Kingsland*, 42 U. S. 1 How. 206, 11 L. ed. 103. A patent right is not a tangible property. It is an incorporeal right. The patent secures to the patentee the exclusive right in the discovery. The Supreme Court, in the case of *Patterson* v. *Kentucky*, 97 U. S. 501, 24 L. ed. 1115, said: "The right of property in the physical substance, which is the fruit of the discovery, is altogether distinct from the right in the discovery itself, just as the property in the instruments or the plate by which copies of a map are multiplied is distinct from the copyright, as the map itself. *Stephens* v. *Cady*, 55 U. S. 14 How. 528, 14 L. ed. 528; *Stevens* v. *Gladding*, 58 U. S. 17 How. 447, 15 L. ed. 155." The incorporeal right, or the right in the discovery, congress has full and complete authority to secure to the inventor, and protect him in its enjoyment and against all interference. *Justice* Field, in delivering the opinion of the Supreme Court of the United States in *Webber* v. *Virginia*, 103 U. S. 344, 26 L. ed. 565, said: "It is only the right to the invention or discovery—the incorporeal right—which the state cannot interfere with." It is proper that this authority should be exercised, that the efforts of genius may be re-

to take a note for a patent right without the words "given for a patent right" contained on its face makes such note void in the hands of a person who takes it in violation of the statute. Bowen v. Kemerer, 2 Pearson, 250; Weaver v. Frantz, 1 Pennyp. 158; Hunter v. Henninger, 93 Pa. 373.

But the bona fide holder of such note given, which omits the words required by statute, is entitled to enforce the note. Kniss v. Holbrook (Ind.) 41 N. E. Rep. 1118; New v. Walker, 108 Ind. 365; Teecher v. Merea, 118 Ind. 586; Pendar v. Kelley, 48 Vt. 27; Streit v. Waugh, 48 Vt. 298; Kraft v. Gingrich, 2 Pa. Dist. R. 398; Canajoharie Nat. Bank v. Diefendorf, 21 N. Y. S. R. 602 (Feb. 7, 1889); Vosburgh v. Diefendorf, 16 N. Y. S. R. 493 (May, 1888); Herdic v. Roessler, 109 N. Y. 127, affirming 39 Hun, 196; Moses v. Comstock, 4 Neb. 516.

The holder of such a note without the words required by statute therein has the burden of proving that he was a bona fide holder without notice. Horstman v. Zimmerman (Pa.) 8 Cent. Rep. 249; Kniss v. Holbrook, *supra*.

Knowledge of the purchaser of a note that it was given for a patent right puts him on inquiry as to whether or not the conditions of the statute as to such notes have been complied with. New v. Walker, 108 Ind. 365; Johnson v. Martin, 19 Ont. App. 592; Tod v. Wick Bros. 36 Ohio St. 370.

But not if the note was made in another state and the purchaser does not know of such statute in the other state. Palmer v. Minar, 8 Hun, 342.

Negotiable paper given for patented machines, or to secure an agency to sell patented machines in a certain specified territory, is held, in State v. Peck, 25 Ohio St. 26, to be unaffected by the statute respecting notes given for "patent rights."

And notes given for articles manufactured under a patent are not within the provisions of the Indiana statute requiring compliance with specified conditions in case of notes taken for patent rights. Hankey v. Downey, 116 Ind. 118, 1 L. R. A. 447.

The Tennessee statute allowing all defenses against an indorsee of a note given for a patent right is held in Harmon v. Hagerty, 88 Tenn. 705, to apply only to notes which disclose on their face that they were given for an interest in a patent right, but nothing is said in the case about the validity of such a statute.

In Delong v. Barnes, 45 Ohio St. 287, without any question as to the validity of the statute, it was held that where a note for a patent right was given containing such words, and immediately surrendered at a discount for another note without those words, the latter also was a patent-right note within the statute.

So, a transfer of an interest in a patent by one partner to another, to induce the latter to join in firm notes for an individual debt of the former, does not bring such notes within the scope of the Bills of Exchange Act 1890, 53 Vict. chap. 33 (D), requiring patent-right notes to have on their face the words "given for a patent right." Samuel v. Fairgrieve, 21 Ont. App. 418.

In First Nat. Bank v. Stockell, 92 Tenn. 252, 20 L. R. A. 605, it was held that the purchaser of a note was not chargeable with knowledge that it was given for a patent right by the letters "C. I. P." standing unexplained on its face, although they were in fact intended to show that it was given for an interest in the "Chapin iron process."

With the above case is a note on the validity of notes given for patent rights. A portion of that note covers some of the ground of this note, but it is thought best to make the present note complete on the subject here treated.

It will be seen from the above cases that a considerable majority of the decisions, and about one half of the courts, sustain the validity of the statutes such as are above mentioned, although in several states such statutes are held unconstitutional. Thus, in Illinois, Minnesota, Nebraska, and Michigan statutes like one or both of the kind mentioned have been held unconstitutional, and to the same effect are several decisions of the circuit courts of the United States, and an expression of opinion without deciding the question in a Wisconsin case. On the other hand, the decisions in Arkansas, Indiana, New York, Ohio, and Pennsylvania, as well as in one of the circuit courts of the United States, sustain the validity of one or both of such statutory regulations, and the Tennessee case of Harmon v. Hagerty, 88 Tenn. 705, seems to assume their validity.

It is not easy to say what may be the final controlling decision of the question by the Supreme Court of the United States which shall settle the present conflict of decisions. But an analogy exists between this question and that of interstate commerce. The decisions on the subject of interstate commerce seem to indicate the invalidity of these patent-right regulations. The question is, Can a state by police regulations discriminate between a sale of patent rights and sales of other property, in respect either to the conditions precedent to the right to sell or to the form of obligations taken on the sales? Or, to put the question in another way, Can state police regulations be valid when aimed exclusively at sales of patent rights? It is clear that police regulations when general in their nature may be valid, although applied to dealings in patent rights; but when they are aimed only at sales of patent rights, thus discriminating against such sales, even if the purpose is not to depreciate the rights of the owners, but only to prevent them from committing fraud in such sales, the question is a different one. The case is similar to that of a police regulation aimed exclusively at interstate or foreign commerce, such as inspection laws applicable only to goods from other states. While general inspection laws are valid, as shown in Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, yet any discrimination in

warded, thus stimulating and encouraging the production of useful inventions. When the property is brought into existence by the application of the discovery, and is brought into or produced in the state, the use of it is not beyond the control of its legislation. The question as to the use of the property thus produced is not involved here. In *Gayler* v. *Wilder*, 51 U. S. 10 How. 494, 13 L. ed. 511, Taney, *Ch. J.*, said: "The monopoly granted to the patentee is for one entire thing; it is the exclusive right of making, using, and vending to others to be used, the improvements he has invented, and for which the patent is granted. The monopoly did not exist at common law, and the rights, therefore, which may be exercised under it, cannot be regulated by rules of the common law. It is created by the act of congress." In Illinois, a statute required vendors of patent rights to procure a certificate from the county clerk, and provided, further, that every note given for a patent right should contain the words "given for a patent right," and that such obligation should be subject to all defenses as if owned by the payee. The supreme court of Illinois, in the case of *Hollida* v. *Hunt*, 70 Ill. 109, 22 Am. Rep. 63, held that the law was unconstitutional, because it was an attempt to regulate and control by enactments of the legislature of Illinois a matter of which congress had sole jurisdiction. Part

such inspection law against property (such as flour) brought from outside the state, is expressly condemned in Voight v. Wright, 141 U. S. 62, 35 L. ed. 668. Yet danger from unwholesome or fraudulent articles of merchandise may in some instances be more peculiar to importations from other states than any danger of fraud in sales can be peculiar to sales of patent rights; and police regulations aimed exclusively at the former seem as justifiable as those aimed exclusively at the latter. Therefore the rule adopted by the Supreme Court of the United States in respect to state inspection laws, which condemns a law aimed only at goods brought from outside the state, would condemn any state statute which aimed to regulate sales of patent rights only, unless interstate commerce has greater immunity from state interference than patent rights have. The decisions of the Supreme Court of the United States suggest that the limit of state police power, when it affects rights given by federal law, is an interference which is merely incidental to other purposes, and which is not exclusively aimed at or limited to its effect on such federal rights.

b. Sales of patented articles.

"We can find no objection to the legislation of Virginia in requiring a license for the sale of the sewing-machines, by reason of the grant of letters patent for the invention," says the opinion of *Mr. Justice* Field in Webber v. Virginia, 103 U. S. 344, 26 L. ed. 565.

The relation of the police power of the states to the rights of patentees under letters patent granted by the United States is expressed very fully and with great clearness by *Mr. Justice* Field in his opinion on behalf of the Supreme Court of the United States in Webber v. Virginia, *supra*. Because of the clearness of the statement as well as because it is from the court of ultimate authority on the subject, we quote at some length. The language is as follows: "The right conferred by the patent laws of the United States to inventors to sell their inventions and discoveries does not take the tangible property, in which the invention or discovery may be exhibited or carried into effect, from the operation of the tax and license laws of the state. The combination of different materials so as to produce a new and valuable product or result, or to produce a well-known product or result more rapidly or better than before, which constitutes the invention or discovery, cannot be forbidden by the state, nor can the sale of the article or machine produced be restricted, except as the production and sale of other articles, for the manufacture of which no invention or discovery is patented or claimed, may be forbidden or restricted. The patent for a dynamite powder does not prevent the state from prescribing the conditions of its manufacture, storage, and sale, so as to protect the community from the danger of explosion. A patent for the manufacture and sale of a deadly poison does not lessen the right of the state to control its handling and use. The legislation respecting the articles which the state may adopt after the patents have expired, it may equally adopt during their continuance. It is only the right to the invention or discovery—the incorporeal right—which the state cannot interfere with. Congress never intended that the patent law should displace the police powers of the states, meaning by that term those powers by which the health, good order, peace, and general welfare of the community are promoted. Whatever rights are secured to inventors must be enjoyed in subordination to this general authority of the state over all property within its limits."

The fact that oil is a patented article was held in Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, affirming 11 Bush, 311, 21 Am. Rep. 220, to be immaterial when the oil did not conform to the standard or test required by a state statute as a prerequisite to the right to sell or offer it for sale for illuminating purposes.

The declaration of *Chief Justice* Kent in Livingston v. Van Ingen, 9 Johns. 581, that, "if the inventor's machine or other production will have a pernicious effect upon the public health or safety, no doubt a competent authority remains with the states to restrain the use of the patent right," has been quoted with approval in later cases, especially in Patterson v. Kentucky, *supra*, where it is said that although the action was no longer authority and the language not absolutely necessary to the decision of the case, yet, "as an expression of opinion by an eminent jurist as to the nature and extent of the rights secured by the Federal Constitution to inventors, it is entitled to great weight."

The police power of the state to regulate the business of peddlers is not limited by the fact that a peddler may be selling patented articles. The court said the patent laws "give exclusive rights, but they do not determine personal capacity to contract, or prescribe the requisites for sales of patented articles, or impose the customary restrictions which are supposed to be important to the protection of public morals. All these matters are left to the state law. A patentee must observe the Sunday law as much as any other vendor; he must put his contracts in writing under the same circumstances which require writings of others, and he must obey all other regulations of police which are made for general observance. Patterson v. Kentucky, *supra*. Invidious regulations, applicable to patentees exclusively, might be void, but there is no question of that nature here." People v. Russell, 49 Mich. 617, 43 Am. Rep. 478.

A state statute prohibiting the manufacture or sale of any article not made from unadulterated milk or cream, designed to take the place of butter or cheese, is sustained in *Re* Brosnahan, 18 Fed.

of the Illinois statute was similar to the one in question. It was an effort to regulate or control the sale of a patent right by first requiring a permission from the county clerk. In *Cranson* v. *Smith*, 37 Mich. 309, 26 Am. Rep. 516, the supreme court of Michigan decided that a statute of that state requiring obligations given for patent rights to contain the words "given for a patent right," and making them subject to defenses in the hand of innocent holders the same as in the hand of the original payee, was an unconstitutional interference with the prerogative of congress, and void. The court said: "Where any right or privilege is subject to the regulations of congress it is not competent for state laws to impose conditions which shall interefere with the rights or diminish their value. In those cases where the congressional power is lawfully exercised it is supreme." *Patterson* v. *Com.*, 11 Bush, 311, 21 Am. Rep. 220, arose under a statute prohibiting the sale within the state of all illuminating oils which did not ignite at a certain named temperature, and imposing a fine for its violation. The same act imposed a penalty on all who should sell such fluid after it had been condemned by the state inspector, and the barrels or packages were branded by him, "Unsafe for illuminating purposes." The defendant was selling an oil which had been condemned by the inspector. The court held

Rep. 62, in an opinion by *Justice* Miller of the Supreme Court of the United States on a writ of habeas corpus by a person who had been convicted of violating the statute by selling oleomargarine, which was a patented article. He said: "The answer is, that the purposes of the patent law and of the constitutional provision are answered when the patentee is protected against competition in the use of his invention by others; and when the law prevents others from infringing on his exclusive right to make, use, or sell, its object is accomplished."

So the fact that an article was manufactured under letters patent issued by the United States is held to constitute no defense for violating Ohio Rev. Stat. § 7090, making it an offense to sell any substance not made wholly from pure cream or pure milk which purports to be butter or cheese. Palmer v. State, 39 Ohio St. 236, 48 Am. Rep. 429.

The owner of a patent medicine is not by virtue of his patent entitled to administer the medicine as a profession in violation of a state law regulating the practice of medicine. Smith v. Tracy, 2 Hall, 465; Thompson v. Staats, 15 Wend. 395; Jordan v. Dayton Overseers, 4 Ohio, 294.

In Jordan v. Dayton Overseers, *supra*, the court said: "An attempt by the legislature in good faith to regulate the conduct of a portion of its citizens in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the federal government." In discussing the patent law the court said: "The sole operation of the statute is to enable him (the patentee) to prevent others from using the products of his labors except with his consent. But his own right of using is not enlarged or affected."

In an action for the price of a patented machine a reply that the plaintiff, although a foreign corporation, had the right to sell patented articles in the state notwithstanding any law of the state to the contrary, is held bad on demurrer where the answer alleged that the foreign corporation had not complied with the laws of the state so as to be authorized to do business. Toledo Agri. Works v. Work, 70 Ind. 268. This decision was based on Fry v. State, 63 Ind. 552, 30 Am. Rep. 238, which sustained a police regulation respecting scalpers or ticket brokers, and it overrules, without mentioning them, the prior decisions of the court which are directly in conflict with it, namely, Grover & B. Sewing Mach. Co. v. Butler, 53 Ind. 454, 21 Am. Rep. 200, and Shook v. Singer Mfg. Co. 61 Ind. 520.

A foreign corporation which receives notes from an agent on an accounting in which he is charged with notes taken by him from the purchasers of patented machines is, in an action against the agent on his notes, subject to the statutes which require certain conditions to be complied with by foreign corporations before doing business in the state, and until these are complied with the corporation cannot maintain its action. Domestic Sewing Mach. Co. v. Hatfield, 58 Ind. 187.

The court does not deny that a foreign corporation could sell its patented articles in the state before compliance with the statutes, but declares that the taking of the note sued on in this case, in consideration of other notes retained by the agent, was a transaction which had nothing to do with the manufacture, sale, or use of any patented article.

II. *Police regulations of other business in which patents are used.*

As to state power to regulate the use of patented articles, there is but little disagreement. It is well established that the manner of the use of a patented article is subject to state regulation and control when the public welfare requires it. So it was held in State v. Bell Teleph. Co. 36 Ohio St. 296, 38 Am. Rep. 583.

The power of the legislature to regulate charges for and prevent discrimination in the use of telephones is not affected by the fact that the instruments are patented. Central Union Teleph. Co. v. Bradbury, 106 Ind. 1; Hockett v. State, 105 Ind. 250; Chesapeake & P. Teleph. Co. v. Baltimore & O. Teleg. Co. 66 Md. 417, 59 Am. Rep. 167.

The fact that a licensee of patents for telephones was forbidden by the terms of the license to supply the instrument to any telegraph company for telegraphic purposes without consent of its licensor, was held no justification for discrimination between those who wished to make use of the telephone, on the ground that the telephone company occupied the position of a common carrier and was by common-law principles precluded from making unjust discrimination. State v. Delaware & A. Teleg. & Teleph. Co. 47 Fed. Rep. 695. Although the licensor was a corporation of another state, the court laid down the rule that when the use of a patented device is thrown open to the public or to classes of the public all are entitled to use it on the same terms as others in the same class, and therefore any contract or agreement which would effectually evade the rule must be declared void as being against public policy both at common law and by statute.

Likewise a provision in a license from a foreign corporation to a domestic corporation for the use of a telephone system, which restricts the right of the licensor to give equal privileges to telegraph companies, was held void as contrary to public policy, especially when that policy is declared in a statute of the state, in State v. Bell Teleph. Co. 36 Ohio St. 296, 38 Am. Rep. 583.

The same decision was made in State v. Bell Teleph. Co. by the St. Louis circuit court, as cited in a *note* in 38 Am. Rep. 597. Also in Missouri v. Bell Teleph. Co. 23 Fed. Rep. 539.

that the legislation was within the jurisdiction of the state, and that, when the article is made by reason of the application of the principle discovered, and is sold or attempted to be sold or used within the jurisdiction of the state, it is subject to its law the same as other property. *Judge* Pryor, delivering the opinion of the court, said: "There is a manifest distinction between the right of property in the patent, which carries with it the power on the part of the patentee to assign it, and the right to sell the property resulting from the invention or patent. A state has no power to say through its legislature that the patentee shall not sell his patent, or that its use shall be common to all of its citizens; for this would be in direct conflict with the law of congress; and that portion of the opinion referred to, giving the patentee an unrestricted power to sell, has allusion alone to his right of property in the patent right, as that was the only question involved in the case. The discovery or invention is made property by reason of the patent, and this right of property the patentee can dispose of under the law of congress, and no state legislation can deprive him of this right; but when the fruits of the invention or the article made by reason of the application of the principle discovered is attempted to be sold or used within the jurisdiction of a state, it is subject to its laws, like other property and such has been the uniform decision of all the courts, state and federal, upon this question." This opinion most clearly states the distinction between the right of property in the patent and the right in the article which has been produced by the application of the principle discovered. *Patterson* v. *Com.*, *supra*, was appealed to the Supreme Court of the United States, and that court affirmed the judgment. 97 U. S. 501, 24 L. ed. 1115.

Another case holding such a stipulation void and against public policy as declared by the common law and by statute is Bell Teleph. Co. v. Com. (Pa.) 8 Cent. Rep. 907.

A decision to the same effect was made in Vermont in Commercial U. Teleg. Co. v. New England Teleph. & Teleg. Co. 61 Vt. 241, 5 L. R. A. 161.

But in conflict with the above cases it was held in American Rapid Teleg. Co. v. Connecticut Teleph. Co. 49 Conn. 352, 44 Am. Rep. 227, that a statute requiring a telephone company to be impartial toward persons using its line did not apply in case of a domestic corporation which had a limited license for the use of patented telephone instruments from a corporation of another state. The court said the utmost reach of the statute is to require an impartial use of such rights or privileges as they possess, and if their system was carried on by instruments not patented or by patented instruments which the defendant owned, the statute would apply. But when the patents were owned by a resident of another state the licensee could be compelled to give impartially to applicants only the full measure of the right which it had been able to procure. It was also said that the domestic corporation could purchase from the owner even the most limited right, and the court could not enlarge or diminish the purchase.

A statute limiting telephone charges is sustained in Central U. Teleph. Co. v. State, 118 Ind. 195, but the effect of patents is not considered.

A telephone company was also compelled by mandamus to furnish a telephone for the office of an attorney, in State v. Nebraska Teleph. Co., 17 Neb. 126, 52 Am. Rep. 404, but nothing was said in the case about any claim of exemption from control on account of patents.

Other decisions by which telephone companies have been compelled to serve those who demand service in a proper way are collected in a note on *Compulsory service by the party whose business it is to serve the public*, in Rushville v. Rushville Nat. Gas Co. (Ind.) 15 L. R. A. 321, but do not seem to have involved any express decision as to any rights under patents, as no such right seems to have been asserted.

The police power of a state to compel electric wires to be placed under ground is sustained in Western U. Teleg. Co. v. New York, 38 Fed. Rep. 552, 3 L. R. A. 449, 2 Inters. Com. Rep. 588, as against a telegraph company which is a business agency of the general government and has the right under act of congress to operate its lines along post roads, but no question seems to have been made in this case as to the effect of any patents.

The right to draw a lottery in violation of state law is denied in Vannini v. Paine, 1 Harr. (Del.) 65, notwithstanding a right to do so was claimed under a patent from the United States. The court said: "A person might with as much propriety claim a right to commit murder with an instrument because he held a patent for it as a new and useful invention."

III. *Restricting right of action for infringement.*

A state statute relieving a state from liability for acts of its officers cannot relieve it from liability for the infringement of a patent. Bliss v. Brooklyn, 8 Blatchf. 538.

In deciding that a county was liable for infringement of a patent it is said in May v. Logan County Comrs., 30 Fed. Rep. 250: "The state could not, by either direct or indirect legislation, exempt its counties from liability for the infringement of patents, nor has it attempted to do so."

The power of a state to exempt counties from liability for infringement of letters patent is also denied in May v. Ralls County, 31 Fed. Rep. 473, which holds that U. S. Rev. Stat., § 4919, authorizing damages for infringement of any patent in an action on the case, applies to actions against a county.

Some other cases holding counties liable for infringement, but not involving the effect of state statutes, are May v. Juneau County, 30 Fed. Rep. 241; May v. Mercer County, 30 Fed. Rep. 246; May v. Fond du Lac County, 27 Fed. Rep. 695; May v. Johnson County Comrs., not reported, but cited in 30 Fed. Rep. 250.

That a county is not liable for infringement of a patent was decided in Jacobs v. Hamilton County Comrs., 1 Bond, 500, following the supposed authority of a state decision denying the liability of a county for negligence. But this decision has been disapproved in all subsequent cases.

A state statute limiting the right to sue a county until a proper demand for payment or settlement has been made, was held in May v. Buchanan County, 29 Fed. Rep. 473, to be valid as applied to an action against a county for infringement of a patent, denying the contention that the law could not apply because the subject-matter of the action was beyond state control.

The effect of state statutes of limitations or other matters of state practice or remedies in infringement cases is not considered here.

IV. *Taxation of patent rights.*

In Pennsylvania the capital stock of a corporation which is issued for patent rights merely, and not for any tangible property or goods manufac-

National authority only can grant patents, and regulate the sale of the right of the inventor in his discovery, and the manner of the disposition of such rights. While the states have jurisdiction to legislate on the matter of the use or sale of the article, which is brought into existence by virtue of the application of the patented process, it is an invasion of national authority for the legislature of a state to make a law which requires the patentee or his vendee to first procure and pay for a license to sell his right in his discovery,—his intangible right,—or the territory in which such right is granted. In so far as the statute attempts this, it is in conflict with the law of congress. If the legislature has authority to require the patentee or his assignees to procure and pay for this privilege, then there is no limit to the extent of such requirement. The legislature could fix the license fee so high that the patentee could not afford to pay it, as it might exceed the commercial value of his right. By this means the legislature of a state could utterly destroy the power which is in congress, by the Federal Constitution, "to promote the progress of science and useful arts." The right to protect the inventor is necessarily with the authority which constitutionally and lawfully granted such rights. It was said by Marshall, *Ch. J.*, in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 426, 4 L. ed. 606: "(1) That a power to create implies a power to preserve; (2) that a power to destroy, if wielded by a different hand, is hostile to, and incompatible with these powers to create and to preserve; (3) that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme."

For the foregoing reasons *the judgment is affirmed.*

Grace, J., did not sit.

tured under such patents, is held not taxable by the state. Com. v. Philadelphia Co. 157 Pa. 527; Com. v. Edison Electric Light Co. Id. 529.

That a state cannot tax the capital stock of a corporation which is invested in patent rights, whether originally issued or merely assigned to the company, was also decided in Com. v. Westinghouse Electric & Mfg. Co. 151 Pa. 265, and Com. v. Westinghouse Air Brake Co. 151 Pa. 276.

But a subordinate or subsidiary corporation which merely leases telephones from the parent company, which is a foreign corporation, is not exempt from taxation on its capital stock on the ground that it is invested in patent rights, nor even on stock issued to the foreign company as consideration for the leases. Com. v. Central Dist. & Printing Teleg. Co. 145 Pa. 121.

The same is held in respect to stock issued to a nonresident for the license of a patented apparatus used by a gas company. Com. v. Philadelphia Co. 145 Pa. 142.

The same is held as to a tax on the stock of an electric light company issued for the use of patented appliances. Com. v. Brush Electric Light Co. 145 Pa. 147; Com. v. Edison Electric Light Co. Id. 151; Com. v. Chester Electric Light & Power Co. Id. 139.

On the other hand, it is held in New York that, although the capital stock of a corporation, or a part of it, is invested in patents, no part of the corporate franchise or business is exempt from taxation on that account. This was decided in People v. Wemple, 61 Hun, 58, although this case was reversed on other grounds in 129 N. Y. 664.

But the court of appeals also decided to the same effect in People v. Campbell, 138 N. Y. 543, 20 L. R. A. 458. In this case although a portion of the capital stock was invested in patents, the court did not discuss the power of the state to impose taxes thereon, but it did declare that it was not error to include the patents in the capital of the company estimated for taxation. The question discussed in the opinion is, Where were the patent rights employed? and the court held that they were employed within the state and consequently taxable there.

The fact that stocks and bonds of a corporation were received as proceeds of the sale of patents was also held not to exempt them from taxation, in People v. Campbell, 88 Hun, 530; People v. Campbell, 138 N. Y. 543, 20 L. R. A. 458.

But the New York statute imposes a tax on the "corporate business or franchise," although the amount of it is determined by reference to the capital stock, and under this statute a tax was upheld by the Supreme Court of the United States in Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, notwithstanding the fact that part of the capital stock was invested in United States bonds which were themselves not taxable by the state. This clearly distinguishes the New York tax from that of Pennsylvania, and leaves the question of a tax on patent rights unaffected by these New York cases.

The decision of the Supreme Court of the United States in California v. Central P. R. Co., 127 U. S. 1, 32 L. ed. 150, denying the power of a state to tax a corporate franchise granted by congress unless congress consents, is cited by McPherson, *J.*, in rendering the opinion of the court of common pleas in the Pennsylvania case of Com. v. Westinghouse Electric & Mfg. Co., *supra*, as showing the invalidity of a state tax on patent rights. His position was approved by the Pennsylvania supreme court as appears above. Up to this time the only decisions on the question are those of the Pennsylvania courts, but the same reasons which operate to require a denial of state taxes on franchises granted to corporations by federal authority seem equally applicable against state taxes on patent rights. R. A. R.

See also 42 L. R. A. 290; 45 L. R. A. 126.

WATERLOO MILLING CO., *Appt.*,
v.
H. KUENSTER *et al.*

(158 Ill. 269.)

1. **A bank with which a draft is deposited for collection discharges its duty** by transmitting it in due season to a suitable agent at the residence of the drawee, with necessary instructions, and is not liable for loss occasioned by the negligence or default of the latter, as such collecting agent becomes the agent of the holder of the draft, and not of the bank with which it is deposited for collection.

2. **That worthless drafts were received by a bank with which paper was deposited for collection,** from a collecting bank to which the paper was sent, and thereupon credited to the depositor without knowledge of the insolvency of the collecting agent, does not change the rule that the depositor must bear the loss, since the rights of the parties are the same as if the worthless drafts had been deposited by him.

3. **The retention of worthless drafts after knowledge of the insolvency of the drawer,** by a bank which has received them as proceeds of paper forwarded for collection and credited to the depositor before learning of such insolvency, and the subsequent proof of a claim on the drafts by the bank in its own name and the receipt of a dividend thereon from the receiver of the drawer, do not relieve the depositor from liability to the bank for the loss sustained on the balance of the drafts.

(October 16, 1895.)

APPEAL by plaintiff from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Monroe County in favor of defendants in an action brought to recover the amount of certain drafts which had been delivered to defendants for collection, but which were lost because of the failure of defendants' correspondent. *Affirmed.*

Statement by **Bailey, J.:**

This was an action of assumpsit brought by the Waterloo Milling Company against H. Kuenster and others, copartners doing a banking business at Waterloo, Illinois, to recover certain moneys alleged to have been collected and received by the defendants from divers persons for the plaintiff, and as its agent. The defendants pleaded *non assumpsit*, and gave notice of set-off, and on trial before the court, a jury being waived, the issues were found for the defendants, and their damages, under their notice of set-off, were assessed at $814.33. For that sum and costs the defendants had judgment. On appeal to the appellate court that judgment was affirmed, and this appeal is from the judgment of affirmance.

The facts appearing at the trial were all admitted by stipulation, and are as follows:

"The plaintiff is a milling company, doing a general milling business in the city of Waterloo, Monroe county, Illinois, and has been so engaged for seven years last past. The defendants were engaged in the banking business as partners, and have been so engaged for eleven years, in said city of Waterloo. On the 21st of August, 1891, the plaintiff delivered to the defendants its thirty days' date draft on one M. J. Heyer, of Wilmington, North Carolina, for $613, with bill of lading attached for flour shipped that day to said Heyer, the said draft to be transmitted by defendants for collection. On the same day the draft was received by the defendants it, together with the bill of lading attached, was sent to the First National Bank of Wilmington, North Carolina, with instructions to collect same and remit to the defendants. The draft contained the privilege to the drawee of obtaining 1 per cent discount for cash. This draft was transmitted, as above stated, for collection, in the usual course of business, without any special instructions or any special arrangements as to compensation, except that the defendants were in the habit of charging plaintiff nothing except costs of such collections to them. The plaintiff had been doing business with defendants' bank since 1886, and kept its deposits with said bank. On October 28, 1891, plaintiff delivered to defendants another draft for the sum of $219.50, upon King & Montgomery, of Wilmington, North Carolina, with bill of lading attached. This draft was payable on arrival of the goods, and was to be transmitted, the same as the first-mentioned draft, for collection in the usual course of business. On the same day the plaintiff delivered to the defendants another draft, payable on arrival of goods, drawn on J. M. Forshee, of the same place, for the sum of $219.50. This was also attached to bill of lading, and to be sent on for collection the same as the other. On the same day plaintiff delivered to the defendants another draft, with bill of lading attached, payable on arrival of goods, drawn on West & Co., of the same place, for the sum of $116, and also on the same day plaintiff delivered to the defendants another draft, with bill of lading attached, payable on arrival of goods, drawn on Fillyaw & Skulker, of the same place, for the sum of $69.60, the last two named drafts to be transmitted to Wilmington for collection, the same as the others. On the 30th of October of the same year plaintiff delivered to the defendants another draft on West & Co., of Wilmington, North Carolina, with bill of lading attached, payable on arrival of goods, for the sum of $108.50, and the same day plaintiff delivered to defendants another draft, with bill of lading attached, drawn on J. S. McEacher, all of the same place, for the sum of $108.50, both of these drafts to be collected in the usual course of business, as the others. And on the 4th of November of the same year plaintiff delivered to the defendants another draft, drawn on West & Co., of Wilmington, for the sum of

NOTE.—For bank collections of negotiable paper through agency of other banks, see *note* to National Butchers' & D. Bank v. Hubbell (N. Y.) 7 L. R. A. 852.

$106.50, with bill of lading attached, payable on arrival of goods, same to be collected in usual course of business, as the other drafts named. No instructions were given by the plaintiff to defendants as to what bank or agency these drafts should be sent to in Wilmington, North Carolina. Defendants sent all of them, in due time and with due diligence, to the First National Bank of Wilmington, North Carolina, with instructions to collect as in the draft directed, and to transmit the proceeds to the defendants. The First National Bank of Wilmington, North Carolina, was a responsible bank, in good standing, its solvency never having been called in question, and the defendants exercised due diligence in selecting that bank. It is further agreed that all the aforesaid drafts were collected by the First National Bank of Wilmington, North Carolina, to which they were sent, but that said bank, on or about the 25th of November, 1891, failed and the proceeds were never remitted to defendants.

"On the 24th of November, 1891, defendants received from said First National Bank of Wilmington, North Carolina, two drafts upon the United States National Bank of the city of New York, one for the sum of $327.25, and the other for the sum of $613. On receipt of said drafts, the intelligence of the First National Bank failure not having reached the defendants, the amount represented by them, being $940.25, was placed to the credit of the plaintiff, paid to and has been retained by it, and the drafts themselves immediately forwarded to New York for collection and credit there, the defendants keeping an account there. The drafts were protested by the New York bank on receipt, and nothing realized from them.

"It is further agreed that on the 27th of May, 1893, plaintiff gave defendants a draft, with bill of lading attached and drawn on B. F. King, of Wilmington, North Carolina, to be transmitted for collection in the usual course of business, without special instructions, same as the other drafts above mentioned, for $77.25, and on the same day plaintiff delivered to the defendants another draft, with bill of lading attached, payable on arrival of goods, drawn on McNair & Pearcell, of Wilmington, North Carolina, for collection, same as draft last mentioned, for the sum of $140.50. These last two drafts were promptly forwarded to the Bank of New Hanover, of Wilmington, North Carolina, with instructions to collect as directed and remit the proceeds to the defendants. This bank was considered a suitable and safe agency, and the defendants are not charged with negligence in this selection. The bank was in good standing, so far as known. This bank afterwards, to wit, about the 18th or 21st (from 15th to 21st) day of June, 1893, likewise failed, after having collected the two drafts, but before remitting the amounts as directed.

"Plaintiff makes no claim on account of drafts mentioned herein, other than those mentioned in the copy of account sued on, attached to the declaration herein, and the sum of $6.14 balance on the draft of August 21, 1891, and said other items and drafts as introduced by the defendants under the notice of set-off.

"It is further agreed that for some time previous, and terminating about 1890, it was the practice of the defendants, on receipt from the plaintiff of drafts for collection, to immediately credit the plaintiff with the amount of the draft, and then charge the plaintiff interest from date of giving it credit to the time defendants received the proceeds of the collection. About 1890 this practice was changed, the defendants receiving items for collection to credit the plaintiff with the proceeds when received, and that continued and was the practice at the time of receiving the drafts above mentioned.

"It is further agreed that on the failure of the banks at Wilmington, North Carolina, respectively, as above stated, the defendants filed affidavits with the respective receivers for the amount of the several drafts that had been collected and not remitted; affidavits and forms of claim furnished by the receivers were made out and presented by the defendants in their own name, the drafts having been indorsed by the plaintiff to the defendants at the time they were respectively delivered to them to be transmitted for collection, as above stated. The defendants have received as dividends on the drafts above mentioned, from the First National Bank of Wilmington, North Carolina, the sum of $625.92, and from the Bank of New Hanover nothing. The dividends, as above stated, have been retained by the defendants.

"It was not uncommon for delays to occur in payment of drafts sent on for collection in this way, caused by delay in the arrival of goods and from other causes, and there is no claim of negligence against the defendants on this account."

Messrs. **Josh Wilson and Hartsell & Sprigg,** for appellant:

The appellees having received the drafts from their agent, and having paid the amount thereof to the appellant as a partial payment on the collections in their hands, surely the transaction, so far as the $940.25 is concerned, is closed between the appellees and the appellant.

Oddie v. *National City Bank*, 45 N. Y. 735, 6 Am. Rep. 160; *American Exch. Nat. Bank* v. *Gregg*, 138 Ill. 601.

In *Exchange Nat. Bank* v. *Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 723, the court says: "The agreement of the defendant in this case was to collect the drafts, not merely to transmit them to the Newark bank for collection."

The taking by a bank from a customer, in the usual course of business, of paper for collection, is sufficient evidence of a valuable consideration for the service.

The contract then becomes one to perform certain duties necessary for the collection of the paper and the protection of the holder. The bank is not merely appointed an attorney, authorized to select other agents to collect the paper; its undertaking is to do the thing, and not merely to procure it to be done. In such case the bank is held to agree to answer for any default in the performance of its contract;

and whether the paper is to be collected in the place where the bank is situated, or at a distance, the contract is to use the proper means to collect the paper, and the bank, by employing subagents to perform a part of what it has contracted to do, becomes responsible to its customer.

Hoover v. *Wise*, 91 U. S. 308, 23 L. ed. 393.

The Wilmington banks having collected the drafts, and mixed them with the general funds of the banks or otherwise appropriated them, their agency for the appellees at once terminated and they became the debtors of the appellees, and in like manner the appellees became the debtors of the appellant.

Marine Bank v. *Rushmore*, 28 Ill. 471.

Messrs. **Travous & Warnock**, for appellees:

Where a draft is left with a bank for collection, and is transmitted by it in due season to a suitable agent at the place of the residence of the drawee, with the necessary instructions, it thereby fully discharges its duty and is not liable for loss accruing through negligence of the latter.

Mechem, Agency, p. 849, § 514; Morse, Banks & Banking, 2d ed. 414, 3d ed. chap. 17; *Ætna Ins. Co.* v. *Alton City Bank*, 25 Ill. 243, 79 Am. Dec. 328; *Drovers Nat. Bank* v. *Anglo-American Pkg. & P. Co.* 18 Ill. App. 191, 117 Ill. 100, 57 Am. Rep. 855; *Fabens* v. *Mercantile Bank*, 23 Pick. 330, 34 Am. Dec. 59; *Daly* v. *Butchers & D. Bank*, 56 Mo. 94, 17 Am. Rep. 663; *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *Citizens' Bank* v. *Howell*, 8 Md. 530, 63 Am. Dec. 714; *Stacy* v. *Dane County Bank*, 12 Wis. 629; *Guelich* v. *National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110; *Third Nat. Bank* v. *Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78; *Bank of Louisville* v. *First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691; *Merchants' Nat. Bank* v. *Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Hyde* v. *Planters' Bank*, 17 La. 560, 36 Am. Dec. 631; *German Nat. Bank* v. *Burns*, 12 Colo. 539; *Bank of Lindsborg* v. *Ober*, 31 Kan. 599; *First Nat. Bank* v. *Sprague*, 34 Neb. 318, 15 L. R. A. 498.

Even the courts which hold the bank receiving paper for collection liable for the negligence of its corresponding bank, the decisions of which are relied upon by counsel for appellant, do not so hold in cases like the present, where the undertaking is to "transmit for collection." The distinction between engaging to do a thing and engaging to procure it to be done is recognized in all the cases.

1 Dan. Neg. Inst. § 345; *German Nat. Bank* v. *Burns*, *supra*; *Bank of Washington* v. *Triplett*, 26 U. S. 1 Pet. 28, 7 L. ed. 39; *Exchange Nat. Bank* v. *Third Nat. Bank*, 112 U. S. 276, 28 L. ed. 722; *Farmers' Bank* v. *Owen*, 5 Cranch, C. C. 504.

Appellees, having discharged their full duty in the premises, were entitled to recover from appellant the money paid them upon the drafts received from appellant's agent, which proved worthless, less the amount afterward received from the receiver, and the circuit court properly so held.

Drovers' Nat. Bank v. *Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 855; *Second Nat. Bank* v. *Cummings*, 89 Tenn. 609; *Rapp* v. *National Security Bank*, 186 Pa. 426; *Farmers' Bank* v. *Owen*, *supra*.

19 L. R. A.

Bailey, *J.*, delivered the opinion of the court:

The controlling question in this case is, whether the First National Bank and the Bank of New Hanover, of Wilmington, North Carolina, to which the defendants transmitted the drafts in question for collection, were, in making the collections and remitting the money, the agents of the defendants or of the plaintiff. It appears from the stipulation of the parties that the drafts were delivered by the plaintiff to the defendants with bills of lading attached, to be transmitted by the defendants to Wilmington for collection. No instructions were given by the plaintiff to the defendants as to the bank or agency in Wilmington to which the drafts should be sent, and all were sent in due time and with due diligence to these banks, all but the last two being sent to the First National Bank, and those two to the Bank of New Hanover. At the time the drafts were sent to these banks, respectively, the banks were each responsible and in good standing, their solvency then never having been called in question, and it is admitted that the defendants used due diligence in selecting these banks as the agencies for collecting the drafts and remitting the money. The drafts were all paid to the Wilmington banks in due course of business, but before the money collected was remitted to the defendants both banks failed, and the money, with the exception of certain sums paid over by the receiver of the First National Bank of Wilmington, was never received by either the defendants or the plaintiff.

Where a draft upon a nonresident drawee is deposited with a local bank for collection, and especially where, as in this case, it is deposited to be transmitted to the place of residence of the drawee for collection, the bank fully discharges its duty by transmitting the draft, in due season, to a suitable agent at the place of residence of the drawee, with necessary instructions, and it is not liable for loss occasioned by the negligence or default of the collecting agent thus employed. Such collecting agent becomes the agent of the holder of the draft, and not of the bank with which it is deposited for collection. While some of the courts have been disposed to hold the bank in such cases to a higher degree of responsibility, the better reasoning, as well as the weight of authority, seems to support the rule as we have stated it, and that rule has long been recognized and adopted in this state.

In *Allen* v. *Merchants' Bank*, 22 Wend. 215, the stricter rule is held, but in a note to that case as it is reported in 34 Am. Dec. 315, by Mr. Freeman, it is said: "The preponderance of authority is against the doctrine of the principal case, and in favor of the rule that the liability of a bank taking a note or bill for collection, which is payable at a distance, extends merely to the selection of a suitable and competent agent at the place of payment, and to the transmission of the paper to such agent with proper instructions, and that the correspondent bank is the agent, not of the transmitting bank, but of the holder, so that the transmitting bank is not liable for the defaults of the correspondent,

where due care has been used in selection of such correspondent." The foregoing statement of the rule by Mr. Freeman is quoted with approval in *First Nat. Bank* v. *Sprague*, 34 Neb. 318, 15 L. R. A. 498, and the rule itself is adopted.

In *Guelich* v. *National State Bank*, 56 Iowa, 434, 41 Am. Rep. 110, the reasons of the rule are stated as follows: "The course of business of defendant, and all other banks, is, in such cases, to make collections through correspondents. They do not undertake themselves to collect the bills, but to intrust them to other banks at the place payment is to be made. The holder of the paper, having full notice of the course of business, must be held to assent thereto. He therefore authorizes the bank with whom he deals to do the work of collection through another bank. . . . The bank receiving the paper becomes an agent of the depositor with authority to employ another bank to collect it. The second bank becomes the subagent of the customer of the first, for the reason that the customer authorizes the employment of such an agent to make the collection. The paper remains the property of the customer, and is collected for him; the party employed, with his assent, to make the collection, must therefore be regarded as his agent."

In *Daly* v. *Butchers' & D. Bank*, 56 Mo. 94, 7 Am. Rep. 668, the plaintiff was a depositor in the defendant's bank, and deposited therein certain drafts in controversy in that case. The drafts were sent by the defendant to the National Bank of Vicksburg, which the defendant believed trustworthy, with directions to collect and remit. The Vicksburg bank collected the money and kept it, and became insolvent, and it was held that the defendant was not liable for the loss.

The foregoing cases are entirely in harmony with the decision of this court in *Ætna Ins. Co.* v. *Alton City Bank*, 25 Ill. 243, 79 Am. Dec. 328, in which it was held that, where a bill or note is received by a bank for collection which renders its transmission to another place necessary, the bank discharges its duty by sending it in due season to a competent, reliable agent, with proper instructions for its collection. There the legal holder of the bill indorsed and delivered it to the defendant bank for collection in the usual and regular course of banking business, and the defendant bank on the same day indorsed and transmitted it for collection to certain bankers in St. Louis, Missouri, the proceeds of the bill, when collected, to be placed to the credit of the Alton bank. By the negligence of the correspondent bankers in failing to have the bill protested for nonacceptance and to give notice of nonacceptance, the amount of the bill was lost, and it was held that the defendant bank was not liable. In discussing the case the court said (p. 234): "This presents the question whether the bank receiving such paper for collection is bound for the acts of its correspondents and is responsible for their negligence, or whether its undertaking requires anything more than that it should use reasonable care and prudence in the selection of a responsible correspondent to whom it shall be intrusted. That a bank receiving such paper for that purpose in the usual course of business is bound to use ordinary and reasonable care in selecting an agent competent and responsible, there is no doubt, and a want of such precaution would clearly render them liable for consequent loss. It does not appear that there was any agreement on the part of the bank to become liable, at all events, for any loss that might occur from the acts of its correspondents, and the law has imposed no such liability." See also *Drovers' Nat. Bank* v. *Anglo-American Pkg. & P. Co.* 117 Ill. 100, 57 Am. Rep. 855; *Fabens* v. *Mercantile Bank*, 23 Pick. 332, 34 Am. Dec. 59; *Stacy* v. *Dane County Bank*, 12 Wis. 629; *Citizens' Bank* v. *Howell*, 8 Md. 530, 63 Am. Dec. 714; *Lawrence* v. *Stonington Bank*, 6 Conn. 521; *Third Nat. Bank* v. *Vicksburg Bank*, 61 Miss. 112, 48 Am. Rep. 78; *Bank of Louisville* v. *First Nat. Bank*, 8 Baxt. 101, 35 Am. Rep. 691; *Merchants' Nat. Bank* v. *Goodman*, 109 Pa. 422, 58 Am. Rep. 728; *Hyde* v. *Planters' Bank*, 17 La. Ann. 560, 86 Am. Dec. 621; *German Nat. Bank* v. *Burns*, 12 Colo. 539; *Bank of Lindsborg* v. *Ober*, 31 Kan. 599; Mechem, Agency, § 514.

In the light of these authorities it must be held that the First National Bank and the Bank of New Hanover, of Wilmington, North Carolina, were the agents of the plaintiff, and not of the defendants, and that the losses resulting from their default must be borne by the plaintiff, and not by the defendants.

It appears, however, that on the 24th day of November, 1891, the First National Bank of Wilmington, after collecting the drafts forwarded to it, remitted to the defendants two drafts on the United States National Bank of the City of New York, aggregating $940.25, and failed and became insolvent the day following; that the defendants, on receipt of the drafts, not having received intelligence of the failure of the drawer, placed the amount of the drafts to the credit of the plaintiff and paid the same over to it, and that the money so paid has been retained by it; that the drafts themselves were immediately forwarded to New York for collection, and were there dishonored and protested, and that nothing was realized from them; that the defendants subsequently proved up their claim for the amount of the two drafts before the receiver of the First National Bank of Wilmington, and afterwards obtained from the receiver, by way of dividends on their claim, the sum of $625.92. They now claim, and have been permitted to recover by way of set-off, the difference between the amount of the dividends so received and the face of the drafts. This we think was proper. If the plaintiff had itself deposited these drafts with the defendants and received payment of their amount, the drafts being at the time worthless by reason of the insolvency of the drawer, there can be no doubt that the defendants would have had the right to charge back and recover the amount of the loss from the plaintiff. They were in fact received by the defendants from the First National Bank of Wilmington, which, for all the purposes of the transactions under consideration, is to

be regarded as the plaintiff's agent. The rights of the defendants would therefore seem to be the same as though the plaintiff had itself deposited the drafts with the defendants.

Nor are we able to see that the case is at all affected by the circumstance that the defendants retained the drafts and proved up a claim for their amount before the receiver in their own name. They had paid the amount of the drafts to the plaintiff and until the money so paid was refunded to them they were entitled to hold the drafts, and collect in their own name and for their own benefit whatever could be collected from the estate of the insolvent drawer, of course crediting whatever they might be able to collect upon their claim against the plaintiff.

We are of the opinion that the judgment is fully warranted by the facts appearing by the stipulation of the parties, and *the judgment of the Appellate Court will therefore be affirmed.*

WASHINGTONIAN HOME OF CHICAGO, *Appt.*, *v.* City of CHICAGO *et al.*

(157 Ill. 414.)

1. **A corporation composed of private individuals,** not restrained by law from conducting its business for private benefit, which does not report to and is not inspected by any state official, elects its own managers without the state's approval, and by law owes the state no duty, is a private corporation within the provisions of the Illinois constitution prohibiting municipalities from making donations to private corporations.

2. **A statute requiring a county and city to pay a percentage of liquor license fees** to a certain home is repealed, but not retrospectively repealed, by a constitutional provision prohibiting municipalities from making donations to a private corporation.

3. **The provision of the constitution prohibiting municipalities from making donations** to private corporations is self-executing, and operated as paramount law from the adoption of the constitution.

4. **A city does not, by an appropriation and payment of its revenue for many years** in violation of the constitution, estop itself to assert that it is prohibited in future from making such payment.

(October 11, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Cook County dismissing a petition for a writ of mandamus to compel defendant to turn over to petitioner certain money derived from liquor licenses. *Affirmed.*

The facts are stated in the opinion.

Messrs. **M. B. Loomis** and **F. S. Loomis,** for appellant:

The charter of the Washingtonian Home was a valid exercise of legislative power and discretion at the time it was granted, and was not repealed or annulled by separate section No. 2 of the Constitution of 1870.

Schall v. *Bowman*, 62 Ill. 321; *Covington* v. *East St. Louis*, 78 Ill. 548; *Chicago & I. R. Co.* v. *Pinckney*, 74 Ill. 277; *Middleport* v. *Ætna L. Ins. Co.* 82 Ill. 562; *Wright* v. *Bishop*, 88 Ill. 302; *Lippincott* v. *Pana*, 92 Ill. 24; Cooley, Const. Lim. 6th ed. 77; *Allbyer* v. *State*, 10 Ohio St. 588; *State* v. *Barbee*, 3 Ind. 258; *Evans* v. *Phillipi*, 117 Pa. 226; *Perkins* v. *Board of Police*, 41 La. Ann. 701; *State* v. *Thompson*, 2 Kan. 432; *Slack* v. *Maysville & L. R. Co.* 13 B. Mon. 1; *State* v. *Macon County Ct.* 41 Mo. 453; *New Central Coal Co.* v. *George's Creek Coal & I. Co.* 37 Md. 557; *Cass* v. *Dillon*, 2 Ohio St. 607; *Indiana County* v. *Agricultural Soc. of Indiana County*, 85 Pa. 357; *Allegheny County* v. *Gibson*, 90 Pa. 397.

The Washingtonian Home is not a private corporation within the meaning of the constitutional clause referred to.

Chicago, D. & V. R. Co. v. *Smith*, 62 Ill. 268, 14 Am. Rep. 99; *Prettyman* v. *Tazewell County Supvrs.* 19 Ill. 406, 71 Am. Dec. 230; *Firemen's Benev. Asso.* v. *Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115; *Johnson* v. *Stark County*, 24 Ill. 75; *Perkins* v. *Lewis*, 24 Ill. 208; *Butler* v. *Dunham*, 27 Ill. 474; *Keithsburg* v. *Frick*, 84 Ill. 405; *Taylor* v. *Thompson*, 42 Ill. 9; *McLean County* v. *Humphreys*, 104 Ill. 378; *Mather* v. *Ottawa*, 114 Ill. 659; *Wetherell* v. *Devine*, 116 Ill. 631; *Cook County* v. *Chicago Industrial School for Girls*, 125 Ill. 540, 1 L. R. A. 437; *Wagner* v. *Rock Island*, 146 Ill. 139, 21 L. R. A. 519; *Burd Orphan Asylum* v. *Upper Darby School Dist.* 90 Pa. 35; *Episcopal Academy* v. *Philadelphia*, 150 Pa. 565; *Philadelphia* v. *Masonic Home of Pennsylvania*, 160 Pa. 572, 28 L. R. A. 545; *Donohugh* v. *Library Co. of Philadelphia*, 86 Pa. 306; *McDonald* v. *Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Gooch* v. *Association for Relief of Aged Indigent Females*, 109 Mass. 558; 2 Pom. Eq. Jur. §§ 1019–1025; *Shepherd's Fold* v. *New York*, 96 N. Y. 137; *Speer* v. *Blairsville School Directors*, 50 Pa. 150; *Brodhead* v. *Milwaukee*, 19 Wis. 625, 88 Am. Dec. 711; Cooley, Const. Lim. 6th ed. pp. 559 *et seq.*

The legislature, having incorporated the Washingtonian Home as a public charity, had the right to endow it from the public treasury.

Sawyer v. *Alton*, 4 Ill. 127; *Mason* v. *Wait*, 5 Ill. 134; *Munn* v. *People*, 69 Ill. 80; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610; *Coles* v. *Madison County*, 1 Ill. 120; *People* v. *Wren*, 5 Ill. 269; *Richland County* v. *Lawrence County*, 12 Ill. 1; *People* v. *Power*, 25 Ill. 187; 1 Dill. Mun. Corp. § 85; *People* v. *Moon*, 4 Ill. 125; *Shaw* v. *Dennis*, 10 Ill. 405; *Gutzweller* v. *People*, 14 Ill. 142; *Dennis* v. *Maynard*, 15 Ill. 477; *Pike County Comrs.* v. *State*, 11 Ill. 202; *Sangamon County Supvrs.* v. *Springfield*, 63 Ill. 66; *Logan County Supvrs.* v. *Lincoln*, 81 Ill. 156; *Harris* v. *Whiteside County Supvrs.* 105 Ill. 445, 44 Am. Rep. 808; *Marion County* v. *Lear*, 108 Ill. 343; *Firemen's Benev. Asso.* v.

NOTE.—For *note* on the question when constitutional provisions are self-executing, see *note* to Willis v. St. Paul Sanitation Co. (Minn.) 16 L. R. A. 281.

For state institutions as distinguished from private corporations, see *note* to State v. Board of Regents (Kan.) *ante*, 378.

See also 33 L. R. A. 137, 554; 34 L. R. A. 393; 38 L. R. A. 591.

Lounsbury, 21 Ill. 511, 74 Am. Dec. 115; *McLean County* v. *Humphreys*, 104 Ill. 378.

The legislation in question was a valid exercise of the police power of the state.

4 Chitty's Bl. Com. 162; Cooley, Const. Lim. 203, 704; *Hawthorn* v. *People, supra; Dennehy* v. *Chicago*, 120 Ill. 627; *Wilson* v. *Chicago Sanitary Dist. Trustees*, 133 Ill. 443; *Marion County* v. *Lear, supra; Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Donoghue* v. *Philadelphia County*, 2 Pa. 230; *Kensington Comrs.* v. *Philadelphia County*, 18 Pa. 76; *Allegheny County* v. *Gibson*, 90 Pa. 397, 35 Am. Rep. 670; *Darlington* v. *New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Ely* v. *Niagara County Supvrs.* 36 N. Y. 297; *Folsom Bros.* v. *New Orleans*, 28 La. Ann. 936; *Street* v. *New Orleans*, 32 La. Ann. 577; *Underhill* v. *Manchester*, 45 N. H. 215; *Chadbourne* v. *Newcastle*, 48 N. H. 196.

A license is not a tax; therefore the decisions holding that a corporate tax cannot be perverted from corporate purposes have no application.

People v. *Thurber*, 13 Ill. 554; *East St. Louis* v. *Wehrung*, 46 Ill. 392; *Lovingston* v. *Board of Trustees*, 99 Ill. 564; *East St. Louis* v. *Trustees of Schools*, 102 Ill. 489, 40 Am. Rep. 606; *Craw* v. *Tolono*, 96 Ill. 261, 36 Am. Rep. 143; *Illinois Mut. F. Ins. Co.* v. *Peoria*, 29 Ill. 180; *Ducat* v. *Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Walker* v. *Springfield*, 94 Ill. 372; *Gutzweiler* v. *People*, 14 Ill. 142; *Pike County Comrs.* v. *State*, 11 Ill. 202; *Richland County* v. *Lawrence County*, 12 Ill. 1; *Firemen's Benev. Asso.* v. *Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115; *People* v. *Power*, 25 Ill. 187; *Sangamon County Supvrs.* v. *Springfield*, 63 Ill. 66; *Benevolent Asso. of Paid Fire Dept.* v. *Farwell*, 100 Ill. 197; *Dennehy* v. *Chicago*, 120 Ill. 627.

The city consented to the appropriation of the fund in question to the Washingtonian Home.

Chicago, R. I. & P. R. Co. v. *Joliet*, 79 Ill. 39; *Chicago, B. & Q. R. Co.* v. *Quincy*, 136 Ill. 498; *People* v. *Salomon*, 54 Ill. 41; *People* v. *Farnham*, 35 Ill. 562; *Roby* v. *Chicago*, 64 Ill. 447; *Mariel* v. *East St. Louis*, 94 Ill. 69; *Chicago & N. W. R. Co.* v. *West Chicago Park Comrs.* 151 Ill. 204, 25 L. R. A. 300; *Booth* v. *Wiley*, 102 Ill. 106; *Searing* v. *Butler*, 69 Ill. 578; *Choisser* v. *People*, 140 Ill. 21; *Connett* v. *Chicago*, 114 Ill. 239; *Cairo & St. L. R. Co.* v. *Sparta*, 77 Ill. 505; *Richland County* v. *Lawrence County*, 12 Ill. 1; *People* v. *Logan County Supvrs.* 63 Ill. 374; *Gaddis* v. *Richland County*, 92 Ill. 119; *Owners of Lands* v. *People*, 113 Ill. 296; *Strosser* v. *Ft. Wayne*, 100 Ind. 451; *Valparaiso* v. *Gardner*, 97 Ind. 1, 49 Am. Rep. 416; *People* v. *Maynard*, 15 Mich. 470; *People* v. *Lothrop*, 24 Mich. 235; *Rumsey* v. *People*, 19 N. Y. 41; *Lanning* v. *Carpenter*, 20 N. Y. 447.

Mr. **S. P. Shope**, with *Messrs.* **Harry Rubens** and **Sigmund Zeisler**, for appellee:

The Washingtonian Home is a private corporation.

Morawetz, Priv. Corp. 2d ed. § 8; *Dartmouth College Trustees* v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629; *Rundle* v. *Delaware & R. Canal*, 1 Wall. Jr. 290; *Sweatt* v. *Boston, H. & E. R. Co.* 8 Cliff. 339; Waterman, Corp. § 17; *Louisville* v. *Louisville University Trustees*, 15 B. Mon. 642; *People* v. *McAdams*, 82 Ill. 356; *Cleaveland* v. *Stewart*, 3 Ga. 291; Walker, American Law, 7th ed. 226, 227; *Harward* v. *St. Clair & M. Levee & D. Co.* 51 Ill. 130; *Harward* v. *People*, 51 Ill. 138; *Hessler* v. *Drainage Comrs.* 53 Ill. 105.

The Constitution of 1870 repealed section 7 of the Washingtonian Home Act.

Phillips v. *Quick*, 63 Ill. 445; *People* v. *Maynard*, 14 Ill. 419; *Hills* v. *Chicago*, 60 Ill. 86; *Chance* v. *Marion County*, 64 Ill. 66; *Concord* v. *Portsmouth Sav. Bank*, 92 U. S. 625, 23 L. ed. 628; *Cook County* v. *Chicago Industrial School for Girls*, 125 Ill. 540, 1 L. R. A. 437.

The legislature is powerless to impose a tax upon a city without its consent. A law creating a corporate debt without the consent of the municipality is unconstitutional.

Marshall v. *Silliman*, 61 Ill. 218; *Choisser* v. *People*, 140 Ill. 21; *Chicago, B. & Q. R. Co.* v. *Aurora*, 99 Ill. 205.

The elements of an estoppel against the city are entirely wanting.

Logan County Supvrs. v. *Lincoln*, 81 Ill. 156; Bigelow, Estoppel, 4th ed. p. 445; 7 Am. & Eng. Encyclop. Law, pp. 17, 18; *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 40; *Chicago & N. W. R. Co.* v. *People*, 91 Ill. 251.

Craig, *Ch. J.*, delivered the opinion of the court:

This was a petition for mandamus brought by the Washingtonian Home of Chicago against the city of Chicago to compel the city to pay to the petitioner $25,000,—10 per cent of moneys received for licenses granted by the city for the right or privilege to sell spirituous liquors from January 1, 1893, to April 1, 1894. To the petition the city of Chicago interposed a general demurrer, which the court sutained, and the petition was dismissed. To reverse the judgment of the circuit court the petitioner appealed.

The petitioner is a corporation organized under an act of the legislature approved February 16, 1867. That act was set out in the petition, sections 1 and 2 of which are as follows:

"Sec. 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that the Washingtonian Home Association of Chicago is hereby created, and declared to be a body corporate and politic, under the name of 'The Washingtonian Home of Chicago,' with power to sue and be sued, plead and be impleaded, contract and be contracted with; to take, by gift, grant, devise or otherwise, property, real, personal and mixed, and the same to hold, use, lease, convey, mortgage and otherwise dispose of, for the purposes hereinafter mentioned; to adopt and use a corporate seal, and alter the same at pleasure; also to erect and maintain such buildings and other fixtures and conveniences as may be deemed requisite or necessary for the purposes of this corporation.

"Sec. 2. The object of this incorporation shall be the founding and maintenance of an institution for the care, cure, and reclamation of inebriates."

Section 3 authorized the corporation to adopt such by-laws for the management of the institution as it thought proper.

Sections 4 and 5 are as follows:

"Sec. 4. Fifteen of the directors of said home, to be selected by lot, shall hold their office until the third Monday of January, A. D. 1869, and the remaining fifteen until the third Monday of January, A. D. 1871; and on the second Monday of January, A. D. 1869, and biennially thereafter, said corporation shall elect successors in place of those whose term of office shall expire the Monday thereafter, who shall, respectively, hold their offices for two years, and until their successors shall have been elected; and in case of removal, death, or resignation of any one or more of said directors or their successors before the expiration of their term of office, their place may be filled by said remaining directors; and such person or persons shall hold their office until the next biennial election. Seven of said directors shall constitute a quorum for the transaction of business.

"Sec. 5. Any person sentenced by the authorities of the city of Chicago to the Bridewell or house of correction for intemperance, drunkenness, or for any misdemeanor caused thereby, may, with the consent of the proper officers of said home, be received and detained as an inmate of said home in lieu of the Bridewell or house of correction, until the expiration of such sentence; and when any such person has been committed to the city Bridewell or house of correction for any such misdemeanor caused by intoxication or for drunkenness, either justice of the police court may, with the consent aforesaid, cause him to be transferred to said home for the unexpired term of sentence."

Section 7 provides:

"Sec. 7. It shall be the duty of the treasurer of the county of Cook and the treasurer of the city of Chicago, or of the officers of either into whose hands the same may come or be paid, to pay over to said corporation in quarterly installments, for the support and maintenance of said institution, 10 per cent of all moneys received for all licenses granted by authority of said county or city for the right or privilege to vend or sell spirituous, vinous, or fermented liquors within the said county of Cook and city of Chicago."

Section 7 was amended by an act in force July 1, 1883, providing that in no case shall the sum so paid for or during any one year exceed $20,000.

It is alleged in the petition that, immediately after the act went into effect, petitioner perfected its organization, and at once proceeded to carry out the objects of its incorporation, and has continued its organization and continued to carry out the objects of its organization; that, since its organization up to the present time, petitioner has cared for and treated in its said institution not less than 18,000 inebriates, large numbers of whom have, by reason of such care and treatment, been cured and reclaimed from their unfortunate habits of drunkenness and inebriety.

That, of the above number of inebriates so cared for and treated by petitioner as aforesaid, a large number, to wit, about 3,865 thereof, were persons sentenced by the authorities of said city of Chicago to the Bridewell or house of correction of said city, for intemperance, drunkenness, or for misdemeanors caused thereby, who, with the consent of the proper authorities of said home, were received and maintained as inmates of the home in lieu of the Bridewell until the expiration of such sentence. It is also alleged in the petition that from the time of petitioner's organization until July 1, 1883, the treasurer of the city of Chicago paid to it, in quarterly installments, for its support and maintenance, 10 per cent of all moneys received for licenses to sell spirituous liquors within the city. That after the said amendatory act went into force, to wit, after July 1, 1883, the treasurer of the said city of Chicago continued to pay over to petitioner, in the manner hereinbefore stated, in quarterly installments, for the support and maintenance of its aforesaid institution, 10 per cent of all moneys received by him as such treasurer as aforesaid for all licenses granted by authority of said city of Chicago, not exceeding $20,000 in any one year, up to and including the quarterly installment due on the 1st day of January, 1893. That since January 1, 1893, the city treasurer has refused to make any payments.

It is claimed on behalf of the city of Chicago that section 7 of the Act of 1867, which requires the city to pay to the home 10 per cent of all moneys received for licenses to sell spirituous liquors, and the amendatory Act of 1883, whereby the amount was limited to $20,000 per annum, are unconstitutional and void; that the section and amendment violate that clause of the Constitution of 1870 which reads as follows: "No county, city, town, township, or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation: Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions where the same had been authorized, under existing laws, by a vote of the people of such municipalities prior to such adoption." It will be observed that this provision of the constitution prohibits cities and other municipal corporations from making donations or loaning their credit in aid of any private corporation; and the first question to be considered is whether the Washingtonian Home is a private corporation, within the meaning of the constitution. As has been seen, the 2d section of the Act creating the home declares the object of the corporation to be the founding and maintenance of an institution for the care, cure, and reclamation of inebriates. The charter contains nothing prohibiting the corporation from making such charges for the care or cure of patients as it may think best; but, on the other hand, section 3 confers the power to adopt such by-laws as it may think proper for the management of its business. The charter does not specify who the incorporators shall be, but

the 1st section of the charter declares the Washingtonian Home Association of Chicago to be a body corporate and politic. Who constituted the association or what was the qualification of members when it was created a corporation is not disclosed by this record. Section 4 provides that fifteen directors, to be selected by lot, shall hold office until the third Monday of January, 1869, and the remaining fifteen until the third Monday of January, 1871; but the act is silent as to who shall elect the first board of directors. The act nowhere prescribes how any person can become a member of the corporation, nor is there any provision in regard to the salary of officers or directors. So far as appears, the persons who composed the Washingtonian Home Association of Chicago when the act was passed were clothed with corporate power, under which they might transact the business mentioned in the act for their own private benefit. At all events, no state control over the institution is provided for, nor has Chicago or Cook county any voice in its control or management. The corporation has the right to acquire and hold property, both real and personal, but the state has no voice in the management or control of the property thus acquired, or in the mode or manner in which the institution shall be managed or conducted. The act makes no provision for any report to be made by the institution to the state or any of its officials. Indeed, no provision whatever is made for an inspection or visitation of the institution in behalf of the state or by any state officer, but the entire supervision and control seem, under the charter, to be intrusted to private individuals. No officer or manager of the corporation is elected by the people or appointed by the state. The institution owes no duty to the public or the state.

Is such a corporation a public one, or is it a private corporation, within the meaning of the constitution? A brief reference to a few authorities will demonstrate, as we think, that the corporation is a private one. Morawetz, Priv. Corp. 2d ed. § 8, says: "By another classification corporations have been divided into public corporations and private corporations. The difference between these two classes of corporations is radical, and hence they are in many instances governed by widely different principles of law. Private corporations are associations formed by the voluntary agreement of their members, such as banking, railroad, and manufacturing companies. Public corporations are not voluntary associations at all, and there is no contractual relation between the corporators who compose them; they are merely government institutions, created by law for the administration of the public affairs of the community. States, counties, and municipalities are examples of public corporations." In *Dartmouth College Trustees* v. *Woodward*, 17 U. S. 4 Wheat. 668, 4 L. ed. 667, *Justice* Story, in pointing out the distinction between private and public corporations, said: "Public corporations are generally esteemed such as exist for public purposes only, such as towns, cities, parishes, and counties; and in many respects they are so, although they involve some private interests; but, strictly speaking, public corporations are such only as are founded by the government, for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder, or the nature and objects of the institution. For instance, a bank created by the government for its own uses, whose stock is exclusively owned by the government, is in the strictest sense, a public corporation. So an hospital created and endowed by the government for general charity. But a bank whose stock is owned by private persons is a private corporation, although it is erected by the government, and its objects and operations partake of a public nature. The same doctrine may be affirmed of insurance, canal, bridge, and turnpike companies. In all these cases the uses may, in a certain sense, be called public, but the corporations are private,—as much so, indeed, as if the franchises were vested in a single person. This reasoning applies in its full force to eleemosynary corporations. An hospital founded by a private benefactor is, in point of law, a private corporation, although dedicated by its charter to general charity. So a college founded and endowed in the same manner, although, being for the promotion of learning and piety, it may extend its charity to scholars from every class in the community, and thus acquire the character of a public institution. This is the unequivocal doctrine of the authorities; and cannot be shaken but by undermining the most solid foundations of the common law. . . . When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of the bounty, but that the government have the sole right, as trustees of the public interests, to regulate, control, and direct the corporation, and its funds and its franchises, at its own good will and pleasure." Waterman, Corp. § 17, says: "A corporation is private when the whole interest does not belong to the government, or the corporation is not created for the administration of political or municipal power. A chartered religious society is a private corporation. A corporation may be private and yet the charter contain provisions of a purely public character introduced solely for the public good, and as a general police regulation of the state." See also *Louisville* v. *Louisville University Trustees*, 15 B. Mon. 642; *People* v. *McAdams*, 82 Ill. 356; *Cleaveland* v. *Stewart*, 3 Ga. 283. Under the rule declared in the authorities cited, it is plain that the Washingtonian Home is nothing more than a private corporation.

The Constitution of 1848 contained no provision prohibiting cities from making donations to private corporations, and, if the legislature conferred the power upon cities, no reason is perceived why that power might not be exercised. But conceding that section 7 of the Act of 1867, under which the Washingtonian Home was incorporated, was constitutional when enacted, the question

then arises how that act was affected by the constitutional provision of 1870, which prohibits cities from making donations to private corporations. It will be observed that the act does not authorize the city to make a contract with the home under which persons sentenced to the Bridewell for intemperance, drunkenness, or for any misdemeanor caused thereby, may be taken into the home, and retained for such time as they may have been sentenced for treatment or for any other purpose; but the act, by its terms, is mandatory on the city, and compels it to pay over $20,000 per annum in quarterly installments to the home for its support and maintenance. The petition for mandamus is not predicated on any contract existing between the city and the home, but the right to require the payment of the fund is predicated on the provisions of the Act of 1867, and upon those provisions alone. It is set out in the petition that during the years 1892 and 1893, and up to the time the petition was filed, in 1894, the amount received by the city from licenses has not been less than $2,000,000 per annum, so that 10 per cent received for licenses each year is far in excess of $20,000, so that the amount the home seeks to compel the city to pay over has become a fixed and definite sum; and it is a matter of no moment whether the money demanded by the home comes from liquor licenses received by the city into its treasury, or from funds in the treasury raised by taxation. Under the Act of 1867, the city was required to pay over to the home each year, from its revenues derived from liquor licenses, 10 per cent of the amount received, not exceeding $20,000, for the support and maintenance of that institution. This was required as a donation. By the terms of the section of the constitution, *supra*, such donation was prohibited; and, whatever may have been the obligation imposed upon the city by the Act of 1867 before the Constitution of 1870 was adopted, after the adoption of the constitution the city had no power or authority to donate any of its revenues derived from liquor licenses or from any other source to a private corporation. It declares: "No county, city, town, etc., shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation." This provision of the constitution required no legislation to place it in full force and effect. It was, like some other provisions of the constitution, self-executing, and operated as a paramount law from the time the constitution was adopted by the people. *Phillips* v. *Quick*, 63 Ill. 445; *Hills* v. *Chicago*, 60 Ill. 86; *Chance* v. *Marion County*, 64 Ill. 66. In the case first cited, it is said: "But it may be said that constitutional provisions require legislation to carry them into effect. This is true in many cases, but not in all, as will occur to every person on a moment's reflection. In cases where its provisions are negative or prohibitory in their character, they execute themselves. Where that instrument limits the power of either of the departments of the government, or where it prohibits the performance of any act by an officer or person, no one would contend that the power might be exercised or the act performed until prohibited by the general assembly. The constitution undeniably has as much vigor in prohibiting the exercise of power or the performance of an act as the general assembly. That body could add to the prohibition penalties and forfeitures if the constitutional prohibition should be disregarded, but the prohibited act would, nevertheless, be void. Where the constitution requires the performance of an act, but provides neither officers, the means, or the mode in which the act shall be performed, in such a case there is no other means of carrying such a provision into effect but by appropriate legislation. In such cases the constitution does not execute such provisions. That instrument, all will concede, may repeal, and does repeal, laws which are repugnant to its provisions. The very first section of the schedule declares that all laws in force at the adoption of the constitution, and not inconsistent with its provisions, shall continue to be as valid as if the constitution had not been adopted. This, by implication, says that all that conflict therewith shall be invalid and of no force. In fact, this provision preserves rights of the state and of individuals that would have otherwise been lost. The understanding with all persons is that a law passed either before or after the adoption of the constitution which is repugnant to its provisions must be held to be of no valid force, and precisely as if it had been repealed before the performance of the act." This question is discussed in *Cook County* v. *Chicago Industrial School*, 125 Ill. 540, 1 L. R. A. 437, and, among other things, it is there said (566): "If, on the one side, a statute directs the county board to pay money to a school which appears, not on the face of the statute, but from outside proof, to be controlled by a church, and if, on the other side, the constitution, in a self-executing provision, directs the county board not to pay money to such a school, which direction is to be followed? We answer, unhesitatingly, the latter. When the constitution says, 'You must not pay,' it must be obeyed in preference to a statute which says, 'You must pay.' And this is true, not only where the statute on its face is in conflict with the constitutional provision, but also in a case where an attempt to apply the statute to a given state of facts gives rise to a violation of such provision. We are therefore of the opinion that, upon the facts of this case, the Act of May 28, 1879, imposes no obligation upon the county of Cook which is superior to its obligation to obey section 8 of article 8 of the Constitution." We do not think the constitution operated retrospectively. Under section 7 of the Act of 1867, the city was authorized to make an annual donation to the home; but, upon the adoption of the Constitution in 1870, all cities were thereafter prohibited from making donations to a private corporation. The donations made prior to the adoption of the constitution remained unaffected, but donations after that time were prohibited.

But it is insisted in the argument that as the city paid over this fund quarterly for a

period of over twenty years, as required by section 7 of the Act, and as the payment was recognized each year in the annual appropriation ordinances of the city, and as the city has received a substantial benefit each year in return, the city is bound by its ratification of the act, and is now estopped from denying its constitutionality. By the adoption of the Constitution in 1870, the 7th section of the Act of 1867 was repealed, and from that time it was nugatory; and the fact that the officers of the city for twenty-two years paid over to the home annually a portion of the revenue of the city, in violation of law, could not work an estoppel on the city; nor did the fact that the city council annually, in its appropriation ordinances, recognized and made provision for the payment of the fund to the home, estop the city from refusing payment at any time it might elect to do so. The revenues of the city of Chicago arising from licenses, from taxation, and from all other sources are owned by the city, and held by it in trust to be used for corporate purposes which are lawful, and the revenues of a city cannot be diverted to any other purpose. The revenues of a city cannot be donated by the officers of the city or by the city council to any person they may think entitled to the same; but, on the other hand, such revenues can only be paid out or appropriated by the city council or its officers in the manner and for the purposes authorized by law. Where the lawful power does not exist, the payment is unauthorized and void, and the city will lose no rights where the money has been unlawfully paid out by its officers. The city having no power to pay over its revenues to the home, the fact of payment for a series of years will not estop it. In *Logan County Supvrs.* v. *Lincoln*, 81 Ill. 156, in speaking in regard to estoppel *in pais*, it is said (159): "Before the doctrine of estoppel can be invoked, there must have been some positive acts by the municipal officers which may have induced the action of the adverse party, and where it would be inequitable to permit the corporation to stultify itself by retracting what its officers had done." An estoppel by matter *in pais* may be defined as an indisputable admission, arising from the circumstance that the party claiming the benefit of it has, while acting in good faith, been induced, by the voluntary, intelligent action of the party against whom it is alleged, to change his position. Bigelow, Estoppel, 2d ed. p. 845. "The other party must have been induced to act upon the representation or concealment. His action must have been of a character to result in substantial prejudice, were he not permitted to rely on the estoppel." 7 Am. & Eng. Encyclop. Law, pp. 17, 18. Here, so far as appears, the home was not induced to change its position, nor was it induced to do or not do anything on account of the payments which were annually made by the city of Chicago different from what it would have done if the city had never made any payments.

The judgment will be affirmed.

Ira BARCHARD *et al.*, *Appts.*,
v.
Josephine KOHN.

(157 Ill. 579.)

The lien of a chattel mortgage upon property exempt from execution is not waived by obtaining judgment upon the notes secured by the mortgage and levying upon the mortgaged property under execution thereon, although the exempt property is set off to the debtor as such; but such lien may be enforced by seizure and sale under the terms of the mortgage, in a jurisdiction where the mortgage creates only a lien and does not transfer the legal title, since there is no such inconsistency between remedies as there would be where the levy asserted title in the mortgagor while the enforcement of the mortgage claimed title in the mortgagee.

(October 11, 1895.)

APPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to recover damages for an alleged trespass in taking property claimed under a chattel mortgage. *Reversed.*

Statement by **Magruder, J.:**

This is an action of trespass, begun on April 14, 1891, by appellee against appellant Borrmann, a dry-goods merchant, and appellant Barchard, a constable, for the alleged unlawful taking and carrying away of a stock of goods claimed to be the property of appellee, and entering for that purpose into the store No. 981 West Eighteenth street in Chicago, on April 13, 1891, where the goods were then located. Three pleas were filed: The first, not guilty. The second, averring that plaintiff, Josephine Kohn, was the wife of William Kohn; that William Kohn was the owner of the goods and chattels on June 16, 1890, and on that day executed a chattel mortgage upon the same to the defendant Borrmann to secure $3,000, of which $2,000 remained unpaid at the time of the alleged trespass; that Borrmann, by his agent, Barchard, took possession of the property under said mortgage, and, in pursuance of its terms, the property was sold at public auction on May 2, 1891, for $421.40, an amount insufficient to pay what was due upon the mortgage. The third plea sets up that the entry into the premises was made in a quiet and peaceable manner, and without unnecessary damage, in order to take the goods under the mortgage. The trial in the circuit court was before the court and a jury, and resulted in verdict and judgment for $800 in favor of plaintiff. The judgment has been affirmed by the appellate court, and an order has been

NOTE.—On the general subject of election of remedies, see *notes* to Mills v. Parkhurst (N. Y.) 13 L. R. A. 472; Crossman v. Universal Rubber Co. (N. Y.) 13 L. R. A. 91; Terry v. Munger (N. Y.) 8 L. R. A. 216; Conrow v. Little (N. Y.) 5 L. R. A. 699; Fowler v. Bowery Sav. Bank (N. Y.) 4 L. R. A. 145.

See also 44 L. R. A. 561.

made by that court certifying that the cause involves questions of law of such importance on account of collateral interests involved that it should be passed upon by the supreme court. The case is brought here by appeal from the judgment of the appellate court.

The material facts necessary to present the question involved are as follows: The chattel mortgage was given to secure twenty-nine notes executed by William Kohn to Borrmann, dated June 16, 1890, twenty-eight of which were each for $100, payable weekly thereafter, and the twenty-ninth was for $200, payable on March 1, 1891; so that all the notes had been due for some two weeks before the levy of the executions hereinafter named. The mortgage was not recorded until July 26, 1891, long after the present trespass suit was begun. On March 18, 1891, the mortgagor, William Kohn, executed two judgment notes,—one for $98.52, to D. Liebman, and one for $231.27, to A. Lewin & Sons. On the next day, March 19, 1891, judgments were entered up upon these notes, and executions issued and placed in the sheriff's hands, the sheriff receiving the Lewin execution at 10:55 A. M. and the Liebman execution at 11 A. M. of that day. On the same day the appellant Borrmann, learning of these judgments, caused judgment for $2,000 to be entered up upon eighteen of the notes secured by his chattel mortgage then remaining unpaid, and execution to be issued thereon, the sheriff receiving said execution at 4 o'clock in the afternoon of March 19, 1891. On the same day, and in the order in which they came to the hands of the sheriff, the three executions were levied upon the property included in the chattel mortgage. The next day, Kohn, the judgment debtor, presented a schedule, and asked to have his legal exemptions set off to him out of the property levied upon under the provisions of the exemption law of this state. 1 Starr & C. Anno. Stat. p. 1112, chap. 52, § 14. Appraisers were appointed, and on March 26, 1891, Kohn selected, and there was set off to him as exempt, property to the amount of $400, being a part of the property covered by the chattel mortgage. Subsequently the balance of the property levied upon, after taking out the exemptions, was sold under the executions, and out of the proceeds of the sale the Lewin and Liebman executions were paid in full, and the remainder of the proceeds was, on March 30, 1891, applied upon the execution of the appellant Borrmann, leaving still due to him upon his judgment about $950. It is claimed by appellee that her husband, William Kohn, owed her $250 when the executions were levied; that he paid $100 of this amount to her on March 19, 1891, and in payment of the remaining $150 turned over the exempt property, amounting to about $400, to her by first transferring it to one Adolph Cohen, who, on or about March 26, 1891, transferred it back to appellee. All instructions asked by the defendants submitting to the jury the question whether the property really belonged to the plaintiff were refused. It was this exempt property which the appellants took under the mortgage on April 18, 1891, for the purpose of satisfying *pro tanto* the $950 remaining due thereon, and which was sold, after the giving and posting of notice as required by the mortgage, at public auction, on May 2, 1891, as alleged in the pleas.

Mr. **Jesse Holdom** for appellants.

Messrs. **Moran, Kraus & Mayer,** for appellee:

Under the law of this state, a chattel mortgage is but a conditional sale, and when the mortgagor fails to perform the condition, the title to the mortgaged property, so far as it is held by the mortgagor, vests in the mortgagee.

Rhines v. *Phelps*, 8 Ill. 455; *Pike* v. *Colvin*, 67 Ill. 227; *Durfee* v. *Grinnell*, 69 Ill. 371.

The levy of the execution upon the mortgaged property on April 19, 1891, seven weeks after default had been made in the payment of the last note secured under the mortgage, was pursuing a course which was neither concurrent nor consistent with the assertion of any right under the mortgage.

Evans v. *Warren*, 123 Mass. 303; *Buck* v. *Ingersoll*, 11 Met. 226; *Swett* v. *Brown*, 5 Pick. 178; *Legg* v. *Willard*, 17 Pick. 140, 28 Am. Dec. 283; *Libby* v. *Cushman*, 29 Me. 429; *Whitney* v. *Farrar*, 51 Me. 418; *Kimball* v. *Marshall*, 8 N. H. 291; *Haynes* v. *Sanborn*, 45 N. H. 429; *Dyckman* v. *Sevatson*, 39 Minn. 132.

If one holding goods in pledge in the hands of an agent attach them for the same debt secured by the pledge, he thereby relinquishes the lien of his pledge.

Jones, Pledges, § 600; Jones, Chat. Mortg. § 565; *Butler* v. *Miller*, 1 N. Y. 496; *Hanchett* v. *Riverdale Distillery Co.* 15 Ill. App. 57.

Where a mortgagee permits the mortgagor to remain in possession until long after the maturity of the mortgage debt, a purchaser who buys the property from the mortgagor will hold it as against the mortgagee, even though said purchaser had actual notice of the mortgage.

Lemen v. *Robinson*, 59 Ill. 115; *McDowell* v. *Stewart*, 88 Ill. 538; *Sage* v. *Browning*, 51 Ill. 217; *Frank* v. *Miner*, 50 Ill. 444.

Magruder, J., delivered the opinion of the court:

The question in the case is whether the appellant Borrmann, mortgagee in the chattel mortgage, had a right to take possession under his mortgage of the goods set off as exempt to William Kohn, the judgment debtor and mortgagor, or whether, by taking judgment upon the notes secured by the mortgage, and levying the execution issued thereon upon the mortgaged property, and allowing a part of the proceeds of the sale made under the executions to be applied upon the judgment, he thereby waived his right to proceed under his mortgage against the portion of the mortgaged property not sold under the executions, and set off as exempt to the judgment debtor. The question arises out of the ruling of the trial court excluding the chattel mortgage when offered by the defendants as a justification of the alleged trespass, and admitting it only in mitigation of damages, and also out of the action of the court in instructing the jury that as a matter of law the

chattel mortgage did not justify the defendants in seizing the goods in question. As the mortgage was not recorded, and provided for the sale of the goods mortgaged in the ordinary course of business, it was void as to creditors, but it was good as between the parties to it. *Gregg* v. *Sanford*, 24 Ill. 17, 76 Am. Dec. 719; *Forest* v. *Tinkham*, 29 Ill. 141; *McDowell* v. *Stewart*, 83 Ill. 538; Jones, Mortg. 4th ed. § 188; *Greenebaum* v. *Wheeler*, 90 Ill. 296; *William Deering & Co.* v. *Washburn*, 141 Ill. 153.

The main case which holds that an attachment of the mortgaged property by the mortgagee for the mortgage debt is a waiver of his lien under the mortgage is *Evans* v. *Warren*, 122 Mass. 303. The decision in that case was placed upon the ground substantially that the liens created by mortgage and by attachment upon the same property are essentially different, and cannot coexist, for the reason that under the Massachusetts statutes the equity of redemption of personal property is not subject to attachment, and hence, if the mortgagee causes an attachment to issue against the mortgaged property, it is a waiver of the mortgage lien. The cases which hold that the attachment operated as a waiver of the plaintiff's rights under the mortgage do so upon the general grounds that a person cannot avail himself of inconsistent remedies in relation to the same matter, and, having chosen and carried into effect one remedy, he cannot resort to a different one, involving a repudiation of the grounds upon which the first one was based; that the suit on the mortgage and the attachment suit were inconsistent, because the one proceeds upon the ground that the mortgagee is the owner of the property, and the other upon the ground that the mortgagor thereof is owner; that when the debt matured the mortgagee had the right to take the property under the mortgage, he having the legal title, subject only to a right of redemption; and that by bringing the attachment suit he elected to treat the property as the property of the debtor, and cannot, by seeking to enforce his mortgage, assert an ownership and right of possession in himself antedating the attachment. The reasoning in *Evans* v. *Warren*, *supra*, was held to be unsatisfactory, and its doctrine was repudiated in *Byram* v. *Stout*, 127 Ind. 195. In the latter case the mortgagee in a chattel mortgage brought an action to foreclose it; and a junior mortgagee set up as a defense that the complainant had previously brought suit upon the evidences of debt secured by his mortgage, and had therein issued a writ of attachment, and levied it upon the mortgaged property, and had thereby released his mortgage lien; but the court held that the attachment was not a waiver of the mortgage lien, and did not estop the mortgagee from claiming under his mortgage, basing its decision mainly upon the ground that in Indiana the mortgagee in a chattel mortgage is a mere lien holder. Jones, Mortg. § 565. In support of the conclusion that the mortgagee of personal property is a mere lien holder, Indiana decisions are there referred to, holding that personal property under mortgage may be levied upon and sold by execution subject to the mortgage lien. The case of *Howard* v. *Parks*, 1 Tex. Civ. App. 603, follows the case of *Byram* v. *Stout*, *supra*, holding that a mortgage lien upon personal property is not waived by suing out an attachment upon the debt secured by the mortgage, and that in Texas a chattel mortgage has the effect of a lien on the property.

There can be no doubt that the chattel mortgage act of Illinois recognizes a lien as existing under the mortgage upon the property mortgaged. Section 1 thereof speaks of a mortgage, trust deed, or other conveyance of personal property "having the effect of a mortgage or lien upon such property." 2 Starr & C. Anno. Stat. p. 1630. We have held that a court of equity has jurisdiction to foreclose a chattel mortgage. *McCauley* v. *Rogers*, 104 Ill. 578; *Dupuy* v. *Gibson*, 36 Ill. 197; *Gaar* v. *Hurd*, 92 Ill. 315. A bill in equity could not be filed to foreclose such a mortgage, unless a lien was thereby conferred which could be enforced against the property. If, therefore, an attachment of the mortgaged property in a suit upon the debt secured by the chattel mortgage is not a waiver of the right to proceed under the mortgage where the mortgage is a lien upon the property, such an attachment will not be a waiver in this state when the subsequent proceeding, begun to enforce the mortgage, is a bill in equity to foreclose. In such case there is no inconsistency between the two remedies, as both certainly recognize the mortgagor as owner. Where a chattel mortgage is properly acknowledged and recorded, a third person, who is a creditor of the mortgagor, may levy an attachment or an execution upon the property in the possession of the mortgagor subject to the mortgage. *Beach* v. *Derby*, 19 Ill. 617; *Pike* v. *Colvin*, 67 Ill. 227; *Durfee* v. *Grinnell*, 69 Ill. 371. We have also held that a chattel mortgage is a conditional sale; that when there is default in the performance of the condition the title of the mortgagor vests in the mortgagee; and that the mortgagee, upon default or condition broken, being invested with the legal title, may bring replevin or trover, or reduce the property to possession, and proceed to sell under the power in the mortgage. *Pike* v. *Colvin* and *Durfee* v. *Grinnell*, *supra*; *Cleaves* v. *Herbert*, 61 Ill. 126; *Simmons* v. *Jenkins*, 76 Ill. 479; *Arnold* v. *Stock*, 81 Ill. 407; *Greenebaum* v. *Wheeler*, 90 Ill. 296; *Rhines* v. *Phelps*, 8 Ill. 455.

But even in this class of remedies the inconsistency relied upon as the basis of the theory of waiver is more seeming than real. In *Howard* v. *Parks*, *supra*, which was a statutory action for the trial of the right of property, in which it was sought to foreclose and enforce a contract lien upon personalty, the court says: "We are of opinion that . . . this lien was not waived by suing out an attachment upon the debt secured by such lien. We see no such inconsistency in the two suits as that the suing out of the attachment should have this effect." In the case at bar there was no attachment of the property covered by the chattel mortgage in the proceeding upon the note secured thereby. The property was levied upon under

an execution issued upon a judgment entered upon the note so secured. There can be no substantial difference, however, between taking the property under execution after judgment and taking it under an attachment before judgment. If there is no inconsistency between the enforcement of the mortgage lien and an attachment of the property, there can be none between the enforcement of such lien and the levy of an execution upon the property. The chattel mortgage here provides that, in case of default in payment, or in any of the other conditions of the mortgage, the mortgagee shall have the right to take immediate possession of the property, and may sell the same, and out of the proceeds of sale, after paying the costs and debt secured, shall render the surplus, if any, to the mortgagor. Although the naked legal title, after condition broken, vests in the mortgagee for the purpose of obtaining possession and applying the proceeds of the sale of the property to the payment of the debt, yet the requirement that the surplus proceeds be paid to the mortgagor shows that the absolute and exclusive ownership is not in the mortgagee. On the contrary, this requirement indicates that even the enforcement of the mortgage by seizure and sale under the power therein contained proceeds upon the idea that the rights of an owner still remain with the mortgagor to a certain extent.

It has long been the doctrine of this court in regard to real-estate mortgages, that the mortgagee may sue upon the note secured by the mortgage, or bring ejectment on condition broken, or file a bill in chancery to foreclose, and that he may pursue these remedies either concurrently or successively. *Fish* v. *Glover*, 154 Ill. 86, and cases there cited. In such cases, reducing the debt to judgment does not release the mortgage. It merely changes the form of the debt, so that the mortgage then becomes a security for the payment of the judgment. The judgment on the note without satisfaction is no bar to a proceeding in equity to foreclose, and the two suits may be pending at the same time. The lien of the debt secured by the mortgage attaches to the mortgaged property, and, as between the parties, can only be defeated by the payment or discharge of the debt, or by the release of the mortgage. *Ibid.* It has never been regarded as an objection to the prosecution of ejectment at law and of foreclosure in equity at the same time against the mortgagor of realty that the one proceeds upon the theory of title in the mortgagee and the other upon the theory of title in the mortgagor. Notwithstanding their apparent inconsistency, they may proceed concurrently until the debt secured is satisfied, it being always understood that there can be but one satisfaction. The rule that a mortgagee may proceed concurrently with an action on his note and with lawful proceedings to foreclose his mortgage applies to mortgages of personal property as well as to mortgages of real estate. *Burtis* v. *Bradford*, 122 Mass. 129.

The holder of a chattel mortgage, after default, has three remedies, any one or two or all of which he may pursue concurrently,—an action at law to recover the debt, an appropriate action to recover the mortgaged property, and a foreclosure of the mortgage. Herman, Chat. Mortg. § 206; 2 Cobbey, Chat. Mortg. § 947. In the case of chattels, as well as of realty, a personal judgment on the note secured by the mortgage is no bar to a subsequent suit to foreclose the mortgage, and the mortgagee does not lose his right to the mortgaged property if he seizes it on execution under the judgment. 2 Cobbey, Chat. Mortg. §§ 944, 1018. The mortgage, being a specific lien, and the judgment a general lien, may be pursued consistently until the debt is satisfied. The doctrine of election does not apply in such cases. Pingrey, Chat. Mortg. § 1027; *Tyson* v. *Weber*, 81 Ala. 470. The authorities which sustain the doctrine of waiver as above stated "depend upon a mere legal technicality, and not upon any principle in equity." *Byrnes* v. *Stout*, *supra*. In *Stier* v. *Harms*, 154 Ill. 476, where the main point decided was that replevin and trespass for the wrongful taking of goods under a distress warrant were analogous, consistent, and concurrent remedies the case of *Dyckman* v. *Swatson*, 39 Minn. 132, was cited as illustrating the general doctrine that, where there are two inconsistent remedies, the selection of one will preclude the right to pursue the other; yet it was not intended to hold that the remedies here under discussion of attachment and foreclosure are inconsistent. Moreover, it is difficult to reconcile them with the decision of this court in *Atkins* v. *Byrnes*, 71 Ill. 326. In that case the action was replevin, brought by the holder of a junior chattel mortgage, who had suffered the mortgaged property to remain in the hands of the mortgagor long after the mortgage debt had matured, against the bailiff, who had taken possession of the property under a distress warrant issued by the holder of a prior chattel mortgage, after the debt thereby secured had been overdue an unreasonable length of time. It was held that, although both mortgagees had been guilty of laches, yet, as against each other, under the circumstances, the one first acquiring possession was entitled to priority; that, although the defendant took the property as bailiff under the distress warrant, yet his possession was legally that of the prior mortgagee, for whom he was acting; that the prior mortgagee did not thereby release any lien which he had upon the property by virtue of his chattel mortgage; that, consequently, he could subject the property, except as against third persons whose interests had attached before the property was taken, to the payment of either or both liens; and that the execution of a note for rent due and a chattel mortgage to secure its payment does not operate as a waiver of the right to enforce payment by distress. If the holder of a chattel mortgage, given to secure a note for rent due does not waive his mortgage lien by causing the property to be seized under a distress warrant issued for the rent, then it would seem to follow that the mortgage lien is not waived when the mortgagee causes the property to be taken under an execution upon the judgment obtained in a suit upon the note secured by the mortgage. The lien of the

execution is no different from the lien of the distress warrant in its effect upon the right to enforce the mortgage lien.

In the case at bar the mortgaged goods were *in custodia legis*, when Borrmann's execution came into the sheriff's hands, because they had theretofore been levied upon under the executions issued upon the judgments in favor of Liebman and Lewin & Sons. Borrmann's execution lien was subject to the prior liens of the two other executions. The property set off to Kohn as exempt was set off as exempt from the levy of the three executions. So far as the proceeds of the sale of the mortgaged property levied upon were applied upon Borrmann's execution, his chattel mortgage was to that extent satisfied. But the execution did not take effect against the property set off as exempt. That property was released from the lien of the execution. It was not sold and applied upon the execution, and did not operate as a satisfaction *pro tanto* of the judgment into which the mortgage note had been merged. In *Conway* v. *Wilson*, 44 N. J. Eq. 457, which was a bill to foreclose a chattel mortgage, the answer set up that the complainant had sued at law on the claim secured by his mortgage, recovered judgment, issued execution, levied on the mortgaged property and other property, and then had directed the sheriff to surrender the goods levied upon to the defendant, and the sheriff did so; and it was claimed from these facts that the complainant, having once had a levy on goods enough to satisfy his demand, his demand would be presumed to be satisfied; but it was held that, although such was the general rule, it could not apply when the defendant himself had received the goods, and retained them. Where property is not taken from the possession of the defendant, or is restored to him at his request, the levy does not operate as a satisfaction, so far as his rights are concerned. Freeman, Judgm. 4th ed. § 475; *Hanness* v. *Bonnell*, 28 N. J. L. 159. Hence, if the mortgaged property levied upon by Borrmann had been surrendered to and retained by Kohn, it would not have affected the right of Borrmann to proceed against it under his mortgage. We cannot see why that right was in any way affected by the fact that the property was, upon the application of the debtor, set off as exempt. In *Tuesley* v. *Robinson*, 108 Mass. 558, 4 Am. Rep. 575, a chattel mortgage covering property exempt by law was held to be fraudulent as against creditors, but good as between the parties; and upon the bankruptcy of the mortgagor the property was set apart by the assignee as excepted from the operation of the bankruptcy act. It was held that the right of the mortgagee to hold the property as security under his mortgage was not waived or affected by the debtor's discharge in bankruptcy, and that he was entitled to replevy from the mortgagor the property so set off to him. In *Sumner* v. *McKee*, 89 Ill. 127, where the mortgagor in a chattel mortgage died before the note secured thereby had matured, and the mortgagee failed to take possession at its maturity, and the widow relinquished her claim to the articles mentioned in the appraisement of her specific allowance, and in lieu thereof elected to take all the articles of personalty inventoried and appraised, including the goods mortgaged, as a creditor of the estate, it was held that she took them subject to the lien of the mortgage. In case of a chattel mortgage the owner waives the benefit of the exemption so far as the encumbrance is operative. Thompson, Homesteads & Exemptions, § 741. It is questionable whether, as between Borrmann and Kohn, the latter was entitled to have the property set off as exempt from the levy of Borrmann's execution. Borrmann had the right, under his mortgage, to take possession of the property and sell it. There could be no material difference in selling it under the mortgage and directing the sheriff to sell it under the execution and apply the proceeds *pro tanto* towards the payment of the execution. "Where personal property otherwise exempt from execution has been pledged as collateral security for the payment of a debt, and judgment has been rendered on the debt, an execution may be issued, and the property seized and sold thereon as in other cases." *Jones* v. *Scott*, 10 Kan. 33. "Where, by the terms of a chattel mortgage, the mortgagee, at the maturity of his debt, has the right to take possession of the property, he may, if he choose, reduce his debt to judgment, take out execution, and levy upon and sell the mortgaged property as in other cases; in which case the debtor sustains no such injury as will support an action of trespass, even though the chattels thus mortgaged be the articles enumerated by law as exempt from execution." *Frost* v. *Shaw*, 3 Ohio St. 270; Thompson, Homesteads & Exemptions, § 742; Herman, Chat. Mortg. § 207. We are inclined to think that the lien of the mortgage upon the property not sold under the execution was not waived by the proceedings under the execution, and that the court below erred in refusing to admit the mortgage in evidence as a justification of the act of taking possession of the property, and in instructing the jury as follows: "The court instructs you as a matter of law that the defendant Borrmann lost the benefit of any lien which he may have had upon any of the property in question under the chattel mortgage in evidence by the entry of the judgment by him against William Kohn, and by the levy of the execution issued thereon, as shown by the evidence; and that, as a matter of law, the chattel mortgage did not justify the defendants in seizing the goods in question, and it is your duty to find the defendants guilty."

The judgments of the Appellate and Circuit Courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed.

PENNSYLVANIA SUPREME COURT.

Thomas DURKIN
v.
KINGSTON COAL CO. *et al.*, *Appts.*

(171 Pa. 198.)

1. **The constitutional right to acquire, possess, and protect property** prevents making a man liable for the acts and engagements of strangers over whom he has no control.
2. **The imposition of liability on a mine owner** by the Act of 1891, art. 17, for the failure of a certified foreman, whom he is compelled to employ, and with whose acts he cannot interfere, and whose duties are prescribed by the act, to comply with those duties, is unconstitutional and void.
3. **A mine foreman is personally liable** for his negligence causing injury to a workman in the mine, either under the Act of 1891, permitting only certified foremen to be employed and regulating their duties, or without regard to such statute.

(October 7, 1895.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Luzerne County in favor of plaintiff in an action brought to recover damages for personal injuries received by plaintiff while working in the mine of the defendant corporation of which the defendant Jones was the superintendent. *Reversed as to the corporation. Affirmed as to Jones.*

The facts are stated in the opinion.

Messrs. **William C. Price** and **H. W. Palmer** for appellants:

A mine boss, under the Act of March 3, 1870, is a fellow servant with a driver boy employed to haul coal from the chambers of the mine.

The operator of a coal mine fulfils the measure of his duty to his employés if he commits his work to careful and skilful bosses and superintendents, who conduct the same to the best of their skill and ability.

Waddell v. *Simoson*, 112 Pa. 567.

In the absence of constitutional prohibition, legislation of this character cannot be sustained.

Millett v. *People*, 117 Ill. 294, 57 Am. Rep. 869; Cooley, Const. Lim. 1st ed. p. 391; *Budd* v. *State*, 3 Humph. 483, 39 Am. Dec. 189; *Wally* v. *Kennedy*, 2 Yerg. 554, 24 Am. Dec. 511; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34.

This action is brought under the statute which gives the action against the operator for negligence of the boss. Such an action cannot be sustained without the aid of the statute. But the bosses are joined in the suit. The statute gives no action against them. If they are liable to fellow servants for injuries arising from their negligence, it would be in a common-law action joined with one for statutory negligence.

Kendrick v. *Chicago & A. R. Co.* 81 Mo. 521; *Smith* v. *Meanor*, 16 Serg. & R. 377.

Messrs. **Edward A. Lynch** and **John T. Lenahan**, for appellee:

Anthracite mining being a separate and distinct class of mining from any other kind, and as the Act of 1891 includes all anthracite coal mines in the commonwealth, and does not make special provisions for the regulation of some and the exclusion of others, it is clearly constitutional under the principle that the fundamental law permits legislation for classes but not for persons or things of a class.

Wheeler v. *Philadelphia*, 77 Pa. 351; *Kilgore* v. *Magee*, 85 Pa. 401; *Lackawanna Twp., Harris' App.* 160 Pa. 494.

If a law is general and uniform throughout the state, operating alike upon all persons and localities of a class or who are brought within the rules and circumstances provided for it, it is not objectionable as wanting a uniformity of operation.

Reading v. *Savage*, 124 Pa. 328; *State* v. *Berka*, 20 Neb. 375; *State* v. *Hawkins*, 44 Ohio St. 98; *Allen* v. *Pioneer Press Co.* 40 Minn. 117, 8 L. R. A. 532; *State* v. *Hudson*, 44 Ohio St. 137; *McAunich* v. *Mississippi & M. R. R. Co.* 20 Iowa, 338.

To make such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important, all contracts and rights are subject to the power.

Cooley, Const. Lim. 3d ed. p. 574; *State* v. *Noyes*, 47 Me. 211; *Powell* v. *Com.* 114 Pa. 294, 60 Am. Rep. 350; *Com.* v. *Vrooman*, 164 Pa. 306, 25 L. R. A. 250; *Wright* v. *Com.* 77 Pa. 470; *New York* v. *Williams*, 15 N. Y. 502.

In a long line of adjudicated cases this police power of the state stands unchallenged, so that now it has become the accepted law of all the states of our Union.

Thorpe v. *Rutland & B. R. Co.* 27 Vt. 148, 62 Am. Dec. 625; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *State* v. *Noyes*, 47 Me. 211; *State* v. *Yopp*, 97 N. C. 477; *Dabbs* v. *State*, 39 Ark. 353, 43 Am. Rep. 275.

Williams, J., delivered the opinion of the court:

The first article of the constitution of this state, known as the "Bill of Rights," declares that all men are possessed of certain inherent and inalienable rights. One of these is the right to acquire, possess, and protect property. The preservation of this right requires, both that every man should be answerable for his own acts and engagements, and that no man should be required to answer for the acts and engagements of strangers over whom he has no control. A statute that should impose such a liability, or that should take the property of one person and give it to another or

NOTE.—The above case is believed to be the first of the kind, as the statute condemned differs from others which have made employers liable to employés for acts of fellow servants in the particular that it attempts also to create the relation of master and servant between the mine owner and a person whom he does not voluntarily employ.

For other statutory regulations for protection of workers in mines, see *note* to Consolidated Coal & M. Co. v. Floyd (Ohio) 25 L. R. A. 848.

See also 40 L. R. A. 812; 45 L. R. A. 616.

to the public, without making just compensation therefor, would violate the bill of rights, and would be, for that reason, unconstitutional and void. *Harvey* v. *Thomas*, 10 Watts, 66, 36 Am. Dec. 141; *Ervine's App.* 16 Pa. 265, 55 Am. Dec. 499; *Kneass' App.* 31 Pa. 87; *Wolford* v. *Morgenthal*, 91 Pa. 30; *Godcharles* v. *Wigeman*, 113 Pa. 431. It is in furtherance of the right to acquire, possess, and protect property that section 18 of the Bill of Rights prohibits the enactment of laws that shall interfere with or impair the obligation of contracts. The tendency toward class legislation for the protection of particular sorts of labor has been so strong, however, that several statutes have recently been passed that could not be sustained under the provisions of the bill of rights. Such was the case in *Godcharles* v. *Wigeman*, *supra;* such was the case with some recent provisions relating to mechanics' liens; and such is alleged by the appellants to be the case with some of the provisions of the Act of 1891 (Pub. Laws, p. 176), under which this action was brought. The title of the Act of 1891 is, "An Act to provide for the health and safety of persons employed in and about the anthracite coal mines of Pennsylvania and for the protection and preservation of property connected therewith." It divides the anthracite region into eight districts, and provides for the appointment by the governor of a competent mine inspector in each district, who shall have a general oversight of mining operations within his district. It creates an examining board for each district, with power to examine candidates, and recommend such as they shall deem qualified for the position of mine foreman to the secretary of internal affairs. It is made the duty of this officer to issue certificates to those who apply therefor and have been recommended by the board of examiners. Article 8, § 1, declares that no person "shall be permitted to act as mine foreman or assistant mine foreman of any coal mines or colliery" who has not been examined by the board of examiners, recommended to the secretary of internal affairs, and provided by that officer with a certificate. The employment of a certified mine foreman is made obligatory upon all mine owners and operators, and a failure to do so is punished by a fine of $20 per day, which may be collected from the owner, the operator, or the superintendent in charge of the mine. The duties of the mine foreman are prescribed by the act, and the owner or operator of the mine cannot interfere with them. He is especially to "visit and examine every working place in the mine at least once every alternate day while the men of such place are or should be at work, and direct that each and every working place is properly secured by props or timber, and that safety in all respects is assured by directing that all loose coal or rock shall be pulled down or secured and that no person shall be permitted to work in an unsafe place unless it be for the purpose of making it secure." The mine foreman is also required to examine, at least once every day, "all slopes, shafts, main roads, ways, signal apparatus, pulleys, and timbering, and see that they are in safe and efficient working condition." After having thus most effectually taken the management of his mining operations out of his hands and committed it to officers of its own creation, whose employment is made compulsory upon him, the statute, in section 8 of article 17, imposes upon the mine owner a liability for the neglect or incompetency of the men whom he is compelled to employ, in these words: "That for any injury to person or property occasioned by any violation of this act or any failure to comply with its provisions by any . . . mine foreman, a right of action shall accrue to the party injured against said owner or operator for any direct damages he may have sustained thereby; and in case of loss of life by reason of such neglect or failure aforesaid a right of action shall accrue to the widow and lineal heirs of the person whose life shall be lost for like recovery of damages for the injury they shall have sustained." This statute, regarded as a whole, is an extraordinary piece of legislation. Through it the lawmakers say to the mine owner: "You cannot be trusted to manage your own business. Left to yourself, you will not properly care for your own employés. We will determine what you shall do. In order to make it certain that our directions are obeyed, we will set a mine foreman over your mines, with authority to direct the manner in which your operations shall be conducted, and what precautions shall be taken for the safety of your employés. You shall take for this position a man whom we certify to as competent. You shall pay him his salary. What he orders done in your mines you shall pay for. If, notwithstanding our certificate, he turns out to be incompetent or untrustworthy, you shall be responsible for his ignorance or negligence." Under the operation of this statute the mine foreman represents the commonwealth. The state insists on his employment by the mine owner, and, in the name of the police power, turns over to him the determination of all questions relating to the comfort and the security of the miners, and invests him with the power to compel compliance with his directions. Incredible as it may seem, obedience on the part of the mine owner does not protect him; but, if the mine foreman fails to do properly what the statute directs him to do, the mine owner is declared to be responsible for all the consequences of the incompetency of the representative of the state. This is a strong case of binding the consequences of the fault or folly of one man upon the shoulders of another. This is worse than taxation without representation. It is civil responsibility without blame, and for the fault of another. The same conclusion may be reached by another road.

It has been long settled that a mining boss or foreman is a fellow servant with the other employés of the same master, engaged in a common business, and that the master is not liable for an injury caused by the negligence of such mining boss. *Lehigh Valley Coal Co.* v. *Jones*, 86 Pa. 432; *Delaware & H. Canal Co.* v. *Carroll*, 89 Pa. 374; *Waddell* v. *Simoson*, 112 Pa. 567. The duty of the mine owner is to employ competent bosses or fore-

men to direct his operations. When he does this he discharges the full measure of his duty to his employés, and he is not liable for an injury arising from the negligence of the foreman. *Waddell* v. *Simoson*, *supra*. A vice principal is one to whom an employer delegates the performance of duties which the law imposes on him, and the employer is responsible because the duty is his own. As to the acts of the workmen, and the manner in which they do their work, the duty of the employer is to employ persons who are reasonably competent to do the work assigned them, and, if he finds himself mistaken in regard to their competency, to discharge them when the mistake is discovered. But he is not responsible for the consequences of their negligence as these may affect each other. *Ross* v. *Walker*, 139 Pa. 42. Now, the Act of 1891 undertakes to reverse the settled law upon this subject and declare that the employer shall be responsible for an injury to an employé resulting from the negligence of a fellow workman. Prior to the Act of 1891, the man whose negligence caused the injury was alone liable to respond in damages. He might not always have property out of which a judgment could be collected, but the plaintiff must, in any case, take his chances of the solvency of the defendant against whom his cause of action lies. The Act of 1891 undertakes to furnish a responsible defendant for the injured person to pursue. Passing over the head of the fellow servant at whose hands the injury was received, it fastens on the owner of the property on which the accident happened, and declares him to be the guilty person on whose head the consequences of the accident shall fall. To see the true character of this legislation we must keep both lines of objection in mind. We must remember that the injury complained of is due to the negligence of a fellow workman, for which the master is responsible neither in law nor morals. We must also remember that this fellow workman has been designated by the state, his duties defined and his powers conferred by statute, and his employment made compulsory, under heavy penalties, by the same statute. Finally, we must remember that it is the negligence of this fellow servant, whose competency the state has certified, and whose employment the state has compelled, for which the employer is made liable. The state says: "He is competent. You must employ him. You shall surrender to his control the arrangements for the security of your employés." It then says, in effect: "If we impose upon you by certifying to the competency of an incompetent man, or if the man to whom we commit the conduct of your mines neglects his duty, you shall pay for our mistake and for his negligence." We have no doubt that so much, at least, of section 8 of article 17 of the Act of 1891 as imposes liability on the mine owner for the failure of the foreman to comply with the provisions of the act which compels his employment and defines his duties, is unconstitutional and void. This disposes of this appeal so far as the Kingston Coal Company is concerned.

But why should the certified mine foreman be relieved from the consequences of his negligence? The jury have found that the injury was due to his want of attention to his proper duties, and his liability is clear, without regard to our mining laws. But the statute required him to examine the roads and ways in use in the mine each day. He knew the film of rock separating the upper from the lower working was but 8 feet thick, at best. He knew that the supports for this film were not in line with each other in the upper and lower workings. He knew that layers of the rock were falling off, that the thickness of the floor was reduced under the way on which the accident occurred to about 5 feet, and that, not far away, it had fallen down into the lower working; yet, with all this knowledge, he did nothing, so far as we can learn, to increase the security of the way. Whether his conduct be considered with reference to the statute, or regardless of it, his failure to do what he must have known to be necessary was a neglect of duty such as should render him liable to his fellow servant who has suffered from it. Some difficulty has been suggested, growing out of the pleadings, but the declaration is not before us. We cannot determine, therefore, whether an amendment is necessary in order to sustain the judgment against him.

We are not prepared to hold the Act of 1891 to be unconstitutional as a whole. It relates to all anthracite coal mines, and defines what shall be regarded as such mines. Coal may be taken out of the ground by farm owners for their own use, or it may be taken in such small quantities and for such local purposes as to make the application of the mining laws to the operations so conducted, not only unnecessary, but burdensome to the extent of absolute prohibition. Such limited or incipient operations are not within the mischief to remedy which the mining laws were devised. They are ordinarily conducted for purposes of exploration, or for family supply, and ought not to be classed with operations conducted for the supply of the public. The business of coal mining, like that of insurance or banking, may be defined by the legislature. The definition found in the Act of 1891 seems to us reasonable, to be within the fair limits of a legislative definition, and to exclude only such operations as are too small to make the general regulations provided by the act applicable to them. The ground on which we place our judgment is not, therefore, that the act is local, but that the provisions of it which we have considered are in violation of the bill of rights.

The judgment against the Kingston Coal Company is reversed for reasons that are fatal to a recovery against it.

The judgment against William Jones is affirmed.

CALIFORNIA SUPREME COURT.

H. M. LEVY
v.
SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO *et al.*

(105 Cal. 600.)

Compelling a person to disclose his possession of any property of a decedent's estate, or his knowledge concerning such estate, on penalty of imprisonment for refusal, in proceedings on behalf of the estate, being a remedial, and not a penal, proceeding, is not within the constitutional provisions against making any person a witness against himself in a criminal action, and against unreasonable searches and seizures.

(*McFarland and De Haven, JJ., dissent.*)

(January 6, 1895.)

APPLICATION for a writ of prohibition to stop further proceedings for the examination of petitioner on oath concerning property alleged to have belonged to the estate of Morris Hoeflich, deceased, and which petitioner was alleged to have concealed and disposed of. *Writ denied.*

The facts are stated in the opinion.

Messrs. **Byron Waters, L. B. L. Brandt,** and **Reddy, Campbell & Metson,** for petitioner:

Sections 1459 and 1460 of the Code of Civil Procedure, under which these proceedings were had, are unconstitutional.

Const. art. 1, §§ 18, 19; U. S. Const. 4th and 5th Amendments.

These sections provide for a penalty.

Andrews v. *Jones*, 8 Blackf. 444; *Taylor* v. *Sandiford*, 20 U. S. 7 Wheat. 13, 5 L. ed. 384; *Astley* v. *Weldon*, 2 Bos. & P. 346; *United*

NOTE.—*Constitutional protection against being forced to furnish evidence to be used against one's self in a civil case.*

I. *Provisions against self-accusation.*
 a. *Limitation to criminal proceedings.*
 b. *Application to proceedings for penalties and forfeitures.*
 c. *General doctrine as to evidence against one's self.*
 d. *The contrary doctrine.*
 e. *Parties in interest.*
II. *Unreasonable searches and seizures.*
III. *Right of trial by jury.*
IV. *Due process of law.*
V. *Distinction between civil and criminal or penal proceedings.*

I. *Provisions against self-accusation.*

a. *Limitation to criminal proceedings.*

Constitutional provisions protecting a witness against being compelled to give evidence against himself extend, as will be seen from the cases set forth below in the latter part of this subdivision, to all evidence which could be used against him whether brought out in a civil or criminal proceeding, and are designed for his protection against such use, and refer, therefore, to the case in which the evidence is thus sought to be used as distinguished from that in which it is sought to be deduced. The term "civil case" as used in the heading of this note applies, therefore, to the case in which the evidence with reference to which constitutional protection is claimed, is sought to be or might be used, and this note does not include those cases which are very numerous, in which the constitutional protection was claimed in a civil action against furnishing evidence which tended to criminate one or render him liable to a criminal prosecution only; but the object of this note is to show what constitutional protection one has against being compelled to give evidence in any case which can be used against him in a civil case.

The provision of the Federal Constitution (Fifth Amendment), that no one shall be compelled in a criminal case to be a witness against himself, expressly limits the privilege to criminal cases, and the constitutions of a number of the states, notably New York, California, and Georgia, contain substantially the same provision, and those of a large number of the other states contain the same limitation though expressed in different language. Some of the constitutions, however, as, for example, those of Massachusetts, Mississippi, New Hampshire, and Virginia, provide that no person shall be compelled to give evidence against himself or to testify against himself. But, even under such provisions, the right to protection against giving evidence against one's self has been limited to criminal cases by a decided preponderance of authority.

This rule was expressly laid down in Judge of Probate v. Green, 1 How. (Miss.) 146 (1834).

And in Bull v. Loveland, 10 Pick. 9 (1830), it was held that a witness is not exempted from being compelled to produce a document in his possession under a *subpœna duces tecum* in a case in which the party calling him has a right to use it, or from examination, in a matter pertinent to the issue, by the provision of the Massachusetts bill of rights that no subject shall be compelled to accuse or furnish evidence against himself, when his answers will not expose him to criminal prosecution or tend to subject him to a penalty or forfeiture, although they may otherwise adversely affect his pecuniary interests.

And the seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself within the spirit and meaning of the constitutional provision. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885).

So, in Devoll v. Brownell, 5 Pick. 448 (1827), it was held that one against whom an action was brought as trustee of another, in which a bill of sale from the latter to the former was disclosed, was bound to answer questions put to him in order to prove that the bill of sale was fraudulent as against creditors and that he had secreted the property, though he might thereby charge himself, the court saying that the constitutional provision that no subject shall be compelled to furnish evidence against himself does not relate to questions of property.

And in Keith v. Woombell, 8 Pick. 211 (1829), the court granted a motion for an order directing the defendant to leave the bond, for the possession of which the action was brought, with the clerk of the court for the inspection of the plaintiff, which was opposed upon the ground that by the constitution a subject could not be compelled to furnish evidence against himself, saying that had reference to criminal cases, and that the plaintiff, claiming an interest in the bond, was entitled to see it.

And in Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891), it was said that the constitutional provision that no person shall be compelled to accuse or furnish evidence against himself, should not have a different inter-

See also 33 L. R. A. 227; 39 L. R. A. 269.

States v. *Chouteau*, 102 U. S. 611, 26 L. ed. 249; Century Dict. 4868; 2 Burrill, Law Dict. 286; 2 Stephen, Com. 159-162; 2 Story, Eq. Jur. §§ 1313-1326; Black, Law Dict. 884; *San Luis Obispo County* v. *Hendricks*, 71 Cal. 245; *United States* v. *Mathews*, 23 Fed. Rep. 74; *United States* v. *Ulrici*, 3 Dill. 532; *People* v. *Nedrow*, 122 Ill. 363; *Grover* v. *Huckins*, 26 Mich. 482; Rapalje & Lawrence, Law Dict. 945; *Sidebottom* v. *Adkins*, 5 Week. Rep. 743; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746; *Ex parte Gould*, 99 Cal. 360, 21 L. R. A. 751.

In no case or proceeding, the object of which is to procure evidence against a person, to enforce a penalty or secure a forfeiture of his goods or chattels, can the defendant or respondent be compelled to be a witness against himself.

2 Story, Eq. Jur. §§ 1319, 1434, 1509; 1 Pom. Eq. § 202; *Poindexter* v. *Davis*, 6 Gratt. 491; *Currier* v. *Concord R. Corp.* 48 N. H. 321; *Livingston* v. *Harris*, 3 Paige, 534.

Mr. **Henry E. Highton**, for respondents: Sections 1458-1461, are analogous in extent and object to the power exercised by courts of chancery upon bills of discovery.

Mesmer v. *Jenkins*, 61 Cal. 151; *Selectmen of Boston* v. *Boylston*, 4 Mass. 318; *Fletcher* v. *Holmes*, 40 Me. 364.

The question of title to property is not involved.

Ex parte Casey, 71 Cal. 269; *Re Curry*, 35 Hun, 321; *Re Knittel*, 5 Dem. 371.

The sections are not penal, but remedial in nature.

Jahns v. *Nolting*, 29 Cal. 507.

The sections are not in conflict with any constitutional provision.

Re Strouse, 1 Sawy. 605; *Re Meador*, 1 Abb. (U. S.) 317.

As to the power of the legislature to make such order prima facie evidence of the right of the administrator to the property, or even to provide that the mere bringing of an action by the administrator to recover the possession thereof, shall be prima facie evidence of his right thereto, there can be no doubt.

Cooley, Const. Lim. 6th ed. 451, 452; *How-*

pretation from that declaring that no person shall be compelled in a criminal case to be a witness against himself, the manifest purpose of all of the provisions being to prohibit the compelling of testimony of a self-criminating kind, and that the privilege is limited to criminal matters.

So, in Thurston v. Clark (Cal.) 40 Pac. Rep. 435 (1895), it was said that the constitutional provision that no one shall be compelled in a criminal case to be a witness against himself applies to all cases in which the action prosecuted is, not to establish, recover, or redress private and civil rights, but to try to punish persons charged with the commission of public offenses.

And in People v. Kelly, 12 Abb. Pr. 150 (1861), it was said that the constitutional exemption applies only when the trial or matter under investigation is criminal, and the statement was repeated in the decision on appeal in the same case, 24 N. Y. 74 (1861).

And in People v. Sharp, 107 N. Y. 427 (1887), and People v. Kelly, 24 N. Y. 74 (1861), it was said that if a witness objects to a question on the ground that an answer would criminate himself, he must allege in substance that his answer, if repeated as his admission on his own trial, would tend to prove him guilty of a criminal offense.

People v. Kelly, *supra*, and People v. Sharp, *supra*, together with Higdon v. Heard, and Wilkins v. Malone, set forth in *infra*, I. b, *Application to proceedings for penalties and forfeitures*, are said, in United States v. James, 60 Fed. Rep. 257, 26 L. R. A. 418 (1894), to have been expressly overruled by Counselman v. Hitchcock, *supra*, so far as they hold that the privilege is confined to evidence given in a criminal prosecution. See also, as to that question, cases set forth in a subsequent portion of this subdivision.

In *Re* Nickell, 47 Kan. 734 (1892), however, it was said that the language of section 10 of the Kansas Bill of Rights, that no person shall be a witness against himself, is, if anything, stronger than that of the Federal Constitution, and does not limit the right to criminal cases.

But the privilege is not confined to evidence given or required in criminal cases, but extends to all evidence called for in any trial, whether civil or criminal, which could be subsequently used against the witness.

This was directly held in Cullen v. Com., 24 Gratt. 624 (1873), of the Virginia constitutional provision that no one shall be compelled to give evidence against himself.

And in Wilkins v. Malone, 14 Ind. 153 (1860), it was held that Ind. Const., art. 4, § 14, providing that no person in any criminal prosecution shall be compelled to testify against himself, extends literally to criminal prosecutions only, and not to civil actions, but its spirit and intent protect a person from a compulsory disclosure in a civil suit of facts tending to criminate him whenever his answer could be given in evidence against him in a subsequent criminal prosecution.

And in Drake v. State, 75 Ga. 413 (1885), Ga. Const., art. 1, § 1, par. 6, providing that no person shall be compelled to give testimony tending in any manner to criminate himself, was held to mean that when a person is sworn as a witness in a case he shall not be compelled to testify to facts that may tend to criminate him.

So in Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891), it was said that the object of the provision of the Fifth Amendment to the Federal Constitution, that no person shall be compelled in a criminal case to be a witness against himself, was to insure that a person should not be compelled when acting as a witness in any investigation to give testimony which might tend to show that he had committed a crime. The privilege is as broad as the mischief against which it seeks to guard.

And in United States v. James, 60 Fed. Rep. 257, 26 L. R. A. 418 (1894), it is said that "since the Counselman Case, *supra*, it is admitted law that every person is protected by the Fifth Amendment against self-disclosure in any proceeding, civil or criminal, of such of his own acts as would subject either the act or any connected act to the dangers of incrimination."

And in Emery's Case, 107 Mass. 172, 9 Am. Rep. 22 (1871), it was said that the provision of the Massachusetts declaration of rights that no subject shall be compelled to accuse or furnish evidence against himself extends to all investigations of an inquisitorial nature instituted for the purpose of discovering crime or the perpetrators of crime by putting suspected parties upon their examination in respect thereto in any manner, although not in the course of any pending prosecution; and that any disclosure which would be capable of being used against the person making it as a confession of crime, or an admission of facts tending to prove the commission of an offense by him, in any prosecution then pending, or that might be brought against him therefor, is an accusation of himself within the meaning thereof.

ard v. *Moot*, 64 N. Y. 262; *State* v. *Cunningham*, 25 Conn. 195.

Van Fleet, J., delivered the opinion of the court:

Morris Hoeflich died at the city and county of San Francisco in May, 1891, and Solomon Hoeflich was by the superior court of said city and county appointed administrator of his estate. Thereafter, on the ——— day of June, 1893, the administrator filed in said superior court a petition in the matter of said estate, averring, in substance, that it had come to his knowledge that said deceased was at and prior to his death a partner with one H. M. Levy, or engaged with said Levy jointly in a large number of transactions in stocks and mines in California and Nevada, and in other property, "the exact nature and extent of which transactions, and of the real and personal estate resulting therefrom, can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and examination of books of account, correspondence, checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of said H. M. Levy;" and also by the examination of other named persons, and documents, etc., in their possession. The petition further averred that said Levy has concealed, conveyed away, and disposed of moneys and property of said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest, and claim of said deceased to real and personal property,"—portions of such property being particularly described. The prayer was that said Levy be cited to appear before said court and undergo an examination under oath, together with such witnesses as might be then produced, touching all the matters set forth in the petition, "and especially touching his possession and knowledge of any and

So, in Poindexter v. Davis, 6 Gratt. 481 (1850), it was held that the rule that a party is not bound to answer interrogatories which may subject him to a penalty or forfeiture is not confined to cases brought for the purpose of enforcing a penalty or forfeiture, but extends also to cases in which the discovery would expose the party to some subsequent action or suit tending to the like result.

And in *Ex parte* Clarke, 106 Cal. 363 (1894), an insolvent debtor was held to be entitled to the immunity of Cal. Const., art. 1, § 13, providing that no person can be compelled in any criminal case to be a witness against himself, in a civil proceeding to examine him with reference to property which should have been turned over to the assignee and alleged to have been disposed of by him, when the facts alleged, if true, would render him guilty of a crime.

So Pennsylvania Act of January 11, 1879, authorizing the plaintiff in an execution, upon filing an affidavit that he believes the defendant owns property which he fraudulently conceals, and refuses to apply to the payment of his debts, to examine him on oath as to his property, conflicts with the Pennsylvania constitutional provision that no one shall be obliged to give evidence which may criminate him, as its design is to compel the debtor to reveal that which is made a misdemeanor by the Criminal Act of 1860. Horstman v. Kaufman, 97 Pa. 147, 39 Am. Rep. 802 (1881).

And champerty is an indictable offense and therefore a party to a champertous agreement, whether a party to the suit or not, cannot be compelled as a witness to make disclosures concerning the agreement which would tend to expose him to punishment or which might be used against him on a prosecution therefor. Douglass v. Wood, 1 Swan, 393 (1852).

So in Emery's Case, *supra*, the provision of the Massachusetts declaration of rights that no subject shall be compelled to accuse or furnish evidence against himself was held to apply to investigations ordered and conducted by the legislature or either of its branches.

b. *Applications to proceedings for penalties and forfeitures.*

At common law no person could be compelled to testify against himself, or compelled to answer any question which would have a tendency to expose him to a penalty or forfeiture, or form a link in a chain of evidence for that purpose as well as to criminate him. Higdon v. Heard, 14 Ga. 255 (1853); Benjamin v. Hathaway, 3 Conn. 528 (1821).

And a court of chancery will not compel a person to discover what may subject him to a penalty or forfeiture or to a loss in the nature of a forfeiture. Northrop v. Hatch, 6 Conn. 361 (1827); Vanderveer v. Holcomb, 17 N. J. Eq. 91 (1864); Higdon v. Heard, *supra*.

Or form a link in a chain of evidence for that purpose. Higdon v. Heard, *supra*.

So the common-law doctrine of protection against compulsory disclosures which will tend to subject the witness to a penalty or forfeiture is also asserted without placing it upon constitutional grounds, in State v. Talbott, 73 Mo. 347 (1881); Lister v. Boker, 6 Blackf. 429 (1843); Poindexter v. Davis, 6 Gratt. 481 (1850).

And in Johnson v. Donaldson, 18 Blatchf. 237 (1880), it was held that the defendant in an action to recover penalties and for the forfeiture of plates for the violation of a copyright under U. S. Rev. Stat. § 4965, cannot be compelled by *subpœna duces tecum* to produce his books of account and plates to be used in evidence against him, though the statute provides that no discovery or evidence obtained from a party or witness by means of a judicial proceeding shall be used against him in any criminal proceeding for the enforcement of a penalty or forfeiture, the proceeding in which it was sought being itself one for a penalty or forfeiture.

And in *Re* Dickinson, 58 How. Pr. 260 (1879), it was held that a county treasurer subpœnaed before a committee of the board of supervisors to answer interrogatories concerning moneys in his hands, pursuant to New York Laws of 1858, chap. 190, § 3, cannot be compelled to answer incriminating questions, though it is provided by section 9 thereof that such testimony shall not be used against him in the trial of any indictment or criminal prosecution, as it might be used in a proceeding for his removal for delinquency under the Act of 1877, which is not a criminal proceeding but a proceeding for the forfeiture of the office.

And when a note is transferred by the payee, and an action is brought upon it by the holder against the maker, and the payee is called as a witness by the maker for the pupose of showing that the note was usurious, he is privileged from answering questions designed to show the consideration for the note or any payment thereon to him, as under the statutes making the taking of usury a misdemeanor and imposing a penalty therefor the tendency of his answers might be to subject him to the penalty or an indictment therefor. Burns v. Kempshall, 24 Wend. 360 (1840), affirmed, Kempshall v. Burns, 4 Hill, 468 (1842).

all deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, and interest or claim of the decedent, Morris Hoeflich, to any real or personal estate, or any claim or demand whatsoever;" and that said Levy be required to produce all said deeds, conveyances, and other writings, books of account, etc., for inspection and examination. In response to a citation issued upon said petition, said Levy appeared and demurred, which demurrer being overruled, he filed a verified answer specifically denying all the material averments of the petition; denied that he had any property in which the deceased was interested, as a partner or otherwise, or that he had any documents or writings relating to any such property. He also filed written objections to any further proceedings in the matter of said examination; but the demurrer and the objections were overruled, and a day was set by the court for the examination. Thereupon said Levy filed his petition here, setting up these facts, upon which he makes this application for a writ of prohibition directed to said court, and the Honorable J. V. Coffey, judge thereof, commanding said respondents to refrain and desist from further proceeding with said contemplated examination. An alternative writ was issued, in response to which respondents have demurred and answered, and the matter has since been argued and submitted.

The proceedings in the superior court which are called into question by this application for prohibition were admittedly taken under and in pursuance of sections 1459 and 1460 of the Code of Civil Procedure, and these sections are as follows:

"Section 1459. If an executor, administrator, or other person interested in the estate of a decedent complains to the superior court, or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of

So the Minnesota statutory provision that a witness shall not be required to answer questions which will have a tendency to accuse himself of any crime or misdemeanor or expose him to any penalty or forfeiture is but a declaration of the law as it previously existed. State v. Bilansky, 3 Minn. 246 (1859).

And the same doctrine has been declared upon constitutional grounds and the constitutional provision held to apply to penalties and forfeitures.

Thus, in Livingston v. Harris, 3 Paige, 534 (1832), it was held to be inconsistent with the spirit of the constitution to compel a party to be a witness against himself in a case when the effect of the disclosure which he is required to make will tend to subject him to a penalty or forfeiture, and he may, in his answer in a proceeding for discovery, object to such matters.

And in Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885), and Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891), proceedings for penalties and forfeitures were spoken of as of a quasi criminal nature within the meaning of the provision of the Federal Constitution.

And that a witness is privileged from testifying, under the provision of the New York constitution that no one shall be compelled in a criminal case to be a witness against himself, to matters which may subject him to a penalty as well as to matters which may tend to criminate him, was held in Cloyes v. Thayer, 3 Hill, 564 (1842).

And the payee in a promissory note which has been transferred is privileged thereunder from testifying when called upon in an action brought upon the note by the holder against the maker to prove that it was given upon a usurious consideration, though the note was made prior to the enactment of the New York Act of May 15, 1837, making the taking of usury a misdemeanor and imposing a penalty therefor. *Ibid.*

So a witness or party called as a witness may not only object to testifying to the main fact which would subject him to a penalty or forfeiture, but may also refuse to disclose any one of a series of facts which together would expose him to such penalty or forfeiture. Henry v. Bank of Salina, 1 N. Y. 83 (1847), 3 Denio, 598, affirming Bank of Salina v. Henry, 2 Denio, 155.

Thus, a witness who is the debtor of a bank is privileged, under the provision of the New York constitution, against being compelled in a criminal case to be a witness against himself, from answering questions propounded to him, any of which would have formed a link in a chain of evidence tending to show that he had discounted the note upon which the action was brought, in violation of 1 N. Y. Rev. Stat., 595, § 26, concerning the discounting of notes by officers of corporations, imposing as a penalty therefor the forfeiture of the debt and twice its amount. *Ibid.*

And the New York Act of 1837, authorizing the calling an officer of a corporation to prove usury in the discount of a note, and excusing him from criminal prosecution therefor, does not deprive such witness of his constitutional exemption from being compelled in a criminal case to be a witness against himself, when under the law he might be subjected to a penalty or forfeiture therefor distinct and separate from the question of usury. *Ibid.*

But the offense created by the provisions of that act making the taking of usury a misdemeanor is not consummated until the usury is actually received and a mere agreement to receive it does not render the party indictable and does not bring him within the protection of the constitutional provision. Henry v. Bank of Salina, 5 Hill, 523 (1843).

So the defendants in a bill in equity for a discovery are not bound to disclose any matters in their answer which will expose them to penalties, and the provisions of New Hampshire Act of July 5, 1837, requiring such discovery, is in conflict with the provision of the constitution of that state that no person shall be compelled to accuse himself of crime or furnish evidence against himself. Currier v. Concord R. Corp. 48 N. H. 321 (1869).

And when a charge of misconduct is made against an officer, whether amounting to an indictable offense, or only to his discredit as such officer, which might furnish grounds for his removal or impeachment, he is protected by the 5th Amendment of the Federal Constitution against being compelled to be a witness against himself. United States v. Collins, 1 Woods, C. C. 499 (1873).

See also, as to disclosures which might be used in proceedings for removal of an officer. *Re* Dickinson, 58 How. Pr. 260 (1879), set forth, *supra*.

And in Trammell v. Thomas, 1 Harr. & McH. 251 (1767), it was held neither the sheriff nor his deputies can be compelled to give evidence tending to show that they had not given notice of an execution served by them in accordance with the return thereof made by them. But the decision was not placed on constitutional grounds.

the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

"Section 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with, or he is discharged according to law; and all such interrogatories and answers must be in writ-

And in Williams v. Lowndes, 1 Hall, 579 (1829), the question whether a deputy who makes a levy can be compelled to testify as to the identity of the execution in an action against the sheriff for a false return was raised but not decided.

The Indiana constitutional provision that no person in any criminal prosecution shall be compelled to testify against himself, however, has been held to apply to criminal prosecutions only, and not to extend to mere penalties and forfeitures. Wilkins v. Malone, 14 Ind. 153 (1860).

c. *General doctrine as to evidence against one's self.*

This subdivision is made up principally, if not entirely, from cases decided upon general principles of evidence without reference to constitutional provisions against self-accusation and which might therefore be regarded as not strictly within the scope of the note. But in view of the universal holding that the constitutional provisions apply only when the evidence sought would tend to subject the witness to a criminal prosecution or a penalty or forfeiture, they have been included with the design of showing the limits of the constitutional rule and what rules govern in civil cases.

By these cases the general doctrine is established by a preponderance of authority that the privilege of a witness to refuse to answer pertinent questions extends only to those the answers to which might criminate him or expose him to punishment. *Ex parte* Boscowitz, 94 Ala. 468 (1887); Calhoun v. Thompson, 56 Ala. 166, 28 Am. Rep. 754 (1876); Hall v. State, 40 Ala. 698 (1867); Jones v. Lanier, 2 Dev. L. 480 (1830); Baird v. Cochran, 4 Serg. & R. 397 (1818); *Re* Doran, 2 Pars. Sel. Eq. Cas. 497 (1846); Robinson v. Neal, 5 T. B. Mon. 213 (1827); Miller v. Creyon, 2 Brev. 108 (1806); Zollicoffer v. Turney, 6 Yerg. 297 (1834); Lowney v. Perham, 20 Me. 235 (1841); Stewart v. Turner, 3 Edw. Ch. 458 (1841); Byass v. Sullivan, 21 How. Pr. 50 (1860); Byass v. Smith, 4 Bosw. 679 (1860).

Or subject him to a penalty or forfeiture. Baird v. Cochran and *Re* Doran, *supra*; Henry v. Bank of Salina, 1 N. Y. 83 (1847); *Re* Kip, 1 Paige, 601 (1829); Jones v. Lanier and Lowney v. Perham, *supra*.

Or something in the nature of a forfeiture of his estate or interest. Henry v. Bank of Salina and *Re* Kip, *supra*.

And that a witness may be compelled to give testimony pertinent to the issue which may tend to subject him to a pecuniary loss. Alexander v. Knox, 7 Ala. 503 (1845); Lowney v. Perham, 20 Me. 235 (1841); Hays v. Richardson, 1 Gill & J. 366 (1829); Ward v. Sharp, 15 Vt. 115 (1843).

Or a civil liability. *Re* Strouse, 1 Sawy. 605 (1871); *Re* Danforth, 1 Pa. L. J. 31 (1870); Naylor v. Semmes, 4 Gill & J. 273 (1832); Judge of Probate v. Green, 1 How. (Miss.) 146 (1834); Hemphill v. McBride, 12 Smedes & M. 620 (1849).

Or which will establish or tend to establish that he owes a debt recoverable in a civil action. Zollicoffer v. Turney, 6 Yerg. 297 (1834); Henry v. Bank of Salina, 1 N. Y. 83 (1847); Burnett v. Phalon, 11 Abb. Pr. 157, 19 How. Pr. 580 (1860); Stewart v. Turner, 3 Edw. Ch. 458 (1841); Hays v. Richardson, *supra*; Copp v. Upham, 3 N. H. 159 (1825).

Or is otherwise subject to a civil suit. Henry v. Bank of Salina, Stewart v. Turner, Burnett v. Phalon, and Jones v. Lanier, *supra*; Taney v. Kemp, 4 Harr. & J. 348, 7 Am. Dec. 678 (1818); Alexander v. Knox, 7 Ala. 503 (1845); Gorham v. Carroll, 3 Litt. (Ky.) 221 (1823); Com. v. Thurston, 7 J. J. Marsh. 69 (1831); Planters' Bank v. George, 6 Mart. (La.) 670, 12 Am. Dec. 497 (1819); Copp v. Upham, *supra*.

Or which may be used against him in a civil suit. *Re* Kip, 1 Paige, 601 (1829).

And he cannot be excused on the ground that the verdict may be used as evidence against him in some other civil proceeding then pending or which might thereafter be instituted. Hays v. Richardson, 1 Gill & J. 366 (1829).

Or because his testimony might injuriously affect his own interests. Miller v. Creyon, 2 Brev. 108 (1806); Robinson v. Neal, 5 T. B. Mon. 213 (1827); Baird v. Cochran, 4 Serg. & R. 397 (1818); Stevens v. Whitcomb, 16 Vt. 121 (1844); Stoddert v. Manning, 2 Harr. & G. 147 (1828); French v. Price, 24 Pick. 13 (1838); Com. v. Willard, 22 Pick. 476 (1839); Harper v. Burrow, 6 Ired. L. 30 (1845).

A witness who is not a party is not privileged, and cannot be excused from testifying upon the ground that he has an interest in the matter in controversy which he may be in danger of prejudicing by his testimony. Robinson v. Neal, *supra*; Black v. Crouch, 3 Litt. (Ky.) 226 (1823); Conover v. Bell, 6 T. B. Mon. 157 (1827).

No interest short of being the real party will excuse him from giving testimony. Stevens v. Whitcomb, 16 Vt. 121 (1844).

Thus, the plaintiff in an action for seduction may be compelled to testify as to alleged previous acts of unchastity with others, where fornication is not punishable except civilly. Love v. Masoner, 6 Baxt. 24, 32 Am. Rep. 522 (1873).

And the plaintiff, in an action for debauching and enticing away his wife, may be compelled to testify on examination as a witness before trial with reference to allegations in the answer that the wife was

ing signed by the party examined, and filed in the court. The order for such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

Petitioner contends that these provisions of the code are unconstitutional and void, and that the proceeding in the superior court is, therefore, without warrant of law. His position is that they are obnoxious to several features of the constitution of the state, and more particularly to section 8 of article 1, which provides that "no person shall . . . be compelled in any criminal case to be a witness against himself;" and to section 19 of the same article, which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." These two provisions of the constitution are of well-understood significance; they involve like principles, and, in considering the objection made, may be regarded as one. The argument of petitioner is that the sections of the code referred to are distinctly penal in character, and contemplate a proceeding which is in its essential nature criminal, within the meaning of the above provisions of the constitution; that, being a criminal proceeding, petitioner is protected by the constitution from being compelled to testify against himself, or submit his books and papers in evidence.

There is no question that, if petitioner's premises are correct, his conclusion follows

compelled to leave him by reason of his cruel and inhuman treatment and immoral conduct in bringing a lewd woman into his home for immoral purposes. Taylor v. Jennings, 7 Robt. 581 (1867).

And a railway conductor, charged with receiving money for fares of passengers for which he has not accounted, may be required to state the condition of his property at the commencement and close of his service, to be weighed with the other evidence in the case, unless the court can see that it would furnish a link in a chain of circumstances tending to accuse him of crime. State v. Farmer, 46 N. H. 200 (1865).

And one who purchased intoxicating liquor may be required to testify thereto on an indictment for the illegal sale thereof when the buying is not made a criminal act. Com. v. Kimball, 24 Pick. 366 (1837); Com. v. Willard, 22 Pick. 477 (1838); State v. Rand, 51 N. H. 361, 12 Am. Rep. 127 (1871).

Nor can a witness refuse to give testimony against the defendant in an action because the defendant is his debtor, and his testimony by establishing the plaintiff's claim would diminish the funds out of which his claim might be satisfied. United States v. Grundy, 7 U. S. 3 Cranch, 342, 2 L. ed. 461 (1806).

So, one of several coheirs of lands descended from an intestate may be called as a witness by the defendant in an action brought for the recovery thereof, and required to testify against the other coheirs where he is not a party to the suit. Nass v. Vanswearingen, 7 Serg. & R. 192 (1821).

And a person called as a witness for the plaintiff cannot refuse to testify upon the ground that he will be required to disclose facts which will show that he was a partner in the transaction out of which the cause of action arose, and that he is equally liable with the defendant to the plaintiff. Zollicoffer v. Turney, 6 Yerg. 297 (1834).

And an attorney employed by parties served, who entered an appearance for all the defendants including parties not served, is a competent witness in a subsequent action for contribution brought by those served against those not served, and the fact that his evidence may disclose matter which will support a civil action against him is no excuse for not testifying. Cox v. Hill, 3 Ohio, 412 (1828).

And the payees in several notes given by an agent for the purchase of goods for the purposes of a voyage are competent witnesses, and may be compelled to testify in an action brought by one of the vendors for the use of himself and other vendors, against the persons interested in the voyage, in behalf of the defendants, as to whether or not the vendors had knowledge that other persons besides the agent were interested in the purchase. French v. Price, 24 Pick. 13 (1839).

So a witness in a bankruptcy proceeding may be compelled to answer a question in the regular line of the investigation concerning transactions with the bankrupt, though the examination may establish a liability on his part to the bankrupt's estate. *Re* Stuyvesant Bank, 6 Ben. 33 (1873).

And a witness who is assignee of certain claims due from the bankrupt cannot refuse to testify before the register in the bankruptcy proceeding on the ground that the consideration did not come from the bankrupt or his estate, and that to answer would be revealing his private business to his prejudice in another case. *Re* Traak, 7 Ben. 60 (1873).

And the wife of a bankrupt, summoned as a witness in a bankruptcy proceeding, may be required to produce a letter from her half-brother accompanying a gift of money with which a house contracted for by her husband was in part paid for. *Re* Schonberg, 7 Ben. 211 (1874).

Neither can a witness be excused from testifying against a sheriff, on a motion against him, on the ground that he is one of his sureties, where he is not a party on the record. Garey v. Frost, 5 Ala. 636 (1843).

Nor can the security of a defaulting sheriff into whose hands the sheriff's books have fallen withhold them, on a bill for a discovery, upon the ground that the disclosure might subject him to suits, but will be compelled to produce them. Hawkins v. Sumter, 4 Desaus. Eq. 106 (1810).

And a security on the bond of a deceased insolvent sheriff, who has obtained possession of the sheriff's books, may be compelled to produce them in evidence by *subpœna duces tecum* in an action between third persons, though he is apprehensive of danger to himself from their disclosure. *Ibid.*

So a stockholder in a bank may be compelled to testify in behalf of the plaintiff in an action against the bank, though his evidence may injuriously affect his interests as such stockholder. *Dictum* in City Bank v. Bateman, 7 Harr. & J. 104 (1826).

And a witness, who is an officer of a corporation, cannot refuse to furnish documentary evidence in a judicial proceeding, on the ground that it might criminate the corporation under the interstate commerce law, as corporations are not liable criminally or exposed to penalties or forfeitures thereunder. *Re* Peasley, 44 Fed. Rep. 271, 3 Inters. Com. Rep. 333 (1890).

necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this court directly at variance with that put upon them by petitioner. Sections 1458-1461 of the Code of Civil Procedure were, prior to the adoption of the codes, a part of the old Probate Act, as sections 116-119; they are a part of the same article, and relate to the same subject, which is expressed in the title as "Embezzlement and surrender of property of the estate." In the case of *Jahns* v. *Notting*, 29 Cal. 507, this court had occasion to construe section 116 of the Probate Act (now section 1458, Code Civ. Proc.) upon the very feature now involved. That was an action by an administrator to recover property belonging to the estate of his decedent, which he alleged had been embezzled by defendant and converted to his own use. The lower court held that the action was brought under section 116 of the Probate Act, which alone gave plaintiff a remedy for the wrong; that the statute was penal in its nature, and that the plaintiff was bound to prove the embezzlement as alleged, or fail in his action. Judgment having gone against him, the plaintiff appealed, and in disposing of that question the court said: "The position that section 116 affords the exclusive remedy for embezzling and alienating the effects of the deceased, intermediate the death of the deceased and the grant of administration, cannot be maintained, unless that section can be held to be a penal statute. . . . The distinctions between penal and remedial statutes are not always clearly marked, nor are the authorities quite harmonious where statutes very similar in their purpose and general terms have been under review. A penal statute is one that imposes a penalty or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong,

And the plaintiff in an action for breach of covenant of warranty of title to land, the breach consisting of the taking of the timber therefrom, who has testified in his own behalf that without the timber it was worth but 10 cents per acre, may be asked on cross-examination if he has not been offered $1 per acre for it, as tending to show the bias of the witness. Clark v. Zeigler, 85 Ala. 154 (1887).

And in Ragland v. Wickware, 4 J. J. Marsh. 580 (1830), which was an action against a sheriff for an alleged illegal seizure, a person who had previously warranted the title of the property seized was held to be compellable to testify, but the decision was placed upon the ground that he would not be liable on his warranty.

The refusal of the court below, however, to compel a witness to answer, who refuses on the ground that it might subject him to a civil liability, is not a ground for reversal on appeal, where the answer would have been irrelevant or inadmissible. Naylor v. Seemes, 4 Gill & J. 278 (1832).

And even if a witness is to be regarded as privileged from answering questions against his interest, the privilege would extend only to refusing to answer particular questions, and would not justify a refusal to testify at all. Judge of Probate v. Green, 1 How. (Miss.) 146 (1834); Hemphill v. McBride, 12 Smedes & M. 620 (1849).

d. *The contrary doctrine.*

The contrary doctrine, that a witness cannot be compelled to testify against his own interests, has been adopted, and seems to remain the rule of conduct in Connecticut.

This was held in Storrs v. Wetmore, Kirby (Conn.) 208 (1787); Starr v. Tracey, 2 Root, 528 (1797); and Benjamin v. Hathaway, 3 Conn. 528 (1821).

And in Benjamin v. Hathaway, *supra*, it was held that a sheriff cannot be compelled to give evidence for the purpose of falsifying his return, the sheriff being liable by statute for a false return, the court saying that in its opinion the result would be the same if the effect of the testimony were merely to subject the witness in debt.

And in Treat v. Browning, 4 Conn. 408, 10 Am. Dec. 156 (1822), holding a certificate of the good character of another, given several years before by a witness who testified on the trial that his character was below the common level, was admissible in evidence, the court said that if there had been any inconsistency between the certificate and the evidence the witness should have claimed his privilege of exemption from testifying in disparagement of himself, but that the evidence was not subject to objection by the party seeking to impeach such person's character.

But a witness is not privileged from testifying where he voluntarily acquired an interest after the interest of the party in his testimony was acquired; but he cannot be compelled to divulge matters coming to his knowledge after he became interested. Simons v. Payne, 2 Root, 406 (1796).

And one who executes a promissory note in behalf of another, and afterwards gives bond conditioned that his principal will prosecute an appeal from a judgment on the note, cannot refuse to testify in behalf of the payee of the note as to its execution on the ground that it would be against his interest, as he voluntarily assumed that interest after the payee acquired an interest in his testimony, and did not acquire it in the common course of business for his own profit. Phelps v. Riley, 3 Conn. 266 (1820).

So there are also a number of cases from other states and jurisdictions, mostly of an early date, holding, either directly or by implication, substantially the same rule as the Connecticut cases. But though not expressly mentioned, it would seem that all, or nearly all, of them must be regarded as overruled by subsequent inconsistent decisions.

Thus, in Bank of United States v. Washington, 3 Cranch, C. C. 295 (1828), it was held that a bookkeeper of a bank cannot be compelled to answer a question, in an action by the bank for an overdraft paid by mistake, the answer to which if given might render him liable for the loss.

And in *Re* Hill, 6 Ct. Cl. 88 (1870), it was held that a witness should not be required to answer a question which in his opinion relates to another suit in which he is claimant, and not to the suit on trial, unless assurance is given to the court that it is intended to elicit testimony relevant to the issue.

But see United States v. Grundy, *Re* Stuyvesant Bank, *Re* Trask, and *Re* Schonberg, set forth *supra* in the preceding subdivision.

So in Appleton v. Boyd, 7 Mass. 131 (1810), the court refused to sustain an objection to the refusal of the court below to compel a person who was interested in the event of the suit to testify therein against his interests.

But see Massachusetts cases set forth *supra* in the preceding subdivision.

So in Bell's Case, 1 Browne (Pa.) 376 (1811), it was held that a witness should not be compelled to answer a question which might affect him civilly, as well as those which might tend to criminate him.

And in Long v. Bailie, 4 Serg. & R. 222 (1818), it was held that a witness cannot be excused from

the ground of forfeiture as declared in the 12th section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute, and it is declared that the offender shall be fined not exceeding $5,000 nor less than $50, or be imprisoned not exceeding two years, or both; and, in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts, the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment, and to file a civil information against the claimants—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against the law are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

The difference in character between the proceeding under discussion there and the proceeding complained of here by petitioner was, however, recognized in the same opinion in the following language (page 624, 116 U. S., and 749, 29 L. ed.): "The entry upon premises, made by a sheriff or other officer of the law, for the purpose of seizing goods and chattels by virtue of a judicial writ, such as an attachment, a sequestration, or an execution, is not within the prohibition of the Fourth or Fifth Amendment, or any other clause of the Constitution; nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those amendments. But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession, and in the case of excisable or dutiable articles, the government has an

that no one shall be deprived of life, liberty, or property without due process of law.

And in *Re* Platt & Boyd, 7 Ben. 261 (1874), it was held that the Act of Congress of March 2, 1867, § 2, authorizing the entry into any place or premises where any invoices, books, or papers are deposited relating to merchandise with respect to which fraud upon the revenues is alleged to have been committed, and the seizure, examination, and retention thereof, is a provision in aid of the due enforcement of the revenue laws and not repugnant to the provision of the Federal Constitution that no person shall be deprived of life, liberty, or property without due process of law.

V. *Distinction between civil and criminal or penal proceedings.*

Constitutional prohibitions against compelling a person to be a witness against himself and against unreasonable searches and seizures having been held to be applicable to penal and criminal proceedings only, it becomes necessary, when the question arises, to determine the character of the proceeding in which the evidence is sought or designed to be used, the availability of the constitutional prohibition depending upon whether it is remedial or penal in its nature.

This was the question upon which the principal case turned, and the distinction there drawn, that compulsory disclosures may be required where the proceeding is purely remedial and the penalty, if any, is not imposed as a punishment for a public wrong, but as a redress for a private grievance, but not where the primary object of the penalty or forfeiture is punishment for a violation of duty or a public wrong and to deter others from offending in a like manner, seems to accord with the authorities on the subject.

Thus, a proceeding to forfeit a person's goods for an offense against the laws, though civil in form, and whether *in rem* or *in personam*, is a criminal case within the meaning of the Fourth and Fifth Amendments to the Federal Constitution prohibiting unreasonable searches and seizures and providing that no person shall be compelled in any criminal case to be a witness against himself. Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885).

In that case the rule was applied to a proceeding to establish a forfeiture, pursuant to the Act of Congress of June 22, 1874, § 12, of goods alleged to have been fraudulently imported without payment of duties in which an order was made requiring the claimant of the goods to produce certain invoices for inspection and introduction in evidence, which was held to be erroneous and illegal. *Ibid.*

And the Act of Congress of June 22, 1874, authorizing courts of the United States in revenue cases, on motion of the government attorney, to require the defendant or claimant to produce in court his private books, invoices, and papers, or else the allegations of the attorney to be taken as confessed, is unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the party's goods, as being repugnant to those provisions. *Ibid.*, overruling United States v. Three Tons of Coal, 6 Biss. 379 (1875); United States v. Distillery No. Twenty-Eight, 6 Biss. 483 (1875); United States v. Mason, 6 Biss. 358 (1875),—as to this point.

It is also to be observed that *Re* Platt & Boyd and United States v. Hughes, set forth *infra*, and Stockwell v. United States, set forth *supra*, under *Unreasonable searches and seizures*, are also overruled by Boyd v. United States, *supra*, so far as they uphold the compulsory production of papers in proceedings for a penalty or forfeiture.

So, an investigation by a grand jury as to whether there has been a violation of the interstate commerce act is a criminal case within the meaning of the Fifth Amendment of the Federal Constitution providing that no person shall be compelled in a criminal case to be a witness against himself. Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816 (1891).

And an action for a penalty under the Contract Labor Law of 1885, § 3, providing that such penalties

interest in them for the payment of the duties thereon, and until such duties are paid, has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery." In the *Counselman Case*, which was a case growing out of the refusal of Counselman to testify before a grand jury upon an investigation of alleged violations of "An act to regulate commerce," on the ground that his answers might tend to criminate him, the court held it was within the principles announced in the *Boyd Case*, and reaffirmed those principles. The case of *Lees* v. *United States*, 150 U. S. 476, 37 L. ed. 1150, is another case falling strictly within the principles of *Boyd* v. *United States*.

These considerations dispose of the main objection of petitioner. The other objections to the constitutionality of the statute are, in our judgment, without merit. Nor is the objection tenable that the proceeding in the probate court involves passing upon the title to property, and is, on that ground, without the court's jurisdiction. *Ex parte Casey*, 71 Cal. 269; *Re Curry*, 25 Hun, 321.

Writ denied.

We concur: **Fitzgerald**, *J.*; **Harrison**, *J.*; **Garoutte**, *J.*; **Beatty**, *Ch. J.*

McFarland, *J.*:

I dissent. This is an original petition here by H. M. Levy for a writ of prohibition to be directed to the superior court of the city and county of San Francisco, department No. 9, and Hon. J. V. Coffey, judge thereof, commanding said court and said Coffey to refrain from further prosecuting a certain proceeding instituted in said court against said petitioner. An alternative writ was issued, and on the return day the respondent demurred and answered, and the matter was then submitted.

It appears that the administration of the estate of one Morris Hoeflich, deceased, is pending in the court of respondent, sitting as a probate court, and that one Solomon Hoeflich is administrator of said estate. On the ——— day of June, 1893, the said Solomon Hoeflich, as such administrator, filed in said court, in the matter of said estate, a certain writing, or petition, the contents of which are substantially these: It is therein averred that, from information derived from persons

may be sued for as debts of like amount are now recovered, though civil in form is criminal in nature, and one in which the defendant is entitled to protection under the Fifth Amendment of the Federal Constitution. Lees v. United States, 150 U. S. 476, 37 L. ed. 1150 (1893).

So, a summary proceeding under Cal. Pen. Code, § 772, for the removal of a sheriff from office is a criminal proceeding in which the defendant has constitutional protection against being compelled to be a witness against himself, removal from office being a punishment for wrongdoing. Thurston v. Clark (Cal.) 40 Pac. Rep. 435 (1895).

And an inquisitorial examination under oath of a United States marshal who had assisted in selecting and making up a list of jurors for the trial of a criminal cause, had upon a challenge to the panel of jurors, whose official conduct was impeached by the challenge and who is charged with misconduct which might amount to an indictable offense or furnish grounds for his removal or impeachment, infringes the spirit if not the letter of the provision of the Fifth Amendment to the Federal Constitution that no person shall be compelled in a criminal case to be a witness against himself, and is repugnant to the principles of personal liberty embodied in the common law. United States v. Collins, 1 Woods, C. C. 499 (1873).

And in Jackson v. Humphrey, 1 Johns. 498 (1806), it was said that a public officer would not be bound to answer any questions impeaching the integrity of his conduct as such.

So a proceeding for contempt against a person charged with inducing witnesses to absent themselves and avoid process is one in which the person charged cannot be required to testify in proof of the charge as he would be thereby required to criminate himself, the contempt being a statutory crime. *In re* Nickell, 47 Kan. 734 (1892).

And a person accused of contempt of court cannot be compelled to submit to examination as a witness on the hearing of an order to show cause why he should not be punished therefor, under Cal. Const. art. 1, § 13 providing that no person shall be compelled in a criminal case to be a witness against himself, contempt of court being a public offense. *Ex parte* Gould, 99 Cal. 360, 21 L. R. A. 751 (1893).

The Act of Congress of March 2, 1867, § 2, authorizing the entry into any place and premises where any invoices, books, or papers are deposited relating to merchandise with respect to which fraud upon the revenue is alleged to have been committed, and the seizure, examination, and retention thereof, however, is a provision in aid of the due enforcement of the revenue laws and not repugnant to the Fourth Amendment to the Federal Constitution providing that the right of the people to be secure against unreasonable searches and seizures shall not be violated. *Re* Platt & Boyd, 7 Ben. 261 (1874).

And proceedings under the Act of Congress of June 30, 1864, as amended by the Act of July 13, 1866, to compel the production of books and the giving of evidence before the assessor concerning assessments under the internal revenue acts, are civil and not criminal proceedings, and do not contravene the provision of the Fourth and Fifth Amendments of the Federal Constitution protecting the people against unreasonable searches and seizures, and being compelled in a criminal case to be witnesses against themselves. *Re* Strouse, 1 Sawy. 605 (1871).

And the proceedings provided for by the Act of Congress of 1868, § 49, empowering supervisors of internal revenue to examine premises and issue summons requiring persons to appear before them and testify under oath and produce books and papers, etc., for the purpose of the prevention, detection, and punishment of frauds with relation to the collection of taxes, and the Act of July, 1866, § 9, providing the mode of compelling obedience thereto, are civil and not criminal proceedings, and not within the prohibition of the Fourth and Fifth Amendments of the Federal Constitution, and such acts are not unconstitutional. *Re* Meador, 1 Abb. (U. S.) 317 (1869).

So, in United States v. Hughes, 12 Blatchf. 553 (1875), it was held that the discovery of evidence contemplated by the provision of U. S. Rev. Stat.

whose names said administrator is unwilling to disclose, he has ascertained that the said deceased, Morris Hoeflich, prior to and down to the time of his death, "was either a full partner with the said H. M. Levy, or engaged with him jointly in a large number of transactions" in stocks and mines in California and Nevada, and in other property, "the exact nature and extent of which transactions, and of the real and personal estate resulting therefrom, can be ascertained by an examination of the said H. M. Levy and other witnesses under oath, and by the production and examination of books of account, correspondence checks, deeds, conveyances, bonds, contracts, and other writings and documents now in the exclusive possession of said H. M. Levy;" and also by examination of other named persons and documents, etc., in their possession. It is also averred that said Hoeflich, deceased, before his death represented to a number of persons, whose names the administrator is unwilling to disclose, "that he was in partnership and had large joint interests with said H. M. Levy;" and that the fact that he made such representation "confirms and strengthens the information otherwise received by your petitioner, and the conviction produced thereby." It is also averred in geneal terms that said Levy has concealed, conveyed away, and disposed of moneys, etc., of the said deceased, and has in his possession and within his knowledge deeds and other documents and writings "which contain evidences of and tend to disclose the right, title, interest, and claim of the said decedent to real and personal property," portions of said property being particularly described. The foregoing are, in brief, the material averments of said petition; and it was prayed therein that said Levy be cited to appear before said probate court and undergo an examination under oath as to all the matters set forth in said petition, and subject all his documents, writings, and papers to inspection and examination. A citation was issued according to the prayer of the petition to said Levy, who appeared and demurred to the petition; and, the demurrer having been overruled, he filed a lengthy written verified answer, in which he specifically denied all the material averments of said petition, and denied that he had any property in which the said decedent was interested, either as a partner or otherwise, or that he had any documents or writings of the character alleged in said petition. He also filed written objections to any further proceeding in the matter of said petition and citation; but the court overruled the objections, and set a day for the examination. Whereupon the said Levy filed here the pres-

§ 860, that no discovery or evidence obtained by means of any judicial proceeding from any party or witness shall be given in evidence or used against him for the enforcement of any penalty or forfeiture, is of a personal nature to which the party can make oath, and not such as may be derived from an examination of books and papers seized under a warrant issued in a proceeding for forfeiture for violation of revenue laws.

But see Boyd v. United States, 116 U. S. 616, 29 L. ed. 746 (1885), set forth *supra* in I. a., *Limitation to criminal proceedings*, and in II., *Unreasonable searches and seizures*.

And in *Re* Meador, *supra*, it was said that persons who applied for, obtained, and accepted a license under the revenue law subsequent to the enactment of the Act of Congress of 1868, § 49, empowering the supervisors of revenue to examine premises and issue summons requiring persons to appear before them and testify under oath and produce books and papers, etc., for the purpose of prevention, detection, and punishment of frauds with relation to the collection of taxes, impliedly contracted to be governed by existing provisions of law affecting the business licensed, and cannot afterwards impugn the constitutionality of that act or refuse to obey its provisions.

But see Boyd v. United States, *supra*, in which a somewhat similar provision was permitted to be questioned under similar circumstances.

So the vendor of an infringing device is not rendered incompetent to prove its purchase and use by persons to whom he has sold it in a suit for infringement to which he is not a party, by U. S. Rev. Stat. §§ 4919, 4921, empowering the court in its discretion to impose additional damages against an infringer as violating the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, on the ground that he may, under such sections, subject himself to penalties and forfeitures in an accounting with the complainant. Masseth v. Johnston, 59 Fed. Rep. 613 (1893).

And a proceeding in which a county treasurer is subpœnaed before a committee appointed by a board of supervisors to answer interrogatories concerning moneys in his hands pursuant to New York Laws of 1858, chap. 190, § 3, is not a criminal case within the provision of the New York Constitution, art. 1, § 6, that no person shall be compelled in a criminal case to be a witness against himself. *Re* Dickinson, 58 How. Pr. 260 (1879).

So, in People v. Board of Police Comrs., 33 N. Y. S. R. 824 (1890), it was held that a police officer charged with conduct unbecoming an officer in that he engaged in an altercation with another officer, cannot refuse to testify as the first witness on the investigation upon the ground that he cannot be compelled to be a witness against himself, as the investigation was not a criminal proceeding.

Daniels, J., dissented from this determination, however, on the ground that the proceeding was one for the forfeiture of an office, but the decision was affirmed by the court of appeals in 123 N. Y. 512.

And it would appear that the prohibition would apply only to violations of public law, and not to violations of city ordinances.

Thus, in Greeley v. Hamman, 12 Colo. 99 (1888), in which the question was whether or not the city had a right to appeal, it was held that a prosecution for the violation of a city ordinance is a civil and not a criminal action, within Colo. Code, § 669, defining crimes and misdemeanors to consist of violations of public law, though punishable by fine and imprisonment, when not punishable by general statute.

And it was also held that the phrases "criminal prosecution," "criminal case," etc., in the Colorado Constitution do not refer to prosecutions for acts which were not criminal at the time of its adoption, or which have not since been declared criminal by statute. Greeley v. Hamman, *supra*.

See also, as to distinction between remedial and penal proceedings, *supra*, I., a and b. F. H. B.

ent petition for a writ of prohibition, setting up all the foregoing facts, and praying that the respondents be restrained from proceeding with said examination; and he contends that said proposed examination is beyond the jurisdiction of said court, and that certain provisions of the code of civil procedure, upon which he contends the proceeding is based, are unconstitutional and void.

The proceeding sought to be prohibited, if valid at all, must rest for its validity upon sections 1459 and 1460 of the Code of Civil Procedure. Our general law of procedure is averse to proceedings which are in their character inquisitorial. The only provision in the code of civil procedure in the nature of a bill of discovery, other than said sections 1459 and 1460, is contained in section 1000, which provides that "any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action or the defense thereto;" and the proceeding here in question is certainly not under that section. Of course, the probate court would have no jurisdiction over any action to determine conflicting rights of property between the estate of Hoeflich and the petitioner herein, H. M. Levy. Moreover, no such action is pending.

Sections 1459 and 1460, above referred to, are as follows:

"Section 1459. If any executor, administrator, or other person interested in the estate of a decedent, complains to the superior court or a judge thereof, on oath, that any person is suspected to have concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings, which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, or any claim or demand, or any lost will, the said court or judge may cite such person to appear before such court, and may examine him on oath upon the matter of such complaint. If such person is not in the county where the decedent dies, or where letters have been granted, he may be cited and examined either before the superior court of the county where he is found, or before the superior court of the county where the decedent dies, or where letters have been granted. But if, in the latter case, he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

"Section 1460. If the person so cited refuses to appear and submit to an examination, or to answer such interrogatories as may be put to him touching the matters of the complaint, the court may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court, or is discharged according to law. If, upon such examination, it appears that he has concealed, embezzled, smuggled, conveyed away, or disposed of any moneys, goods, or chattels of the decedent, or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidences of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand, or any lost will of the decedent, the court may make an order requiring such person to disclose his knowledge thereof to the executor or administrator, and may commit him to the county jail, there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court. The order of such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof; and any judgment recovered therein must be for double the value of the property as assessed by the court, or jury, or for return of the property and damages in addition thereto, equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side."

It is contended by petitioner herein that these provisions are in contravention of section 13 of article 1 of the State Constitution, which provides that "no person shall . . . be compelled in any criminal case to be a witness against himself;" and of section 19 of the same article, which provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated." He also contends that they contravene section 11 of said article, which provides that "all laws of a general nature shall have a uniform operation," and section 25 of article 4, which provides that no special law shall be passed "regulating the practice of courts of justice," for the reason that they give special privileges to administrators over other litigants. It is also contended that the probate court could not make the orders sought here to be restrained without passing upon rights of property between the estate of Hoeflich and said Levy, which it has no jurisdiction to do.

I shall not discuss any of the above positions taken by petitioner, except the first two. The two provisions that a person shall not be compelled to be a witness against himself in a criminal case, and shall be secure against unreasonable seizures and searches, are so akin to each other that they are both covered by those judicial decisions and constitutional inhibitions which have established the personal rights and liberties of Englishmen and Americans. A compulsory production of a man's private papers is, in effect, compelling him to be a witness against himself. It will be sufficient, however, in this case, to particularly consider only the first of these two provisions, although the second is necessarily involved. And, basing our decision on that provision, I am of the opinion that upon the principles announced,

and the decisions made by the Supreme Court of the United States in the cases of *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746; *Counselman* v. *Hitchcock*, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816; and *Lees* v. *United States*, 150 U. S. 476, 37 L. ed. 1150,—the contention of petitioner must be sustained, and that the writ of prohibition should issue as prayed for. If the proceeding in the probate court sought here to be restrained were, in form, a "criminal case," there could be no plausible contention that, in view of section 18 of article 1 of the state Constitution, the petitioner could be compelled to be a witness against himself. But in the *Boyd Case* it was held that the Fourth and Fifth Amendments to the Federal Constitution—which are similar to said sections 18 and 19 of our state Constitution—applied to a proceeding to recover a penalty or forfeiture, although the proceeding was not criminal in form. That was a suit to forfeit Boyd's property for an alleged violation of a revenue law, and the court held that to compel him to produce books and papers as evidence against him was a violation of said amendments. The court says that suits for penalties and forfeitures "are within the reason of criminal proceedings for all the purposes of the Fourth Amendment to the Constitution, and of that provision of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself." The court further says that "illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure," and that "this can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual deprivation of the right, as if it consisted more in sound than substance." Afterwards the same court, in *Counselman* v. *Hitchcock*, *supra*, expressly approved the decision in the *Boyd Case*, and declared that in the *Boyd Case* it was held that a statute which authorized a court to require a party to produce his private papers in court was "unconstitutional and void, as applied to a suit for a penalty or to establish a forfeiture of the goods of the party, because it was repugnant to the Fourth and Fifth Amendments of the Constitution;" and, furthermore, that "it is an ancient principle of the law of evidence that a witness shall not be compelled, in any proceeding, to make disclosures or to give testimony which will tend to criminate him, or to subject him to fines, penalties, or forfeitures." But the principle was still more directly decided in the late case of *Lees* v. *United States*, *supra*. That was a civil action brought by the United States to recover a penalty of $1,000 for the violation of an act of congress prohibiting the importation of aliens under contracts for labor. The circuit court compelled Lees, one of the defendants, to become a witness for the government, against his objection that the suit was in the nature of a criminal proceeding, and that he could not be compelled to testify; and on a writ of error to the United States Supreme Court the judgment was reversed. The Supreme Court, by *Mr. Justice* Brewer, said: "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than to refer to the case of *Boyd* v. *United States*, *supra*. The question was fully and elaborately considered . . . in that case. And within the rule there laid down it was error to compel the defendant to give testimony in behalf of the government."

It is quite clear that said sections 1459 and 1460 include a "penalty" within the meaning of the authorities above noticed. Indeed the whole scope of the proceeding which is their purpose to authorize is, in its nature, quasi criminal. It is founded upon the fact that the party to be examined "is suspected" of being guilty either of the embezzlement or smuggling, or of the fraudulent concealment and secret and unlawful disposition of property of another. Certain things are to be done if he "is found innocent." But, if the contrary is found, then an order for disclosure is to be made, which he must obey or be sent to jail. And then it is provided that such order for disclosure shall be prima facie evidence of the right of the administrator to the property involved in any action brought for the recovery of such property; and that "any judgment recovered therein must be for double the value of the property as assessed by the court or jury, or for return of the property, and damages in addition thereto equal to the value of such property." It is thus sought to compel the party examined to testify, and to produce his private papers for the purpose of furnishing evidence upon which may be based an order that will make a prima facie case against him in an action for a penalty which may be of the most grave character. If he be defeated in such action, although he may have defended it with the utmost good faith, and under an honest claim of right, the judgment against him will not be, as in ordinary civil actions, for the value of the property or its return with the usual incidental damages, but, in addition to that, the judgment "must be" for a second full value of the property as a penalty, and cases might easily arise where the amount of such penalty would greatly exceed the highest fine provided as punishment for a crime by any section of the penal code. I am satisfied, therefore, that the said sections of the code are within the inhibition of the constitutional provision of said section 18 of the Constitution of the state. And, under the rule and the authorities above cited, a person in the position of the petitioner cannot be compelled to give testimony or produce papers which would tend to make a case against him, or furnish data or links of evidence favorable to such case. I have just noticed the recent case of *United States* v. *James*, reported in 60 Fed. Rep. 257, 26 L. R. A. 418, in which *Judge* Grosscup of the United States district court, northern district of Illinois, in a very interesting opinion, discusses the

subject here under review at great length. In that case the learned judge holds that a person cannot be compelled to testify or produce documents that may tend to criminate him, although there be a statute providing that he shall not be prosecuted or punished for the matter about which his testimony is sought. He holds that the purpose of the Fourth and Fifth Amendments was not confined to the protection of a witness against "law-inflicted pains and penalties only," but that the purpose was "to make the secrets of memory, so far as they brought one's former acts within the definitions of crime, inviolate as against judicial probe or disclosure;" and that "the privilege of silence, against a criminal accusation, guaranteed by the Fifth Amendment, was meant to extend to all the consequences of disclosure." This doctrine is perhaps extreme. It may be that a statute exempting a witness from prosecution and from any exposure to penalties or forfeitures for the acts or things about which he is called upon to testify might remove him from behind the constitutional shield. I have noticed the *James Case*, however, because it is the latest judicial expression upon the general subject, and because the opinion discusses very fully the personal rights of individuals under English and American institutions. Of course, if our views hereinbefore expressed, and the authorities therein cited, are correct, the petitioner herein can invoke these constitutional principles equally with one who is a party to an action which is strictly in form criminal.

If the administrator of the estate of Hoeflich, deceased, believes, from information which he has, that said estate has a just cause of action against the petitioner herein, he has the privilege of bringing an action against said petitioner in the proper court; and when said action is pending he may avail himself, like other litigants, of the provisions of section 1000 of the Code of Civil Procedure to have an inpection of such books, documents, and papers in the possession of said petitioner as the court may deem proper, and may also examine said petitioner as a witness in the case. I think that a peremptory writ of prohibition should issue as prayed for in the petition.

I concur: **De Haven, J.**

VIRGINIA SUPREME COURT OF APPEALS.

NORFOLK & WESTERN R. CO., *Plff. in Err.*,
v.
H. W. WHEELER, Admr., etc., of George De Board, Deceased.

(.....Va.....)

A railroad company is not liable for injuries to a licensee by the sliding of a bank along the top of which was a footpath which he was using, in consequence of the removal of a boulder to prevent its falling on the tracks, unless the person doing the work knew that such removal left the path unsafe and failed to use reasonable precautions to avoid injury to persons likely to use it, or to notify them of the danger.

(July 18, 1895.)

ERROR to the Circuit Court for Smyth County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Bolling & Stanley,** for plaintiff in error:

Deceased was on private property, and in assuming to himself the right to go upon it he relieved the owner thereof from any care or responsibility in his behalf.

Finlayson v. *Chicago, B. & Q. R. Co.* 1 Dill. 579; *Illinois C. R. Co.* v. *Godfrey*, 7 Ill. 500, 22 Am. Rep. 112; *McClaren* v. *Indianapolis & V. R. Co.* 88 Ind. 319; *Palmer* v. *Chicago, St. L. & P. R. Co.* 112 Ind. 250; *Cauley* v. *Pittsburgh, C. & St. L. R. Co.* 98 Pa. 498; Whart. Neg. pp. 351, 352.

He was not a licensee in the true sense of the word, and if he could be considered as such in any sense, on account of the continued use of the path, it could be only as a bare or naked licensee, to whom the defendant owed no duty, and who went upon its lands at his own peril.

Beach, Contrib. Neg. pp. 26, 57; *Hargreaves* v. *Deacon*, 25 Mich. 1; *Evansville & T. H. R. Co.* v. *Griffin*, 100 Ind. 221, 50 Am. Rep. 784; *Reardon* v. *Thompson*, 149 Mass. 267; Whart. Neg. p. 351; 1 Thomp. Neg. pp. 333, 361, § 8; *Hogan* v. *Chicago, M. & St. P. R. Co.* 59 Wis. 139; *Central Railroad* v. *Brinson*, 70 Ga. 207; *Parker* v. *Portland Pub. Co.* 69 Me. 173, 31 Am. Rep. 262; Whittaker's Smith, Neg. pp. 61 *et seq.*, and *note; Cahill* v. *Layton*, 57 Wis. 600, 46 Am. Rep. 46; *Union Stock Yards & Transit Co.* v. *Rourke*, 10 Ill. App. 474; *Metcalfe* v. *Cunard S. S. Co.* 147 Mass. 66; *Heinlein* v. *Boston & P. R. Co.* 147 Mass. 136; *Faris* v. *Hoberg*, 134 Ind. 269.

The mere fact that people have frequently trespassed upon a railroad track, with no effort by the company to stop them, will not create any right in the public.

Central Railroad v. *Brinson*, 70 Ga. 207.

Messrs. **Cole & Bell,** for defendant in error:

The court's instruction was a full, clear, and accurate definition of a licensee.

Davis v. *Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667; *Virginia Midland R. Co.* v. *White*, 84 Va. 498; *Norfolk & W. R. Co.* v. *Carper*, 88 Va. 556; *Graves* v. *Thomas*, 95 Ind. 361, 48 Am. Rep. 727.

NOTE.—For general subject of liability for negligence in respect to grounds beside frequented path, see *note* to Lepnick v. Gaddis (Miss.) 26 L. R. A. 686.

If the jury say by their verdict that one thing was the cause of the fall, and counsel contend that it was not that thing, but that it was some other thing, the contention of the latter will not be considered or noticed, unless they can show an utter failure of all evidence supporting the finding of the jury.

Va. Code 1887, § 3484; Barton, Law Pr. 1st ed. p. 221, § 34, and cases there cited.

Cardwell, J., delivered the opinion of the court:

This is a writ of error to a judgment of the circuit court of Smyth county. The action was brought by the defendant in error to recover of the plaintiff in error damages for alleged injuries to defendant in error's decedent, caused by the negligence of the plaintiff in error; and the case, briefly stated, is as follows: George De Board, at the time of the accident from which this suit arose, occupied a blacksmith shop on a 3-acre lot of ground lying on the south side of plaintiff in error's line of railroad, about 1¼ miles west of Marion station, and adjacent to a private crossing called Hull's Crossing. De Board, together with the other occupants of this 3 acres of land, and perhaps other persons in the neighborhood, has been in the habit for a number of years of using a path which crossed this lot of ground and ran along the edge of the railroad embankment or cut a short distance to Hull's crossing; De Board using the path chiefly to go over and get water from a spring on the north side of the railroad. In the afternoon of December 6, 1892, De Board was found in the ditch at the bottom of the railroad embankment or cut, just under where the path ran along on the edge of the embankment, and near the side and at the end of the cross-ties of the company's railroad, so much injured that he could not stand alone, and was carried to the house of his son-in-law, the plaintiff in this case, where he, from his injuries, died, as alleged, some time in the following January. This suit was brought by his personal representative at the first March rules, 1893, and the declaration filed charges that De Board's death was caused by the careless and negligent action of the plaintiff in error, through its agents or employés, in removing rock and earth from underneath the path in question, leaving the surface of the path unsupported, and thus making a trap or pit-fall for any one passing over or along the path, whereby De Board, in passing along the path, which he had been doing for a number of years past, broke through and fell upon the company's railroad track below, and received the injuries from which he afterwards died. At the trial of the case the court below instructed the jury as follows: "No. 1. The jury are the triors of the facts as to whether or not George De Board was a licensee on the defendant's right of way. If the jury believe from the evidence that the deceased, George De Board, when he received his injuries, was traveling along the footpath or way over the defendant's land, which had been long used as a walk way, leading to a crossing over defendant's track, by himself and certain other individuals, occupants of an adjoining lot or close, or by the general public, with the knowledge of the defendant company, and without any objection on its part, then the jury must find that said George De Board was not a trespasser while traveling said path, but that he was a licensee, and not wrongfully traveling said path." "No. 2. The court further instructs the jury that, if they find that George De Board was traveling said path as such licensee, no duty was imposed upon the defendant company to keep the said path in good order and repair, and the said George De Board traveled thereon at his peril. But if the jury believe from the evidence that the defendant company did carelessly and negligently make an excavation beneath said pathway, not open to the common observation of persons walking along said path, and no notice or warning had been given to said De Board, and that said De Board, while walking along said path or way with due caution and care, was injured and killed by reason of said excavation, then the said defendant company is liable to answer therefor in damages. But if the jury believe from the evidence that the supposed excavation complained of was open to the common observation of those traveling along said pathway, and that said De Board, by the exercise of ordinary care, could have observed the same, and that he carelessly and negligently stepped into said excavation, then he was chargeable with contributory negligence, and is not entitled to recover." "No. 3. And the court instructs the jury that, if they find for the plaintiff, in assessing the damages they are not limited to the actual loss of service of deceased, George De Board, but they may assess such sum as to them may seem fair and just, looking to all the circumstances of the case, not exceeding the amount claimed in the declaration."

We are of opinion that these instructions fairly expound the law applicable to the case; but the question to be determined here is, Does the evidence in the case sustain the verdict of the jury in favor of the defendant in error, assessing his damages at $505? Though the jury might have been warranted in finding, from all the circumstances surrounding the case, that De Board was a licensee upon the plaintiff in error's property at the time of his injury, plaintiff in error could not be held liable in damages for the injuries he sustained, unless the evidence showed that the agents or employés of plaintiff in error, having charge of the repairs to its railroad track at this point, knew of the dangerous condition in which the path in question was left after the removal of the rock and earth, as alleged in the declaration. The evidence in the case shows that the section hands of the railroad company, a few days prior to the injury of De Board, had taken out a rock immediately west (about one foot west) of where persons usually traveling this path step over a fence which ran to the railroad embankment at that point, because the rock was loose and dangerous, and was liable to fall into the track and cause the wreck of trains,—the person who took out the rock, testifying for the defendant in error, stating that he had been over the path once or twice;

that he knew something of the rock; that he took it out, but did not meddle with the path after taking the rock out; that the rock was loose, and thrown down with little or no exertion, and fell and rolled on the railroad track, and rested against the rail. The evidence for defendant in error further shows that the rock, before it was taken down, was visible above the ground for three or four inches, and dipped south under the path, and had often been sat upon by one of the witnesses, and that any one going along the path, who took the trouble to look, could have seen the rock; that from the top of the bank on which the path ran to the point in the ditch below where the plaintiff's intestate was found, in a "perpendicular line, was about 7 feet, being measured to the top of the crossties." This is all the evidence that even tends to show that the employés of the railroad company had any sort of knowledge that the path in question was left in a dangerous condition after this rock had been removed from the bank as stated, and it can ot be questioned that it was entirely proper that this rock should have been removed. There could be no carelessness or negligence on the part of the plaintiff in error, under the circumstances surrounding the removal of this rock, for which it could be held liable in damages to defendant in error, unless it be shown by satisfactory proof that the section hands, or employés, of the company, when they removed the rock, knew that the path was left in an unsafe condition, and failed to restore it to its original state, or use reasonable precaution to avoid injury to those likely to pass along the path, or notify such persons of the danger; and as the evidence in this case does not, in our opinion, sufficiently show that the employés of the plaintiff in error had knowledge of the dangerous condition of this path after the removal of the rock, the verdict of the jury is without sufficient evidence to sustain it.

It was therefore error in the circuit court of Smyth county to overrule the motion made by plaintiff in error for a new trial on the ground that the verdict is contrary to the law and the evidence; and for this error its *judgment must be reversed*, and this cause remanded for a new trial, to be had in accordance with this opinion.

LYNCHBURG NATIONAL BANK, *Plff. in Err.*,
v.
SCOTT BROTHERS *et al.*

(.....Va.....)

Usury forming part of the face of a renewal note discounted in the regular course of business at the legal rate, without notice and before maturity, is not an available defense under a statute changing the law making usurious contracts "void," so that they shall be "deemed to be for an illegal consideration" as to the interest

(July 11, 1895.)

ERROR to the Circuit Court for Washington County to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due on a promissory note. *Reversed.*

The facts are stated in the opinion.

Messrs. **Honaker & Hutton** and **White & Penn**, for plaintiff in error:

The change in the act from "void" to "be deemed to be for an illegal consideration" puts a negotiable instrument in the hands of an innocent holder on the same footing with innocent holders of negotiable paper, when the illegality arises from any other cause than the statute.

A purchaser or holder of a negotiable instrument, who has taken it, bona fide, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor, and without notice of the facts which impeach its validity, as between antecedent parties, has a title unaffected by those facts.

Dan. Neg. Inst. § 769; 1 Barton, Law Pr. p. 552; Story, Prom. Notes, 8d ed. § 192; 3 Kent, Com. p. 100, *note 4; Norris* v. *Langley*, 19 N. H. 423; *Converse* v. *Foster*, 32 Vt. 828; *Johnson* v. *Meeker*, 1 Wis. 436; Chitty, Bills & Notes, 11th Am. ed. *81, 95; 1 Parsons, Notes & Bills, p. 279; *Glenn* v. *Farmers' Bank*, 70 N. C. 191; *Paton* v. *Coit*, 5 Mich. 505, 72 Am. Dec. 58; *Hay* v. *Ayling*, 16 Q. B. 423; *Vallett* v. *Parker*, 6 Wend. 615; *Pickaway County Bank* v. *Prather*, 12 Ohio St. 497; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Sondheim* v. *Gilbert*, 117 Ind. 71, 5 L. R. A. 432; *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631.

Independently of the fact that the plaintiff bank is protected as an innocent holder of the note sued on, the circuit court erred in holding that the usurious interest paid the Bank of Abingdon by Scott Brothers (the makers) could be credited upon the principal of the debt in the hands of the plaintiff.

Moseley v. *Brown*, 76 Va. 423; *Clarkson* v. *Garland*, 1 Leigh, 162; *Spengler* v. *Snapp*, 5 Leigh, 505; 3 Minor, Inst. 850, *Money had and received; Astley* v. *Reynolds*, 2 Strange, 915; *Smith* v. *Bromley*, 2 Dougl. 697; *Fitzroy* v. *Gwillam*, 1 T. R. 153.

The purpose and effect of the statute, from its very terms, are only to give the borrower the right at law to recover back the excess beyond the legal interest paid, in any case, from the person paying the same, and to limit the right of that recovery to one year from the date of such payment; and this remedy is exclusive.

Matthews v. *Paine*, 47 Ark. 54; *Presbrey* v. *Thomas*, 1 D. C. App. 171; *Carter* v. *Carusi*, 112 U. S. 478, 28 L. ed. 820; *Hinman* v. *Goodyear*, 56 Conn. 210; *Pixley* v. *Ingram*, 58 Hun, 93; *Cummings* v. *Knight*, 65 N. H. 202; Wood, Limitation of Actions, p. 237, § 168; *Barnet* v. *Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212;

NOTE.—As to effect on notes in hands of bona fide holders, of a statute declaring the notes void, see *note* to Voreis v. Nussbaum (Ind.) 16 L. R. A. 45.

For general rules as to rights of bona fide holders, see *note* to Canajoharie Nat. Bank v. Diefendorf (N. Y.) 10 L. R. A. 676.

Walsh v. *Mayer*, 111 U. S. 31, 28 L. ed. 338; *Driesbach* v. *National Bank*, 104 U. S. 52, 26 L. ed. 658; *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 23 L. ed. 196; *Cook* v. *Lillo*, 103 U. S. 792, 26 L. ed. 466; *Stephens* v. *Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399.

Mr. **Daniel Trigg** for defendants in error.

Harrison, *J.*, delivered the opinion of the court:

This was a suit at law instituted in the circuit court of Washington county, in December, 1893, by the Lynchburg National Bank against Scott Bros., upon a negotiable note for $1,000, bearing date June 3, 1893, executed by Scott Bros., and payable four months after date to S. L. Scott, at the Bank of Abingdon, Va., indorsed by S. L. Scott and the Bank of Abingdon, and discounted by the Lynchburg National Bank. The note sued on is the last of a series of renewals of a similar note discounted by the Bank of Abingdon, December 17, 1888, at a usurious rate of interest, the usurious interest paid said bank aggregating the sum of $506.38. The plaintiff bank discounted the note sued on before maturity, in the due course of business, at 6 per cent interest, without notice of any fact connected with its history, or of any illegality which affected it in the hands of antecedent parties. Before the maturity of the note sued on, the Bank of Abingdon made a general deed of assignment for the benefit of all of its creditors. Among the defenses set up by the defendants Scott Bros. was that of usury, and all questions of law and fact were, by agreement, submitted to the court, which gave judgment for the plaintiff for the sum of $1,002.25, the principal of said note, and charges of protest, subject to a credit of $506.38, with interest on the balance from the date of said judgment. Objections to the rulings of the circuit court adverse to the plaintiff being regularly saved by bills of exceptions, application was made to this court for a writ of error, which was granted.

In the petition the plaintiff assigns four grounds of error, all raising questions of far more than ordinary interest. In the view, however, taken of the case by this court, it becomes unnecessary to consider but one; and that is, Can the defendants Scott Bros., in this action, avail themselves of the defense of usury against the plaintiff bank, a bona fide holder of the note sued on, for value, and without notice of any taint of usury, and received in the due course of business, before maturity, and at a legal rate of discount?

The Statute of Virginia (Code, § 2818) provides as follows: "All contracts and assurances, made directly or indirectly for the loan or forbearance of money or other thing at a greater rate of interest than is allowed by the preceding section, shall be deemed to be for an illegal consideration, as to the excess beyond the principal amount so loaned or forborne." This section of the Code is in the words of the Act, as passed March 24, 1874, and has been the law in Virginia since that date. By the terms of the statute which was in force in this state prior to April 1, 1873, all contracts and assurances for the loan or forbearance of money founded upon a usurious consideration were declared to be void.

The question to be considered is the effect, as to negotiable instruments, of this change in the statute, declaring that such contracts shall be deemed to be for an illegal consideration instead of void, as formerly.

These are not meaningless words, and it cannot be doubted that the legislature had some wise purpose in adopting the one rather than the other.

The purchaser or holder of a negotiable instrument, who has taken it bona fide, for a valuable consideration, in the ordinary course of business, when it was not overdue, without notice of its dishonor, and without notice of facts which impeach its validity as between antecedent parties, has a title unaffected by those facts, and may recover on the instrument, although it may be without any legal validity, as between the antecedent parties. 1 Dan. Neg. Inst. p. 576, § 769.

I believe the foregoing strong statement of the favor with which negotiable instruments are regarded by the law is universally accepted as sound. So far as I have been able to examine the authorities, there is but one exception to the rule just laid down, and that is when the statute renders such instruments void. The law extends this peculiar protection to negotiable instruments because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. The same author says: "When the statute merely declares, expressly or by implication, that the consideration shall be deemed illegal, the bill or note founded upon such consideration shall be valid in the hands of the bona fide holder without notice, but the burden of proof will be upon the plaintiff, when the illegal consideration appears, to show that he is a bona fide holder without notice." In sections 807 and 808 the same author says: "In many localities negotiable instruments executed upon gaming or usurious considerations are upon the same footing as those executed for other illegal considerations—that is, void between the parties, but valid in the hands of a bona fide holder. . . . And that when the instrument was executed upon an illegal consideration, especially if illegal by statute (but not absolutely avoiding the instrument), it throws upon the holder the burden of proving bona fide ownership for value. . . . And in all cases where the statute does not declare the instrument void, bona fide ownership for value being proved, the holder is entitled to recover."

Story, Prom. Notes, 8d ed. § 192, says: "The same doctrine will generally apply to all cases of a bona fide holder for value, without notice, before it becomes due, where the original note, or the indorsement thereof, is founded on an illegal consideration; and this upon the same general ground of public policy, without any distinction between a case of illegality founded in moral crime or turpitude, which is *malum in se*, and a case founded in the positive prohibition of a stat-

ute, which is *malum prohibitum;* for, in each case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is, where the statute creating the prohibition has at the same time, either expressly or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice or not."

In *note 4* to Kent's Commentaries, 11th ed., vol. 3, p. 100, it is said: "If a note is not declared void by statute, mere illegality in its consideration will not affect the rights of a bona fide holder for value;" citing *Norris* v. *Langley*, 19 N. H. 423; *Converse* v. *Foster*, 32 Vt. 828; *Johnson* v. *Meeker*, 1 Wis. 486.

The principles in the foregoing text-books are sustained by the following adjudicated cases: *Glenn* v. *Farmers' Bank*, 70 N. C. 191; *Paton* v. *Coit*, 5 Mich. 505, 72 Am. Dec. 58; *Hay* v. *Ayling*, 16 Q. B. 423; *Vallett* v. *Parker*, 6 Wend. 615; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 249, 250, 25 L. ed. 580, 584, 585; *Sondheim* v. *Gilbert*, 117 Ind. 71, 5 L. R. A. 432.

In the case of *Converse* v. *Foster*, 32 Vt. 828, cited in *note 4* to Kent's Commentaries, *supra*, *Judge* Poland says: "The English statutes against usury and gaming, not only impose a penalty for such illegal acts, but expressly declare that all notes, bills, bonds, and other securities given upon such illegal considerations shall be utterly void. All the cases that have been cited, and all that can be, so far as we know, both English and American, upon this subject, turn upon this very distinction and difference between these statutes. In those cases in which the legislature has declared that the illegality of the contract or consideration shall make the security, whether bill or note, void, the defendant may insist on such illegality, though the plaintiff or such other party between him and the defendant, took the bill or note bona fide, and gave a valuable consideration for it. But unless it has been so expressly declared by the legislature, illegality of consideration would be no defense in an action at the suit of a bona fide holder for value, without notice of the illegality."

"If a statute declares a security void," says *Judge* Rodman in the case of *Glenn* v. *Farmers' Bank*, 70 N. C. 191, "then it is void in whosesoever hands it may come. If, however, a negotiable security be founded on an illegal consideration (and it is immaterial whether it be illegal at common law or by statute), and no statute says it shall be void, the security is good in the hands of an innocent holder, or of any one claiming through him.

"The case of *Hay* v. *Ayling*, above cited, is a notable illustration of the difference.

"Gaming securities were declared void by 9 Anne, chap. 14, § 1, and it was held that they were void in the hands of a bona fide innocent indorsee. The Act of 5 & 6 Wm. IV., chap. 41, § 1, modified the Act of Anne, and declared they should be illegal. The court held that after that act they could be recovered on by an innocent holder."

Mr. Justice Story, in the case of *Fleckner* v. *Bank of United States*, 21 U. S. 8 Wheat. 338, 5 L. ed. 631, in delivering the unanimous opinion of the court, says: "The statutes of usury of the states, as well as of England, contain an express provision that usurious contracts shall be utterly void; and without such an enactment the contract would be valid, at least, in respect to persons who were strangers to the usury."

In *Vallett* v. *Parker*, 6 Wend. 615, *Chief Justice* Savage said: "Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure, or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of the consideration."

In *Sondheim* v. *Gilbert*, 117 Ind. 71, 5 L. R. A. 432, Mitchell, *J.*, says: "The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the legislature that the illegality insisted upon shall make the security, whether contract, bill, or note, void. But unless the legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable;" citing a number of authorities.

This court, in *Branch* v. *Sinking Fund Comrs.*, 80 Va. 427, 56 Am. Rep. 596, says that a note in the hands of the maker, before delivery, is not property, nor the subject of ownership as such; that it must be issued or delivered by the maker before any one can become the bona fide holder of it. This view is not in conflict with the position taken here, where the question being considered is the difference between contracts declared by the statute to be void, and those declared to be for an illegal consideration, and where the note sued on was issued and delivered by the maker. Nor are the authorities quoted to sustain the conclusion here reached in conflict with the view expressed in 80 Va. 427, 56 Am. Rep. 596.

If the word "illegal" were construed to mean "void," as contended for by the learned counsel for the appellees, the change in the statute would be meaningless. A glance at the history of the statute makes it clear that the legislature had an object in its change. The revisers of the Code of 1849 recommended that what is now section 2818 should be adopted by the legislature. The legislature, however, refused to adopt the report of the revisers, and the law still declared all usurious contracts void, until the law was modified, and declared they should be void only as to the interest in excess of 6 per cent per annum, but the Legislature of 1874 declared that it should be deemed to be for an illegal consideration, as to the excess beyond the principal sum loaned or forborne. Commercial paper has ever been regarded with favor by the law, and, in view of its growing importance and its universal convenience in

the affairs of men, it is not strange that the lawmaker, in the interest of a wise public policy, should desire to exempt such paper, in the hands of a bona fide holder for value, and without notice, from the hazard and uncertainty to which it was subjected by the law under a statute which declared the usurious contract void. But, whatever may have been the motive of the legislature in making this change, it is the duty of the court to enforce the law as it is made. And it is perfectly clear, upon reason and authority, that, no matter how illegal the consideration may be, a negotiable note in the hands of a bona fide holder, for value, without notice, will be held valid and enforceable.

If the maker of a negotiable note contests the right of one who has acquired it by indorsement, for value, before maturity, and without notice of any defense, to recover of him the amount of the note, he must, to prevail, be able to show a statute that in express terms, or by necessary implication, declares the note to be void.

The agreed statement of facts in this case shows that the plaintiff in error discounted the note sued on before maturity, and in the due course of business, at 6 per cent interest; that the plaintiff in error had no notice or knowledge when it discounted the note that it was a renewal of any other note, or that it had ever theretofore been discounted by the Bank of Abindgon, or that any one had at any time received from the defendants in error usurious interest thereon.

The Statute (sec. 2818) declaring that all usurious contracts shall be deemed to be for an illegal consideration as to the interest, instead of void, as formerly, it follows from what has been said that the defendants in error could not avail themselves of the defense of usury, to defeat the plaintiff bank of its recovery of the note sued on, or any part thereof.

The judgment of the Circuit Court being in conflict with this opinion, it must be reversed and set aside, and this court will enter such judgment as the said circuit court ought to have entered.

MISSOURI SUPREME COURT.

Henry H. SCHUFELDT *et al.*, *Respts.*,
v.
J. Francis SMITH *et al.*, *Appts.*

(.....Mo.....)

1. **A deed of trust by an insolvent corporation is not void** as matter of law from the fact that the directors vote themselves preferences in payment of debts.
2. **Directors of an insolvent corporation, who vote themselves preferences** over other creditors, must show that all their secured claims are honest and justly due them.

(July 9, 1895.)

APPEAL by defendants from a judgment of the Circuit Court for Buchanan County in favor of plaintiffs in an action brought to set aside a trust deed executed by James Walsh Mercantile Company for the benefit of creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. **Huston & Parrish, S. S. Brown,** and **H. K. White,** for appellants:

A corporation in the transaction of its business, though embarrassed, can convey its assets by way of deed of trust, making a preference among its creditors.

2 Kent, Com. 281, 315, *note g;* Cook, Corp. 2d ed. 691; Ang. & A. Priv. Corp. 11th ed. 187; 1 Beach, Priv. Corp. 358; 2 Potter, Corp. 695; Burrill, Assignm. 5th ed. 64; *St. Louis City & County* v. *Alexander*, 23 Mo. 483; *Kitchen* v. *St. Louis, K. C. & N. R. Co.* 69 Mo. 224; *Shockley* v. *Fisher*, 75 Mo. 498; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Larrabee* v. *Franklin Bank*, 114 Mo. 592; *Alberger* v. *National Bank of Commerce*, 128 Mo. 318; *LaGrange Butter Tub Co.* v. *National Bank of Commerce*, 122 Mo. 154; *Catlin* v. *Eagle Bank*, 6 Conn. 233; *Savings Bank* v. *Bates*, 8 Conn. 505; *Pondville Co.* v. *Clark*, 25 Conn. 97; *Smith* v. *Skeary*, 47 Conn. 47; *Warner* v. *Mower*, 11 Vt. 385; *Sargent* v. *Webster*, 13 Met. 497, 46 Am. Dec. 743; *Pond* v. *Framingham & L. R. Co.* 130 Mass. 94; *Olney* v. *Conanicut Land Co.* 16 R. I. 597, 5 L. R. A. 361; *DeRuyter* v. *St. Peter's Church Trustees*, 3 Barb. Ch. 119, approved in 3 N. Y. 238; *Hoyt* v. *Sheldon*, 3 Bosw. 267; *Duncomb* v. *New York, H. & N. R Co.* 84 N. Y. 190, 38 N. Y. 1; *Lane* v. *Wheelwright*, 69 Hun, 180; *Brower* v. *Brooklyn Trust Co.* 50 N. Y. S. R. 630; *Vail* v. *Jameson*, 41 N. J. Eq. 648; *Bergen* v. *Porpoise Fishing Co.* 42 N. J. Eq. 397; *Sewell* v. *East Cape May Beach Co.* 50 N. J. Eq. 717; *Dana* v. *Bank of United States*, 5 Watts & S. 223; *Gordon* v. *Preston*, 1 Watts, 385, 26 Am. Dec. 75; *State* v. *Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561; *Burr* v. *McDonald*, 3 Gratt. 215; *Planters' Bank* v. *Whittle*, 78 Va. 737; *Ruffner Bros.* v. *Welton Coal & Salt Co.* 36 W. Va. 244; *Dabney* v. *Bank of State of S. C.* 3 S. C. N. S. 124; *Baring* v. *Dabney*, 86 U. S. 19 Wall. 1, 22 L. ed. 90; *Carey* v. *Giles*, 10 Ga. 9; *Globe Iron Roofing & C. Co.* v. *Thacker*, 87 Ala. 458; *Goodyear Rubber Co.* v. *George D.*

NOTE.—For preferences by insolvent corporations, see *note* to Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co. (Tex.) 22 L. R. A. 802.

29 L. R. A.

Scott Co. 96 Ala. 439; *Arthur* v. *Commercial & R. Bank*, 9 Smedes & M. 394, 48 Am. Dec. 719; *Ex parte Conway*, 4 Ark. 302; *Ringo* v. *Biscoe*, 13 Ark. 563; *Worthen* v. *Griffith*, 59 Ark. 562; *Gould* v. *Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 682; *United States Bank* v. *Huth*, 4 B. Mon. 423; *Newport & C. Bridge Co.* v. *Douglass*, 12 Bush, 673; *Hopkins* v. *Gallatin Turnp. Co.* 4 Humph. 403; *Lippincott* v. *Shaw Carriage Co.* 25 Fed. Rep. 577; *Reichwald* v. *Commercial Hotel Co.* 106 Ill. 439; *Town* v. *Bank of River Raisin*, 2 Dougl. (Mich.) 530; *Covert* v. *Rogers*, 38 Mich. 363, 31 Am. Rep. 319; *Turnbull* v. *Prentiss Lumber Co.* 55 Mich. 387; *Kendall* v. *Bishop*, 76 Mich. 634; *Bank of Montreal* v. *J. E. Potts Salt & L. Co.* 90 Mich. 345; *Hills* v. *Stockwell & D. Furniture Co.* 23 Fed. Rep. 432; *Buell* v. *Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Garrett* v. *Burlington Plow Co.* 70 Iowa, 697, 59 Am. Rep. 461; *Warfield* v. *Marshall County Canning Co.* 72 Iowa, 666; *Rollins* v. *Shaver Wagon & C. Co.* 80 Iowa, 380; *Hospes* v. *Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470; *Poole* v. *West Point Butter & C. Asso.* 30 Fed. Rep. 513; *Milroy* v. *Eager*, 30 Fed. Rep. 544; *Allis* v. *Jones*, 45 Fed. Rep. 148; *Hays* v. *Citizens' Bank*, 51 Kan. 535; *Fogg* v. *Blair*, 133 U. S. 534, 33 L. ed. 721; *George T. Smith Middlings Purifier Co.* v. *McGroarty*, 136 U. S. 237, 34 L. ed. 346; *Re Patent File Co.* L. R. 6 Ch. 88; *Re Wincham Shipbuilding B. & S. Co.* L. R. 9 Ch. Div. 322.

The fact that one of the claims preferred was guaranteed by the president of the corporation, and that another was the property of the estate of a decedent of which the president of the corporation was administrator, will not invalidate the deed in any respect.

St. Louis City & County v. *Alexander*, 23 Mo. 483; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Buell* v. *Buckingham*, 16 Iowa, 284, 85 Am. Dec. 516; *Hallam* v. *Indianola Hotel Co.* 56 Iowa, 179; *Garrett* v. *Burlington Plow Co.* 70 Iowa, 697; *Farmers' & M. Bank* v. *Wason*, 48 Iowa, 336; *Bank of Montreal* v. *J. E. Potts Salt & L. Co.* 90 Mich. 345; *Ex parte Conway*, 4 Ark. 302; *Ringo* v. *Biscoe*. 13 Ark. 563; *Worthen* v. *Griffith*. 59 Ark. 562; *Planters' Bank* v. *Whittle*, 78 Va. 739; *Hospes* v. *Northwestern Mfg. & Car Co.* 48 Minn. 174, 15 L. R. A. 470; *Catlin* v. *Eagle Bank*, 6 Conn. 233; *Wilkinson* v. *Bauerle*, 41 N. J. Eq. 635; *Whitwell* v. *Warner*, 20 Vt. 425; *Gordon* v. *Preston*, 1 Watts, 385; *Ashhurst's App.* 60 Pa. 290; *Duncomb* v. *New York, H. & N. R. Co.* 84 N. Y. 190; *Central R. & Bkg. Co.* v. *Claghorn*, 1 Speers, Eq. 545; *Brown* v. *Grand Rapids Parlor Furniture Co.* 58 Fed. Rep. 286, 22 L. R. A. 817; *Gould* v. *Little Rock, M. R. & T. R. Co.* 52 Fed. Rep. 680; *Hills* v. *Stockwell & D. Furniture Co.* 23 Fed. Rep. 432; *McCracken* v. *Robison*, 57 Fed. Rep. 375; *Taylor County Ct.* v. *Baltimore & O. R. Co.* 35 Fed. Rep. 161.

Walsh's vote as director was not necessary to order the deed of trust. Two of the directors, Byrne and McGuire, constituted a quorum, and their votes in favor of the deed of trust made it the act of the corporation, even if Walsh's vote in its favor be excluded.

Foster v. *Mullanphy Planing Mill Co. supra;* Cook, Stock & Stockholders, 713; *Buell* v. *Buckingham, supra.*

Even if a single director's interest in the claims, one of which he held as administrator and another of which he had indorsed, rendered the deed invalid as to those claims, the deed remains good as to the others.

Jones, Chat. Mortg. 336; *Hardcastle* v. *Fisher*, 24 Mo. 70; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Morris* v. *Lindauer*, 54 Fed. Rep. 23, 6 U. S. App. 510; *Cohn* v. *Ward*, 32 W. Va. 39; *Riggan* v. *Wolf*, 53 Ark. 537.

Messrs. **Vinton Pike, Stauber & Crandall, Willard P. Hall,** and **Dowe, Johnson & Rusk,** for respondents:

The directors of an insolvent corporation cannot be made preferred creditors for unsecured debts. This rule is universal where the vote of the preferred director or directors is necessary to the giving of the preference.

Suddath v. *Gallagher*, 126 Mo. 393; *Bridgens* v. *Dollar Sav. Bank*, 66 Fed. Rep. 9; *La Grange Butter Tub Co.* v. *National Bank of Commerce*, 122 Mo. 154; *Hill* v. *Rich Hill Coal Min. Co.* 119 Mo. 9; *Roan* v. *Winn*, 93 Mo. 508; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Williams* v. *Jackson County Patrons of Husbandry*, 23 Mo. App. 182; *Adams* v. *Kehlor Mill. Co.* 35 Fed. Rep. 433; *Consolidated Tank Line Co.* v. *Kansas City Varnish Co.* 43 Fed. Rep. 204, 45 Fed. Rep. 7; *Mallory* v. *Mallory Wheeler Co.* 61 Conn. 131; *Olney* v. *Conanicut Land Co.* 16 R. I. 597, 5 L. R. A. 361; *Hopkins's App.* 90 Pa. 69; *Richards* v. *New Hampshire Ins. Co.* 43 N. H. 263; *Sicardi* v. *Keystone Oil Co.* 149 Pa. 148; *Lowry Bkg. Co.* v. *Empire Lumber Co.* 91 Ga. 624; *Corey* v. *Wadsworth*, 99 Ala. 68, 23 L. R. A. 618; *Gibson* v. *Trowbridge Furniture Co.* 96 Ala. 357; *Lippincott* v. *Shaw Carriage Co.* 25 Fed. Rep. 577; *Beach* v. *Miller*, 130 Ill. 162; *Roseboom* v. *Whittaker*, 132 Ill. 81; *Peterson* v. *Brabrook Tailoring Co.* 150 Ill. 290; *Hays* v. *Citizens' Bank*, 51 Kan. 535; *Howe* v. *Sanford Fork & T. Co.* 44 Fed. Rep. 231; *Bosworth* v. *Jacksonville Nat. Bank*, 64 Fed. Rep. 615; *Sutton Mfg. Co.* v. *Hutchinson*, 63 Fed. Rep. 497; *Gaslight Imp. Co.* v. *Terrell*, L. R. 10 Eq. 168; *Haywood* v. *Lincoln Lumber Co.* 64 Wis. 639; *Thompson* v. *Huron Lumber Co.* 4 Wash. 600; *Hill* v. *Pioneer Lumber Co.* 113 N. C. 173, 21 L. R. A. 560; *Chamberlain* v. *Pacific Wool-Growing Co.* 54 Cal. 103; *Blalock* v. *Kernersville Mfg. Co.* 110 N. C. 99; 2 Morawetz, Priv. Corp. § 787, par. 3; 17 Am. & Eng. Encyclop. Law, p. 123; Gluck & Becker, Receivers, § 49; Wait, Insolv. Corp. § 162; *Lamb* v. *Laughlin*, 25 W. Va. 300; Wait, Fraud. Conv. § 470.

A corporation is insolvent within the rule as to preferring creditors when its assets are insufficient to pay its debts, and it has ceased to do business, or is in the act of taking a step which will practically incapacitate it for conducting the corporate enterprise.

Corey v. *Wadsworth*, 99 Ala. 68, 23 L. R. A. 618; *Dodge* v. *Mastin*, 17 Fed. Rep. 660; 11 Am. & Eng. Encyclop. Law, pp. 168, 172; Morse, Banks & Banking, § 662; Gluck & Becker, Receivers, §§ 14, 49; *Reid* v. *Lloyd*, 52 Mo. App. 282; *State* v. *Koontz*, 83 Mo. 323; *Eddy* v. *Baldwin*, 32 Mo. 369; *Buchanan* v. *Smith*, 83 U. S. 16 Wall. 277, 21 L. ed. 280.

Directors are charged with knowledge as to the solvency of their corporation.

McDaniel v. *Harvey*, 51 Mo. App. 198; *Hop-*

kins's App. 90 Pa. 69; *Sicardi* v. *Keystone Oil Co.* 149 Pa. 148; *Lowry Bkg. Co.* v. *Empire Lumber Co.* 91 Ga. 624; *Corey* v. *Wadsworth, supra; Jones* v. *Arkansas Mechanical & Agri. Co.* 38 Ark. 25.

The execution of a conveyance of all its property by a corporation is a confession of insolvency.

Kellog v. *Richardson*, 19 Fed. Rep. 71; *Oliver-Finne Grocer Co.* v. *Miller*, 53 Mo. App. 107; *Walton* v. *First Nat. Bank*, 18 Colo. 265, 5 L. R. A. 765; *Consolidated Tank Line Co.* v. *Kansas City Varnish Co.* 45 Fed. Rep. 18; Morse, Banks & Banking, § 622.

Inasmuch as the directors were preferred in the deed of trust, they were disqualified by their self-interest from acting and making such preference as trustees of the corporation. The deed of trust is therefore void *in toto* on account of the disqualification of the directors to act as trustees of the corporation in a matter in which they were personally interested.

Suddath v. *Gallagher*, 126 Mo. 393; *Bridgens* v. *Dollar Sav. Bank*, 66 Fed. Rep. 9; *Roan* v. *Winn*, 93 Mo. 503; *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 79; *Williams* v. *Jackson County Patrons of Husbandry*, 23 Mo. App. 132; *Adams* v. *Kehlor Mill. Co.* 35 Fed. Rep. 433; *Consolidated Tank Line Co.* v. *Kansas City Varnish Co.* 43 Fed. Rep. 204, 45 Fed. Rep. 7; *Duncomb* v. *New York, H. & N. R. Co.* 84 N. Y. 190.

When the corporation became insolvent its assets became *ipso facto* a trust fund in the hands of its directors for the benefit of its creditors, and the directors were disqualified from dealing with this fund for their own benefit or advantage. It therefore follows that the attempt on the part of the directors to authorize the execution by the corporation of the deed of trust in which certain debts of the directors were attempted to be preferred was void.

Munson v. *Syracuse, G. & C. R. Co.* 103 N. Y. 73; *Lamb* v. *Laughlin*, 25 W. Va. 800; *Sutton Mfg. Co.* v. *Hutchinson*, 63 Fed. Rep. 496; *Bradley* v. *Farwell*, Holmes, C. C. 433; *Adams* v. *Kehlor Mill. Co. supra; Ward* v. *Davidson*, 89 Mo. 445.

Macfarlane, *J.*, delivered the opinion of the court:

This suit is to set aside a certain deed of trust, executed on the 18th day of March, 1893, by the James Walsh Mercantile Company, a business corporation, to defendant J. Francis Smith, as trustee, to secure its creditors in the order therein named. The deed was executed in pursuance of this resolution of the board of directors: "Whereas, this corporation is unable to meet its obligations as they fall due, though its assets are much more than its liabilities: Resolved, that, in order to more economically dispose of such portion of its assets as may be necessary to pay its debts than could be done if legal proceedings should be instituted, the corporation convey all its property, real, personal, and mixed, to J. Francis Smith, as trustee, with powers of sale and collection, and that such trustee pay: First, costs of the trust; second, debts preferred by the state laws of Missouri; third, obligations for borrowed money not secured by collateral; fourth, balance due on notes for borrowed money secured by collateral after application of collateral and their proceeds, and notes of other parties discounted by the company, after due attempt to collect from makers; fifth, other indebtedness of the company not disputed." The deed of trust was drawn in accordance with the resolution. The creditors of the various classes, with the amounts due each, were specified, and directions were given the trustee to pay the debts in the order named.

The debts of the third class as specified in the mortgage aggregated about $35,000, and those of the fourth class about $56,000. The fifth class of creditors secured were the general mercantile creditors of the corporation. The debts of this class aggregated about $30,000. Creditors of this class prosecute this suit. Pending the suit, defendant Smith was appointed receiver. The face value of the assets amounted to about $300,000, but, on account of depreciation, it was thought by the receiver that not more than $100,000 could be realized on them. There would be, therefore, but little, if anything, to apply on the fifth class of debts. Under the deed of trust, power of sale was given the trustee, as also authority to collect the debts due the company. It was charged in the petition "that certain of the indebtedness in preferred classes 3 and 4 is the individual indebtedness of the officers and directors of said corporation, and was contracted for the purpose of protecting the individual liability of said officers and directors." Defendant Smith, by answer, admitted the execution and delivery of the deed of trust, and that, by virtue of the powers thereby conferred, he took into his possession all the property so assigned to him, with a view of administering the same. The other allegations of the petition were in substance denied. The only evidence offered on the trial was directed to the question of the solvency of the corporation at the time the deed of trust was made. The records of the corporation showed that James Walsh was its president. Charles McGinn, vice-president, and John F. Byrne, secretary. It also appears that these were the only directors who passed the resolution. The deed of trust was signed by James Walsh, as president, and attested by John F. Byrne, as secretary. One note placed in class 3, as described in the deed of trust, was dated January 25, 1883, and was executed by the former firm of James Walsh & Co. in the sum of $12,000, payable to Ferdinand Lutz, of St. Joseph, Missouri, payment of which has been assumed by said party of the first part." Another note of the same character, dated in 1889, for $2,000, was also described in the deed of trust. In the same class were two notes made by the corporation to James Walsh, as administrator of the Conrad estate. It was not shown by evidence that the creditor James Walsh was the same person as James Walsh the president and director of the corporation; nor was any evidence offered explanatory of the assumption by the corporation of the note of James Walsh & Co. The case was argued by counsel on both sides, and the identity of James Walsh in each capacity

has been assumed. No evidence was offered tending to prove actual bad faith, either in the execution of the deed, or in creating the debts secured by it. The court found that on the 18th day of March, 1893 (the date of the deed of trust), the defendant James Walsh Mercantile Company was insolvent, and from that date "ceased to be a going concern." Upon this finding a decree was entered setting aside the deed of trust, from which defendants appealed.

Most of the questions involved in this record have in some recent cases in this court been given careful and exhaustive consideration. The investigations given the subject have been more labored and thorough on account of apparent want of harmony in some of the previous decisions of this court, as well as on account of the diversity of opinion in other jurisdictions. The conclusions reached by each of the divisions, which received the concurrence of all the members, may be briefly given in the language of the syllabus prepared by the judge who wrote one of the opinions, as follows: "A corporation in failing circumstances may prefer one creditor to another, in discharging its obligations, if such preference is made in good faith while the property of the company remains in its possession, unaffected by liens or any process of law. Mere insolvency of a corporation does not of itself transform its assets into a trust fund for the equal benefit of all its creditors." *Alberger* v. *National Bank of Commerce*, 123 Mo. 313; *Slavens* v. *John R. Cook Drug Co.* (Mo.) 30 S. W. Rep. 1025; *Waggoner-Gates Mill Co.* v. *Ziegler-Zaiss Commission Co.* (Mo.) (not yet officially reported) 31 S. W. Rep. 28. In the case last cited, which was decided by division 2 of this court, it was also held that preference in the same circumstances may be given to a creditor of a corporation who is secured by the indorsement of some of its directors. It would seem to follow logically from these decisions that a preference may be made to a director for a debt directly due him from the corporation, unless it would be defeated by his own act in voting himself the preference.

But it is insisted with much earnestness, and argued with great ability, that the directors had no power to bind the corporation to an agreement made with themselves, and in which they had a personal interest, and that, therefore, the resolution of the board of directors authorizing preferences to be given the members thereof, over other creditors, and the deed of trust executed in pursuance thereof, were absolutely void. This contention must rest upon one of two theories,—either that the directors of a corporation are trustees for its creditors, and its assets constitute a trust fund which they must apply ratably toward the satisfaction of all the debts, or that such a transaction is, upon its face, constructively fraudulent. As has been seen, the so called "trust-fund theory," as applied to a corporation, while dominion over its property is retained, is not recognized in this state as being sound. Nothing additional need be said on that subject. The board of directors are undoubtedly trustees for the corporation and stockholders, and, when acting for them, are bound to exercise the utmost good faith. Any attempt in dealing with its property or affairs to secure themselves personal advantages over other stockholders should at least be subject to the most rigorous scrutiny. *Hill* v. *Rich Hill Coal Min. Co.* 119 Mo. 19, and cases cited.

But it cannot be said, as a correct proposition of law, that officers of a corporation cannot themselves and in their own names contract with it. To so hold would virtually deny to corporations the credit upon which so much of the business of the country is transacted, and which is so essential to success. If the stockholders and officers of corporations are not permitted to advance money to them, or to indorse for them, without subjecting themselves to such disadvantages, they would be deprived of their most valuable source of credit. A corporation naturally looks to those interested in its affairs for accommodations. If directors can lend the corporation money, or indorse for it, they should certainly have the same right to collect the debts or secure themselves as is accorded to other creditors. The cases cited abundantly show that a corporation, so long as it has control of its property, though insolvent, may, when acting honestly, prefer one creditor to another. A mortgage, then, giving such preference, is not constructively fraudulent. Neither the corporation nor the other stockholders are injured by the preference given. To defeat them, actual fraud should be shown. The honest debts all stand, and should stand, on equal footing. All the creditors should have equal rights to enter in the race of diligence. The fact that the race may be unequal should not deprive the winner of his reward. An individual debtor can prefer his family, his neighbors, and his friends. If the preferred debt is honest, the preference cannot be impeached, though the wife of the debtor secure the advantage. *Hart* v. *Leete*, 104 Mo. 338; *Riley* v. *Vaughan*, 116 Mo. 176. No reason can be seen why a corporation may not also prefer its friends. There is no more equity in allowing an individual debtor to prefer his creditor, wife, or children than in allowing a corporation to prefer its stockholders and officers. To permit equities to control would defeat all preferences. While the owner of property retains the power of its disposal he may apply it to the payment of any honest debt, is the rule upon which the right to make preferences among creditors rests. The rule should apply as well to corporations as to individuals, and any change should be made by the legislature, and not by the courts. If the debt is an honest one, and the corporation had the power to contract it, it has the right to pay or secure it, and no fraud can be imputed to it from the fact that it is paid or secured in preference to another. "It may be conceded," said *Judge* Taft in a recent case, "that the trust relation justifies and requires courts of equity to subject preferences by an insolvent corporation of its own directors to the closest scrutiny, and of showing beyond question that he had a bona fide debt; but we do not see why, if a corpora-

tion may prefer one creditor over another, it may not prefer a director who is a bona fide creditor. Preferences are not based on any equitable principle. They go by favor. And, as one individual may prefer among his creditors his friends and relations, so a corporation may prefer its friends." *Brown* v. *Grand Rapids Parlor Furniture Co.* 58 Fed. Rep. 286, 22 L. R. A. 817. See also *Worthen* v. *Griffith*, 59 Ark. 562, and cases cited.

We do not think, therefore, that the deed of trust is constructively fraudulent for the reason that it gives preferences to a director of the corporation. When the right of the corporation to give preferences to any of its creditors is conceded, the logical conclusion follows that it can give them to any creditor who holds an honest debt against it, though he be an officer or stockholder. This conclusion is in accord with the declaration of Sherwood, *J.*, in a recent case. He says: "A corporation, within the scope of the purposes for which it was incorporated, may do any act in furtherance of these purposes which an individual in similar circumstances might do, and, though insolvent, may prefer some creditors to others, even though such creditors are among the directors of the corporation." *Foster* v. *Mullanphy Planing Mill Co.* 92 Mo. 87. While the directors of a corporation do not sustain the strict relation of trustees for its creditors, yet their duties to them and their relation to the corporation itself are such as impose upon them some of the obligations of trustees. In dealing with the corporation, they deal with themselves. They determine the liability of the corporation to themselves. They should therefore be required, in case they give themselves a preference over other creditors, to show that all their secured debts are fair, honest, and justly due them. This burden properly rests upon them. From this record it appears that the invalidity of the deed of trust in question was declared to result from the mere insolvency of the corporation at the time it was executed. The question of the bona fides of the debts of directors, who were given preferences, was not gone into on the trial. The act of the directors in voting themselves preferences would make the deed of trust prima facie fraudulent in fact but not conclusively so as a matter of law. The court evidently did not decide the case upon the presumption of fact that the deed was fraudulent, which it might have indulged.

We therefore reverse the judgment and remand the cause for a new trial.

Brace, *P. J.*, and **Barclay and Robinson**, *JJ.*, concur.

Rehearing denied.

WYOMING SUPREME COURT.

PEOPLE of the State of Wyoming, *ex rel.* Isaac CHANDLER,
v.
N. D. McDONALD, Warden of the Penitentiary.

(.....Wyo.....)

A statute is not an ex post facto law because it abrogates the provision existing when an offense was committed, that the accused may secure a change of magistrate or place of preliminary examination upon his affidavit of belief of the prejudice of the magistrate before whom he is brought for examination.

(October 25, 1895.)

APPLICATION for a writ of habeas corpus to obtain the release of relator from defendant's custody to which he had been committed after conviction of assault and battery with intent to kill. *Denied.*

The facts are stated in the opinion.

Mr. **Charles F. Tew**, for plaintiff:

The repeal and re-enactment is an *ex post facto* law as to this case if it alters the situation of the accused to his disadvantage or robs him of a substantial right.

7 Am. & Eng. Encyclop. Law, p. 526; *Kring* v. *Missouri*, 107 U. S. 221, 27 L. ed. 506; *Garvey* v. *People*, 6 Colo. 559, 45 Am. Rep. 531.

Under the information system of criminal procedure the presentment stands in the place and stead of the presentment by a grand jury.

Re Wright, 3 Wyo. 487, 18 L. R. A. 748; *Fowler* v. *People*, 34 Mich. 286; *White* v. *State*, 28 Neb. 341.

Such presentment by a magistrate, under the information system or by a grand jury under the grand jury system is necessary to confer jurisdiction upon the trial court.

White v. *State*, *supra*; *People* v. *Chapman*, 62 Mich. 280; *People* v. *Smith*, 25 Mich. 497; *State* v. *Sorenson*, 84 Wis. 30; *Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849; *Ex parte Lange*, 85 U. S. 18 Wall. 168, 21 L. ed. 875; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89.

The right to a change of venue at a preliminary examination under the information system is to a defendant an important and substantial right.

State v. *Sorenson*, *supra*.

Mr. **Benjamin F. Fowler**, for defendant:

A law which operates as a mere change of criminal procedure, without affecting any substantial right of the accused, is not *ex post facto*, as applied to crimes committed before it took effect.

Cooley, Const. Lim. p. 329; *State* v. *Manning*, 14 Tex. 402; *State* v. *Clarkson*, 59 Mo.

NOTE.—On the subject of *ex post facto* laws, see also Anderson v. O'Donnell (S. C.) 1 L. R. A. 632, and *note*; State v. Cooler (S. C.) 3 L. R. A. 181, and *note*; *Re* Tyson (Colo.) 6 L. R. A. 472; *Ex parte* Larkins (Okla.) 11 L. R. A. 418; *Re* Wright (Wyo.) 18 L. R. A. 748; Com. v. Graves (Mass.) 19 L. R. A. 256; People v. Hayes (N. Y.) 23 L. R. A. 890; Boyd v. Mills (Kan.) 25 L. R. A. 486; French v. Deane (Colo.) 24 L. R. A. 887.

See also 35 L. R. A. 238.

149; *State* v. *Williams*, 2 Rich. L. 418, 45 Am. Dec. 741; *People* v. *Phelps*, 5 Wend. 9; *Rand* v. *Com.* 9 Gratt. 738; 7 Am. & Eng. Encyclop. Law, p. 581; *Re Wright*, 3 Wyo. 478, 18 L. R. A. 748.

A law is not unconstitutional which precludes a defendant in a criminal case from taking advantage of variances which do not prejudice him.

Com. v. *Hall*, 97 Mass. 570.

Nor is a law unconstitutional which reduces the number of the prisoner's peremptory challenges.

Dowling v. *State*, 5 Smedes & M. 664.

A law is not unconstitutional which, though passed after the commission of the offense, authorizes a change of venue to another county of the judicial districts.

Gut v. *Minnesota*, 76 U. S. 9 Wall. 35, 19 L. ed. 573. See also *Holt* v. *State*, 2 Tex. 363; 1 Kent, Com. 408; *Calder* v. *Bull*, 3 U. S. 3 Dall. 388, 1 L. ed. 649; *Strong* v. *State*, 1 Blackf. 193; *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 138, 3 L. ed. 178; *State* v. *Cooler*, 30 S. C. 105; *Com.* v. *Phillips*, 11 Pick. 28.

A defendant on trial for a criminal offense has no vested right in the manner of procedure established by law at the time of the commission of the alleged crime.

Marion v. *State*, 20 Neb. 233, 57 Am. Rep. 825; *State* v. *Manning*, 14 Tex. 402; *State* v. *Ryan*, 13 Minn. 370; *Walston* v. *Com.* 16 B. Mon. 16; *Warren* v. *Com.* 37 Pa. 45.

Groesbeck, *Ch. J.*, delivered the opinion of the court:

The petitioner for the writ of habeas corpus, Isaac Chandler, was convicted in the district court for Laramie county of the crime of assault and battery with the intent to kill and murder, and on the 7th day of June, A. D. 1895, was sentenced to imprisonment in the penitentiary for the term of fourteen years. He applies for the writ of habeas corpus, alleging that his imprisonment is unlawful, because the justice of the peace before whom he was examined on said charge refused to grant him, upon his sworn application therefor alleging the prejudice of the magistrate, an examination before some other justice of the peace of the county wherein the offense was alleged to have been committed. The time fixed in the information or complaint before the justice of the peace, when the offense was committed was January 3, 1895. At the time of the commission of the offense, as alleged in the complaint, the statute (section 3441 of the Revised Statutes of Wyoming, as amended by chapter 17 of the Session Laws of 1890) provided, among other things, that if, upon the return of the process, or the appearance of the parties in any civil cause or proceeding "or upon any criminal examination," either party, his agent, or attorney shall make affidavit that, from prejudice, bias, or other cause, he believes that the justice of the peace before whom the cause is pending will not decide impartially in the matter, the said justice shall transfer said suit and all papers appertaining thereto to some other justice of the peace of the same or adjoining precinct against whom no such objection has been raised, who may thereupon proceed to hear and determine the same in the same manner as it would have been lawful for the justice before whom the cause or proceeding was commenced to have done. This last-mentioned act was repealed, and section 3441 of the Revised Statutes, amended thereby, was re-enacted, in such manner as to remove all reference to criminal proceedings or criminal examinations, by chapter 84 of the Session Laws of 1895, which by its terms took immediate effect, and which became a law upon the approval of the governor, February 18, 1895, two days before the complaint was made before the justice of the peace, and before the preliminary examination of the petitioner. The petitioner, at his preliminary examination, notwithstanding the repealing statute, filed his affidavit and motion before the examining magistrate, the affidavit alleging that the "affiant has been reliably informed and verily believes that there exists in the mind of H. Glafcke [the magistrate] a prejudice against said defendant such as would preclude said Glafcke from giving said defendant a fair and impartial hearing or examination," and, further, "that said affiant has been informed and verily believes that there exists in the mind of L. E. Stone, a justice of the peace of Cheyenne precinct, in Laramie county, Wyoming, and in the mind of one Charles Carlstrum, of Pine Bluffs precinct, in said county and state, and a justice of the peace within and for said precinct, a prejudice such as would preclude both said L. E. Stone and said Carlstrum from giving said defendant a fair and impartial examination in said matter." The objection was therefore made to three justices of the peace of the county wherein the offense was alleged to be committed by this affidavit. The justice of the peace refused the application for change of venue, doubtless because of the passage of the repealing statute taking away the right of a defendant in a criminal cause or proceeding to a change of venue in a preliminary examination. The attention of the district court was called to this matter by a plea in abatement before the trial and by a motion in arrest of judgment, both of which were overruled by the trial court.

The petitioner claims that the statute (Sess. Laws 1895, chap. 84), in repealing or attempting to repeal, without a saving clause, the prior statute providing for a change of venue in a preliminary examination before a justice of the peace in criminal cases, is *ex post facto*, and void as to him, as the offense with which he was charged was alleged to have been committed January 3, 1895, and that the Act of February 18, 1895, could not deprive him of the right to object by affidavit to the justice of the peace before whom he was brought to be examined on said charge, upon the grounds mentioned in the statute in force at the time of the alleged commission of the offense. He contends that, notwithstanding the repeal of the statute providing for a change of venue in preliminary examinations, he was entitled to it, when he applied therefor, under the law as it existed at the time of the commission of the offense alleged; that the jurisdiction of the justice as an examining tribunal or court of inquiry

was defeated after the application for change of venue had been made; that the magistrate was without jurisdiction to proceed with the examination; that, as the subsequent proceedings of the magistrate were void, the accused had no preliminary examination; and that, therefore, as the statute then provided for such an examination in trials upon information of the prosecuting attorney, and where the accused had not been indicted by a grand jury, the district court was without jurisdiction to try the defendant, and that all its proceedings, resulting in the conviction and sentence of the petitioner, are wholly void. The relator insists that he has been deprived of a substantial right by the repealing statute, that of the right to object to the examining magistrate upon the belief of the petitioner of his bias and prejudice, and to secure, by merely filing an affidavit stating such belief, a change of place of trial or in the personnel of the examining tribunal.

It is doubtful if the record discloses sufficient facts to enable us to determine whether or not the offense with which the petitioner is charged occurred prior to the passage of the Statute of February 18th, which took away the right to a change of the place of the examination or in the examining magistrate. We do not have before us, in this proceeding, the record of the district court, sufficient to show when the alleged offense was committed. The allegation in the information, filed before the examining magistrate on the 20th of February, 1895, alleges that the offense occurred on the 3d day of January of that year, but this is not conclusive upon the prosecution, and, under a familiar rule of criminal law, the prosecution may lay one day in the information and prove that the offense was committed upon any day prior to the filing of the accusation. The offense may, then, have occurred, for aught we know to the contrary, on the 19th or 20th day of February, 1895, and after the passage of the challenged act of the legislature became a law by the signature of the governor, in which event, the contention of the petitioner would amount to nothing. However, we have determined to decide this proceeding upon the question involved in the briefs of counsel, and to consider only the validity of the statute which it is claimed took away the right of the petitioner in the examining court to secure a change of magistrate or place of trial, and treating the date of the commission of the offense to be prior to the enactment of the challenged statute.

There is no doubt that the statute as it originally stood was liable to great abuse, and it is no wonder that the legislature sought to repeal it. In the case at bar, the relator objected to three magistrates of the county, and it would seem that he could have objected to all but one, and thus have chosen his magistrate, or, for that matter, to all of the magistrates in the county, and thus have forced the prosecution to resort to a grand jury to secure an indictment; for, as the act stood in its primitive simplicity, it provided that, if the affidavit be filed that from prejudice, bias, or other cause the defendant believes that the justice will not decide impartially in the matter, the proceeding shall be transferred to some other justice of the same or adjoining precinct "against whom no such objection has been raised." It will be seen, therefore, that the relator under the provisions of this statute was quite modest, as he objected to but three justices of the peace, when he might have filed his affidavit against every one in the county, if he "believed" that they were all prejudiced against him. It is asserted that the petitioner was deprived of a substantial right by the repealing statute, and, that being so, deprived of a substantial protection afforded to him by the law existing at the time of the commission of the offense, that of the right upon information and belief to object to one, three, or any number of examining magistrates of the county, including the one before whom he was brought for examination. Nothing appears in the record that the magistrate was biased or prejudiced against the accused; nothing but the bare allegation that the defendant believed that there existed in the mind of the magistrate a prejudice against the relator which would preclude the magistrate from giving the defendant a fair and impartial hearing and examination. It does not appear that the magistrate was prejudiced, but merely that the defendant was reliably informed and verily believed such to be the case. An affidavit is classed as the lowest grade of proof known in courts of justice, and an affidavit upon information and belief may well be termed the lowest grade of the lowest grade of proof. A fair and impartial jury, as we must consider them to be, and a judge not objected to, sat in the trial court wherein the defendant was convicted of the felony charged against him, and such must have been the atrocious nature of the felonious assault that was proven that the judge felt compelled to sentence the defendant to the full extent of the law. We are now asked to set aside the trial, and perhaps discharge the defendant from custody and all future punishment, because he has been deprived of the benefit of this statute. If his rights have been invaded, either as secured to him by constitutional or statutory law, this duty must be fearlessly done, but this must be clear to warrant the exercise of such a power.

The development of the law relating to the guaranty of the Federal Constitution that "no state shall pass an *ex post facto* law" (art. 1, § 10) is remarkable. It has sprung from definitions in decisions wherein such definitions are the clearest *dicta*, and it will be somewhat interesting to trace the federal decisions to the present time, and to ascertain what the views of the national tribunal of last resort have been and are for the definition and classification of *ex post facto* laws. The rule established by that great tribunal should be followed, as the determination of what is or what is not an *ex post facto* law is necessarily, under the guaranty of the Federal Constitution, a federal question, as well as a question arising under the provisions of our state constitution. In the case of *Calder* v. *Bull*, 3 U. S. 3 Dall. 390, 1 L. ed. 650, *Mr. Justice* Chase defined what he considered *ex*

post facto laws as follows. "(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was, when committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." These views were not adopted by the majority of the court in that case, and were, indeed, mere *dicta*, as the act of the legislature of the state of Connecticut, setting aside a decree of a court of probate and granting a new hearing before the same court, with liberty of appeal, was held not to be an *ex post facto* law, within the meaning of section 10 of article 1 of the Constitution of the United States, as that article had reference only to crimes, and this was the main question decided. But the court really adopts this definition in *Cummings* v. *Missouri*, 71 U. S. 4 Wall., at page 325, 18 L. ed. 368, where, in the language of *Mr. Justice* Field, delivering the opinion of the majority, it is said: "By an *ex post facto* law is meant one which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment to that then prescribed, or changes the rules of evidence by which less or different testimony is sufficient to convict than was then required." *Mr. Justice* Miller dissented in this case, and in the case of *Ex parte Garland, Petitioner*, following (71 U. S. 4 Wall. 390, 18 L. ed. 374), and says of the case of *Calder* v. *Bull, supra:* "The first case on the subject is that of *Calder* v. *Bull*, and it is the one in which the doctrine concerning *ex post facto* laws is most fully expounded." He further states that the court, in that case (*Calder* v. *Bull*), divides all laws which come within the meaning of that clause into four classes, and then names the classifications made by *Mr. Justice* Chase, quoted fully, *supra*. In the celebrated case of *Kring* v. *Missouri*, 107 U. S. 228, 27 L. ed. 508, in which the court apparently assumed by a bare majority a new position, *Mr. Justice* Miller says, of the definition given by *Mr. Justice* Chase, in *Calder* v. *Bull:* "But it is not to be supposed that the opinion in that case undertook to define, by way of exclusion, all the cases to which the constitutional provision would be applicable." This learned jurist adopts, as supplementary to the views of *Mr. Justice* Chase, the language of *Mr. Justice* Washington, in *United States* v. *Hall*, 2 Wash. C. C. 366, Fed. Cas. No. 15,285, that an *ex post facto* law is one, "in short, which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage," the words herein quoted being italicized in the opinion of the majority of the court, and 10 U. S. 6 Cranch, 171, 3 L. ed. 189, is cited as showing that the case of *United States* v. *Hall* was affirmed, but the opinion on affirmance makes no reference to *ex post facto* laws, and the case was disposed of on other grounds. The opinion in the case in 6 Cranch was delivered by *Mr. Chief Justice* Marshall, and if the case had rested upon the invalidity of the law, such a matter would hardly have escaped the attention of that great jurist. In the *Kring Case*, the following language is used in the majority opinion: "Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed to the disadvantage of the prisoner by state legislation after the offense was committed, and such legislation not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop? And can any substantial right which the law gave the defendant at the time to which his guilt relates be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it cannot." Upon these excerpts last quoted have been built up many hopes of convicted criminals, but we think this language is *dictum*, and it has so been held by other state courts than this. *Lybarger* v. *State*, 2 Wash. 552; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748. In the majority opinion in *Ex parte Medley*, 134 U. S., at page 171, 33 L. ed. 640, written by *Justice* Miller, the court goes further, and defines an *ex post facto* law to be, among other things, one "which alters the situation of the accused to his disadvantage," leaving out, evidently unintentionally, the important qualifying words, used in almost every other case in the Federal Supreme Court on this subject, "in relation to the crime and its consequences."

We think that these cases have not been followed by the great tribunal in which they were rendered, and that what may be termed extreme terms used in them have not been crystallized into law. The cases where this sweeping language has been employed have been those where the punishment has been increased, either by restoring the death penalty, where the accused has once been acquitted of a capital offense, or where the punishment has been increased, or where some legislative act, in relation to the crime or its consequences, has imposed a greater degree of punishment than that inflicted at the time it was committed. The definitions of an *ex post facto* law have sprung from the *dicta* of jurists, adopted by the court, but, however apt or exact as to the case under consideration, can hardly be said to have been accepted as legal definitions or axioms. A review of the cases in the Federal Supreme Court will establish this fact. In the case of *Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, a law of the territory of Utah was challenged as *ex post facto*, which repealed a statute providing that "persons against whom judgment has been rendered upon a conviction for felony, unless pardoned by the governor, or such judgment has been reversed on appeal, shall not be witnesses," after the commission of the crime of one accused of murder; but the court held unanimously that the repealing act merely enlarged the class of persons who might be competent to testify, and was not *ex post facto*. It was said that such statutory alterations "only remove existing restrictions upon the competency of certain classes of per-

sons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure." And the testimony of one who was convicted of the crime of murder was held to be rightfully admitted by the trial court against the defendant, although the law making such testimony incompetent was repealed after the offense was committed, leaving the statute in such shape as to make such testimony competent. The case of *Holden* v. *Minnesota*, 137 U. S. 483, 34 L. ed. 734, is distinguished from *Ex parte Medley, supra*. But in a comparatively recent case (*Cook* v. *United States*, 138 U. S. 157-183, 34 L. ed. 906-913), the court says: "It is said that the construction we place upon the 2d section of article 3 makes it obnoxious to the *ex post facto* clause of the Constitution. In support of this position reference is made to *Kring* v. *Missouri*, 107 U. S. 221, 27 L. ed. 506, where it was declared that any statute passed after the commission of an offense, which, 'in relation to that offense or its consequences, alters the situation of a party to his disadvantage,' is an *ex post facto* law. This principle has no application to the present case. The Act of 1889 does not touch the offense nor change the punishment therefor. It only includes the place of the commission of the alleged offense within a particular judicial district, and subjects the accused to trial in that district rather than in the court of some other judicial district established by the government against whose laws the offense was committed. This does not alter the situation of the defendants in respect to their offense or its consequences. 'An *ex post facto* law,' this court said, in *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 35-38, 19 L. ed. 573, 574, 'does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission.'" See *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485.

This *résumé* of the authoritative federal decisions, however conflicting they may seem, or however unsatisfactory they may be in defining what is and what is not an *ex post facto* law, shows, we think, that the court has not established as law the broad definitions laid down in the *Kring* and *Medley Cases*, but that the definition of *Mr. Justice* Washington, quoted in *Kring* v. *Missouri*, may be relied upon, that a law which, in relation to the offense or its consequences, alters the situation of a party to his disadvantage, is an *ex post facto* law, as this formula evidently comprehends and is the sum of all the definitions.

The state courts have strongly leaned to the position that a mere change in procedure is not an *ex post facto* law, and to the doctrine that an act, to be denounced as unconstitutional in this respect, must make punishable that which was not punishable at the time the act was committed, or which aggravates the punishment, or operates to the disadvantage of the accused in relation to the crime or its punishment. Laws have been held constitutional which, after the commission of an offense, decrease the number of a jury in trials for misdemeanors (*State* v. *Carter*, 33 La. Ann. 1314); which provide that, in all questions affecting the credibility of a witness, his general moral character may be given in evidence (*Robinson* v. *State*, 84 Ind. 483); which authorize the punishment of a person for an offense previously committed, and as to which all prosecution and punishment were barred at its passage, according to pre-existing statutes of limitation (*State* v. *Moon*, 42 N. J. L. 208); which reduce the number of peremptory challenges allowed the accused (*Dowling* v. *State*, 5 Smedes & M. 664; *Mathis* v. *State*, 31 Fla. 311); which change the manner of summoning a jury (*Perry* v. *Com.* 3 Gratt. 632); which allow amendments to pending indictments (*State* v. *Manning*, 14 Tex. 402); which prevent the defendant from taking advantage of variances in the indictment (*Com.* v. *Hall*, 97 Mass. 570); which give the state seven peremptory challenges (*State* v. *Ryan*, 18 Minn. 370 [Gil. 343]; *Walston* v. *Com.* 16 B. Mon. 16, 40); requiring the jury, instead of the court, to fix the punishment (*Holt* v. *State*, 2 Tex. 363); making the court, instead of the jury, judges of the law (*Marion* v. *State*, 20 Neb. 236, 57 Am. Rep. 825); changing the place of trial after the commission of the offense (*State* v. *Gut*, 13 Minn. 341 [Gil. 315]); clothing justices of the peace with jurisdiction over crimes previously committed (*State* v. *Welch*, 65 Vt. 50); dividing a county into judicial districts (*Potter* v. *State*, 42 Ark. 29); repealing a law providing for preliminary examinations after indictment found (*Jones* v. *Com.* 86 Va. 661); changing method of prosecution from indictment to information by prosecuting attorney (*People* v. *Campbell*, 50 Cal. 243, 43 Am. Rep. 257; *Lybarger* v. *State*, 2 Wash. 552; *Re Wright*, 3 Wyo. 478, 13 L. R. A. 748).

By our statute taking away the right of the accused to object, by an affidavit made upon information or belief, to the examining magistrate, after the commission of felony, the petitioner was not deprived of any substantial right or protection, as it is within the power of the legislature to change the form and method of procedure in any manner which, in relation to the crime or its consequences, does not alter the situation of the accused to his disadvantage, and the situation of the prisoner was not so changed by the statute challenged by him. It cannot be seriously contended that all who may have committed criminal offenses prior to the date of the statute repealing the law providing that the defendant may, upon his own statement upon information and belief, secure a change of place of trial, shall have the right for years to come (as we have no statute of limitations relating to crimes or misdemeanors) to be considered as pardoned by the legislature, or as entitled to the right under a repealed statute to object to the magistrate before whom they are brought upon complaint and warrant to answer a criminal charge of which the magistrate has not full jurisdiction to hear, try, and determine. True, in one case, the right of a change of venue in preliminary examinations is said to be a substantial and important right, of which the accused cannot be deprived except by his own act (*State* v. *Sorenson*, 84 Wis.

27); but this is a right given under a statute already existing. If the statute had been repealed, it is doubtful if the Wisconsin court would hold, in face of all the authorities, that the right to a change of place of trial, being a method of procedure, in which no one has a vested right, cannot be taken away by a statute after the commission of the offense. *Cook* v. *United States*, 138 U. S. 183, 34 L. ed. 913; *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 38, 19 L. ed. 574; *Hopt* v. *Utah*, 110 U. S. 589, 28 L. ed. 268. The right to a change of place of trial, or a change of judge, in case where the magistrate or judge is disqualified by prejudice, or where there cannot be a fair trial owing to the prejudice in the community against the accused, always existed at common law, but the venue was never changed upon the mere opinion or belief of the party applying therefor at common law, as the rule was that facts and circumstances must appear satisfying the court. 1 Bishop, Crim. Proc. 70, 71.

By no accepted definition of an *ex post facto* law is this statute, which sweeps away the provision that the accused may secure a change of magistrate or place of preliminary examination in a criminal case upon his affidavit of belief of the prejudice of the magistrate before whom he has been brought for such examination, an *ex post facto* law. It does not make criminal what before its enactment was innocent; it does not inflict greater punishment than was attached to the crime when committed; it does not alter the rules of evidence, and direct that less or different testimony may be received than required at the time of the commission of the offense; and it does not alter, in relation to the crime or its consequences, the situation of the accused to his disadvantage. If we go further, and add other means invented in some of the cases for the detection of an *ex post facto* law, it does not deprive him of any substantial or vested right provided by law at the time of the guilty act for his protection. It is necessary, in the administration of justice, that one accused of crime should have a fair trial before an impartial and unprejudiced judge and jury, and even an examination on the initial or preliminary inquiry before an impartial and unprejudiced magistrate. Nowhere does the record show that the petitioner has been shorn of any of these substantial rights and privileges; for, if the examining tribunal, the court of inquiry, was prejudiced against him, we have no knowledge of that fact from the record, and it is not even asserted that the allegations of the defendant, upon information and belief, made in his affidavit, alleging such prejudice before the examining magistrate were true. It merely appears that he believes them to be true, and this is insufficient under the statute in force at the time that he was complained against at the preliminary examination. Endless confusion would result from a decision by us that the legislature had no right to make new regulations as to methods of procedure in the courts of justice, or to remove and repeal old rules that may be found to be a temptation to perjury or liable to abuse, and which in no way affect the right of the accused to a fair and impartial hearing, either in the examining or in the trial court.

The writ is disallowed, and the petition for the writ is dismissed. In accordance with the provisions of the habeas corpus act, the clerk of this court will return the petition for the writ to the petitioner, or the person applying for the writ, with a certified copy of this opinion containing the reasons of this court for disallowing and refusing the writ.

Conaway and **Potter**, *JJ.*, concur.

CALIFORNIA SUPREME COURT.

SAN DIEGO WATER CO., *Appt.*,
v.
SAN DIEGO FLUME CO., *Respt.*

(.....Cal.....)

1. A prayer of a complaint for damages for breach of a contract and for specific performance of the same, based upon the same facts, does not render the complaint obnoxious to the objection that it joins several causes of action without separately stating them.

2. Trustees appointed by parties to a contract to manage the details of the business done thereunder are not necessary parties to an action thereon.

3. A contract between corporations organized to distribute and furnish water to consumers in a county and city, for co-operation in supplying water to the city, is not *ultra vires* because one officer of each corporation is appointed a trustee and they together given general charge of the operation of the works, and of keeping the accounts of receipts and expenses, with a limited power of determining what shall be charged to the account of operating expenses, and with other powers and duties simply executory and such as could not be discharged by any board of directors otherwise than through an agent.

4. The appointment by a corporation, by its board of directors, of another corporation to act as its sole agent in the sale of water within a city, to be distributed by means of plants of both corporations, is not in violation of Civ. Code, § 354, subdivs. 5, 8, where the agency, although exclusive, is not unlimited or unrestricted.

5. A contract between corporations organized to distribute and furnish water to consumers in a county and city, one of which owns a supply of water and a pipe line ending at the city limits, and the other a distributing plant within the city, for co-operation in

NOTE.—The general subject of monopolies and combinations by corporations will be found treated to a considerable extent in the *note* to People v. Chicago Gas Trust Co. (Ill.) 8 L. R. A. 497.

For right of one corporation to hold the stock of another, see *note* to Buckeye Marble & T. Co. v. Harvey (Tenn.) 18 L. R. A. 252.

See also 39 L. R. A. 299.

supplying water to the city and providing a method of determining the price of water, is not in violation of public policy as a combination to create a monopoly, since the California constitution reserves to municipal corporations the power of regulating water rates.

(August 26, 1895.)

APPEAL by plaintiff from a judgment of the Superior Court for San Diego County in favor of defendant in an action brought to enforce specific performance of a contract for the furnishing of water to the City of San Diego and for damages for its breach. *Reversed.*

The facts are stated in the Commissioner's opinion.

Messrs. **Works & Works,** for appellant:

As to the extent to which a corporation may go, in making contracts, without bringing itself within the prohibitory rules,—

See *Ellerman* v. *Chicago Junction R. & U. S. Y. Co.* 49 N. J. Eq. 217; *Union Water Co.* v. *Murphy's Flat Fluming Co.* 22 Cal. 621; *Sutro Tunnel Co.* v. *Segregated Belcher Min. Co.* 19 Nev. 121; *Leslie* v. *Lorillard*, 110 N. Y. 519, 1 L. R. A. 456; 1 Wood, Railway Law, pp. 491–499; *Bissell* v. *Michigan S. & N. I. R. Co.* 22 N. Y. 258; *Kent* v. *Quicksilver Min. Co.* 78 N. Y. 159; *Chicago, St. L. & N. O. R. Co.* v. *Pullman Southern Car Co.* 139 U. S. 79, 35 L. ed. 97; *Elkins* v. *Camden & A. R. Co.* 36 N. J. Eq. 241; *Central Shade Roller Co.* v. *Cushman*, 143 Mass. 353; *State* v. *Hancock*, 35 N. J. L. 537; *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 543, 99 Am. Dec. 300; *Sussex R. Co.* v. *Morris & E. R. Co.* 19 N. J. Eq. 13.

If the corporation has derived any benefit from the execution, or partial execution, of the contract, it can be compelled to perform on its part, to the extent, and up to the time, such contract had been acted upon.

Kelsey v. *National Bank*, 69 Pa. 426; 1 Wood, Railway Law, pp. 491–502; *Bissell* v. *Michigan S. & N. I. R. Co. supra; Witter* v. *Grand Rapids Flouring Mill Co.* 78 Wis. 543; *Heims Brewing Co.* v. *Flannery*, 137 Ill. 309; *Holmes* v. *Willard*, 125 N. Y. 75, 11 L. R. A. 170; *Manchester & L. R. Co.* v. *Concord R. Co.* 66 N. H. —, 9 L. R. A. 689, 3 Inters. Com. Rep. 819; *State Board of Agriculture* v. *Citizens' Street R. Co.* 47 Ind. 407, 17 Am. Rep. 702; *Bradley* v. *Ballard*, 55 Ill. 413, 8 Am. Rep. 656; *Oil Creek & A. R. R. Co.* v. *Pennsylvania Transp. Co.* 83 Pa. 160; *Main* v. *Casserly*, 67 Cal. 127.

In *Heims Brewing Co.* v. *Flannery, supra*, it is said: "The defense of *ultra vires* cannot avail the defendant. Even admitting that entering into said contract was in excess of the defendant's corporate powers, yet, having entered into said contract and enjoyed its benefits, it should be estopped to appeal to the limitations imposed by its charter for the purpose of escaping payment of the stipulated consideration."

See also *Manchester & L. R. Co.* v. *Concord R. Co.* and *Oil Creek & A. R. R. Co.* v. *Pennsylvania Transp. Co. supra.*

This was not a copartnership contract.

Hanna v. *Flint*, 14 Cal. 74; *Wheeler* v. *Farmer*, 38 Cal. 203; *Stuart* v. *Adams*, 89 Cal. 367; *Smith* v. *Schultz*, 89 Cal. 526; *Loomis* v. *Marshall*, 12 Conn. 69, 30 Am. Dec. 596; *Keiser* v. *State*, 58 Ind. 379; *Boyce* v. *Brady*, 61 Ind. 432; *Harvey* v. *Childs*, 28 Ohio St. 319, 22 Am. Rep. 387; 17 Am. & Eng. Encyclop. Law, p. 845.

Messrs. **McDonald & McDonald,** for respondent:

Enough appears upon the face of the complaint to show that said contracts were and are void because beyond the powers of the respective corporations and against the public policy of the state.

The primary object of the two corporations in entering into those contracts was to control the water supply, and thereby enhance the price of water in the city of San Diego, and to create and maintain a monopoly of the water business of said city. This rendered the contracts void.

Spelling, Trusts & Monopolies, §§ 82, 106–109; *Arnot* v. *Pittston & E. Coal Co.* 68 N. Y. 559, 23 Am. Rep. 190; *Ford* v. *Gregson*, 7 Mont. 89; *Santa Clara Valley Mill & L. Co.* v. *Hayes*, 76 Cal. 387.

A corporation can exercise no other powers than such as are specifically granted, or such as are necessary for carrying into effect the powers granted.

Vandall v. *South San Francisco Dock Co.* 40 Cal. 83; Morawetz, Priv. Corp. § 316; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55.

The authority of every agent of a corporation is derived, directly or indirectly, from the agreement of the shareholders as expressed in their charter or articles of incorporation.

The board of directors cannot depart from the company's chartered purposes under any circumstances.

Morawetz, Priv. Corp. § 514.

Whatever tends to injustice or oppression, restraint of liberty, commerce, and natural or legal right; whatever tends to the obstruction of justice, or to the violation of a statute; and whatever is against good morals,—when made the object of a contract is against public policy, and, therefore, void, and not susceptible of enforcement.

9 Am. & Eng. Encyclop. Law, p. 880. See also Greenhood, Pub. Pol. p. 2; *Kreamer* v. *Earl*, 91 Cal. 117; *Dial* v. *Hair*, 18 Ala. 800, 54 Am. Dec. 179; *Smith* v. *Johnson*, 37 Ala. 636; *Damrell* v. *Meyer*, 40 Cal. 170; *Beard* v. *Beard*, 65 Cal. 354; *Alpers* v. *Hunt*, 86 Cal. 78, 9 L. R. A. 483; *Gridley* v. *Dorn*, 57 Cal. 78, 40 Am. Rep. 110; *Mitchell* v. *Cline*, 84 Cal. 409.

The state has declared all water appropriated for the purposes of sale, rental, or distribution to be charged with a public use, and has indicated the policy of the state to the prevention of monopolies so far as furnishing light and water to cities and their inhabitants is concerned.

People v. *Stephens*, 62 Cal. 209; *People* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *McCrary* v. *Beaudry*, 67 Cal. 120.

The franchises of a corporation are privileges granted and held in personal trust by it, and cannot be transferred, either by forced sale or by voluntary assignment, except by permission of the legislature, and when that permission is granted the mode of transfer

pointed out is the measure of the power; and any attempt on the part of the corporation to devest itself of its franchise and thus disable itself from performing its duties to the public, without legislative authority is *ultra vires* and void.

Wood v. *Truckee Turnp. Co.* 24 Cal. 474; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Stockton* v. *Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97; *Randolph* v. *Larned*, 27 N. J. Eq. 557; *Troy & B. R. Co.* v. *Boston, H. T. & W. R. Co.* 86 N. Y. 107; *Fanning* v. *Osborne*, 102 N. Y. 441; *Peoria & R. I. R. Co.* v. *Coal Valley Min. Co.* 68 Ill. 489; *Richardson* v. *Sibley*, 11 Allen, 65, 87 Am. Dec. 700; *Middlesex R. Co.* v. *Boston & C. R. Co.* 115 Mass. 347; *Stewart's App.* 56 Pa. 413; *Gibbs* v. *Drew*, 16 Fla. 147, 26 Am. Rep. 700; Ray, Contractual Limitations, pp. 273, 278.

This agreement is also *ultra vires* and illegal, for the reason that it undertakes to constitute the parties partners in the business of furnishing water to the city of San Diego and its inhabitants.

1 Morawetz, Priv. Corp. § 421; 2 Beach, Corp. § 843; Ray, Contractual Limitations, § 56; *People* v. *North River Sugar Ref. Co.* 121 N. Y. 582, 9 L. R. A. 33, 54 Hun, 355, 5 L. R. A. 386; *Mallory* v. *Hanaur Oil Works*, 86 Tenn. 598; *Pearce* v. *Madison & I. R. Co.* and *Peru & I. R. Co.* 62 U. S. 21 How. 441, 16 L. ed. 184; *Burke* v. *Concord Railroad*, 61 N. H. 160; *Quinn* v. *Quinn*, 81 Cal. 14.

This agreement is contrary to public policy, for the reason that it is a combination between the parties for the purpose of creating a monopoly for the sale of water to the city of San Diego and its inhabitants.

Pacific Factor Co. v. *Adler*, 90 Cal. 110; *Santa Clara Valley Mill & L. Co.* v. *Hayes*, 76 Cal. 387; Ray, Contractual Limitations, pp. 212, 213, 234, 238, and cases cited; *Richardson* v. *Buhl*, 77 Mich. 632, 6 L. R. A. 457.

The general rule that contracts in partial restraint of trade are not invalid does not apply to corporations engaged in a public business in which the public are interested.

Chicago Gas Light & Coke Co. v. *People's Gas Light & Coke Co.* 121 Ill. 530; *People* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Gibbs* v. *Consolidated Gas Co.* 130 U. S. 396, 32 L. ed. 979; *West Virginia Transp. Co.* v. *Ohio River Pipe Line Co.* 22 W. Va. 600, 46 Am. Rep. 527; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55; *Miner's Ditch Co.* v. *Zellerbach*, 38 Cal. 543, 99 Am. Dec. 300.

When the illegal purpose is disclosed, whether the shelter be under form of partnership of individuals or of corporations, the grasp of a court of equity will be equally powerful to control the trust.

Ray, Contractual Limitations, pp. 234, 279; *Stockton* v. *Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97; *People* v. *North River Sugar Ref. Co.* 54 Hun, 354, 5 L. R. A. 386.

These corporations not having had the power to enter into this agreement, it is void *in toto*, and the defendant may avail itself of the plea of *ultra vires*.

Miner's Ditch Co. v. *Zellerbach*, *Thomas* v. *West Jersey R. Co.*, and *Central Transp. Co.* v. *Pullman's Palace Car Co.*, *supra*.

Haynes, *Ch. J.*, filed the following opinion:

Defendant's demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment of dismissal was entered, from which judgment it appeals. The only questions to be considered, therefore, are those presented by the demurrer.

The complaint alleges, in substance, that both the parties to this action are corporations organized and existing under the laws of this state for the purpose of distributing, selling, and furnishing water to consumers in the county and city of San Diego; that the plaintiff is the owner of a complete distributing plant for furnishing water to the city of San Diego and its inhabitants; that the defendant is the owner of water rights, reservoirs, and a supply of water outside of said city, from which the water is conducted by flumes and pipes to the city boundary, where, during all the times mentioned in the complaint, they were and are connected with the water mains and pipes of the plaintiff; that the defendant was not and is not the owner of any water pipes within the city, and was unable to distribute or furnish its water to the city or its inhabitants. Under these circumstances, the parties to this action executed two written agreements, both bearing date November 6, 1890, which are referred to as Exhibits A and B, respectively, but which constitute one contract. By the first, the flume company appoints the water company its sole agent for the exclusive sale of its water within the corporate limits of the city, as then or thereafter established, excepting the peninsula of San Diego; but all sales made by the water company "shall be subject to the approval of the party of the first part [the flume company], and no sales shall be made without the consent of the party of the first part." It was further provided that said appointment should continue and be in force during the continuance of the other contract of the same date, namely, twenty years. The other contract—Exhibit B—is very long, but for the purpose of disposing of the questions made upon this appeal may be greatly condensed. By this agreement E. S. Babcock and J. W. Sefton, the former the president of the plaintiff corporation, and the latter the president of the defendant, were appointed trustees, to whom were given the control of the properties of these corporations, respectively, "so far as the same may be confined to the corporate limits of the city of San Diego," to operate and control the same for the use and benefit of the respective parties thereto. These trustees were selected and named, one by each corporation, and each was to hold said office of trustee at the pleasure of the party naming him, who should also appoint his successor, and the compensation of each should be fixed and paid by the party appointing

him; that "the use, operation, and control of these properties by the said trustees shall be for the purpose of furnishing the water supply to the city of San Diego and its inhabitants, the profits arising therefrom to be subject to the control and use of the parties hereto, as hereinafter mentioned; said parties hereto agreeing to combine their joint endeavor for the advancement of their respective interests under this trust, subject to the conditions as hereinafter mentioned." The water company agreed to furnish its entire plant, and the flume company agreed to deliver at the city limits a sufficient quantity of good water for the supply of the city and its inhabitants, to be used by the trustees for that exclusive purpose. The trustees were to keep three separate accounts, one designated as the "operating account," another as "first-division account," and the third, as "second-division account." The second and third accounts were for the purpose of distributing the profits between the respective corporations. The agreement stated, in a general way, what should be charged to operating expenses, and except as provided, and excluding certain specified matters, the trustees were empowered to determine what should constitute a proper charge to that account. It was also provided that the flume company might use the water company's system of pipes for conducting water to parties outside the city limits, the compensation therefor to be fixed by the trustees.

The complaint further alleged that the parties thereto entered upon the performance of said agreement, that the plaintiff in all things carried out and performed the same on its part, that plaintiff and defendant and their said trustees failed to agree as to the proper basis of division of the accounts between them, and especially as to the amount to be expended for the extension of plaintiff's plant, and have been unable to agree upon a settlement of their said accounts; alleged plaintiff's willingness to settle and adjust the same, but that defendant made said differences an excuse for not furnishing the water required by the contract, and had wholly failed since May 2, 1892, to comply with said contract, though plaintiff had demanded in writing such performance; alleged that upon a true and just accounting there was due to it from defendant the sum of about $50,000, but that if the court should find otherwise, and that it was indebted to the defendant, it thereby offered to pay the same; that, by the defendant's failure to comply with its said contract, plaintiff had been damaged in the sum of $100,000; that, acting under said contract, plaintiff contracted with the city of San Diego to supply it with water for the term of twenty years at a reasonable profit, but that defendant, after furnishing water for said purpose for about a year, failed and refused to longer furnish the same, whereby plaintiff sustained special damage in the sum of $100,000.

The prayer is for an accounting, for damages, and for a specific performance of the contract, and for general relief.

The demurrer was upon several grounds, viz.: (1) For want of facts sufficient to constitute a cause of action; (2) that two alleged causes of action for damages are joined with an alleged cause of action for specific performance, without separately stating said several causes of action; (3) for defect of parties, in that Babcock and Sefton, the trustees, are not made parties; and (4) that the complaint is uncertain, in that several causes of action are joined without being separately stated and numbered.

The second and fourth grounds of demurrer go to the joinder of several causes of action without being separately stated. Different causes of action are not stated, however. Both legal and equitable relief is sought, but the right to such relief is based upon the same facts. Pom. Rem. § 452. Nor is the third ground of demurrer well taken. The trustees were simply the agents or instruments of the parties to the contract, and had no interest in the controversy in any legal sense.

Whether the complaint states facts sufficient to constitute a cause of action is the principal question in the case. Respondent contends "that enough appears upon the face of the complaint to show that said contracts were void, because beyond the powers of the respective corporations, and against the public policy of the state." The questions here presented were discussed by counsel in another action between the same parties, but that case went off upon another point, and no opinion was expressed upon them. *San Diego Water Co.* v. *San Diego Flume Co.* 100 Cal. 43.

It is contended that the contract in question was *ultra vires*, because under it the management of the affairs of the two corporations were taken from their respective boards of directors and transferred to two trustees, each of whom is a stranger to the corporation appointing the other. This statement of the effect of the contract is too broad. When analyzed, the powers of the trustees are very limited. By that part of the contract called "Exhibit A," the plaintiff, as a corporation, was appointed the agent of the defendant corporation for the sale of water within the city of San Diego; but all sales were subject to the approval of the defendant, and no sales could be made without its consent. The trustees were not given any power or authority over the sale of the water. They were given the general charge of operating the works of the plaintiff in distributing the water furnished by the defendant, and of keeping the accounts of receipts and expenses, with a limited power of determining what should be charged to the account of operating expenses; and, with that exception, their whole powers and duties were executory, and such as could not be discharged by any board of directors otherwise than through an agent. Nor is it material whether these agents were or were not connected with either corporation. They derived their authority from the agreement, and, as they were named in the agreement, each corporation acted upon and consented to the appointment of both. It is not contended that two corporations may not enter into contracts with each other. Their power to do so de-

pends, however, upon the character of the contract, examined in the light of their charters and of public policy. So far as the subject-matter of the contract is concerned, it relates to the sale and distribution of water, and to that extent, at least, it relates to the very purpose of the organization of each of these corporations, and is therefore presumably within their power. It is contended, however, in support of the demurrer, "that, under the power conferred by subdivisions 5 and 8 of section 354 of the Civil Code, the defendant, by its board of directors, was only authorized to appoint such agents and enter into such contracts as were essential to the transaction of its ordinary affairs; and that any attempt to make the plaintiff its exclusive agent for the sale of water was illegal and beyond the powers of the corporation." The statement that plaintiff is made "the exclusive agent" of the defendant for the sale of water is too broad. Such agency is confined to the corporate limits of the city of San Diego, within which the plaintiff alone had the means of distributing water to consumers. The agency, however, while exclusive, was not unlimited or unrestricted; but all sales of water were to be subject to the approval of the defendant, and no sale could be made without its consent. It is not suggested that the plaintiff corporation could not legally become an agent as to matters consistent with or in furtherance of the objects of its organization, nor that the defendant, within similar limitations, could not appoint an agent; but the real question involved lies back of and beyond these objections, which go only to the instrumentalities used to carry out the ultimate purpose of the parties in making the contract in question, viz., that the contract is against public policy, and therefore void.

It is urged that "both corporations were formed for the purpose, among other things, of furnishing water to the city of San Diego and its inhabitants, and are, therefore, quasi public corporations;" and that "the agreement is contrary to public policy, for the reason that it is a combination between the parties for the purpose of creating a monopoly for the sale of water to the city of San Diego and its inhabitants." That the contract is consistent with the purpose of the organization of each of these corporations, viz., "to furnish the city of San Diego and its inhabitants with water," is too clear for discussion. The question is therefore narrowed down to this: Does the agreement create a monopoly, or in any manner injuriously affect the interests of the city or its inhabitants? "Monopoly" signifies the sole power of dealing in a particular thing, or doing a particular thing, either generally or in a particular place. A monopoly is usually, though not necessarily, harmful or injurious to public interest, though, as that term is generally used, injury to the public is implied, and competition is therefore regarded as favorable to the public interest. But there is a competition which tends to monopoly by driving out all but the stronger competitor, when prices are again increased so as not only to yield a profit upon the original investment, but to recoup the losses incurred in breaking down competitors; or, where the competitors are of equal strength and tenacity of purpose, it may result in the destruction of the public service by the collapse of all of them. At and before the date of the contract in question, the plaintiff was the owner of a pumping plant, and of a system of mains and pipes for the distribution of water to the city of San Diego and its inhabitants, and was engaged in supplying them with water. The defendant was the owner of a reservoir supplied with water, together with flumes and pipes by which the water was conveyed to the borders of the city; but it owned no distributing plant by which it could dispose of its water within the city. To enable it to do so, it must either purchase plaintiff's distributing plant, or construct a distributing system of mains and pipes of its own, or sell its water within the city by or through the plaintiff, under some agreement for that purpose. It is not suggested that one distributing plant is not sufficient for all the wants of the city and its inhabitants, and certainly we cannot assume that it is not. Some agreement of the character here in question which would effectuate the evident intention of the parties would appear to be to the best interest of both corporations; and if the city and its inhabitants can be properly served through one distributing system, at reasonable rates, it is obviously to its best interest that its streets should not be subjected to the burden of laying and keeping in repair an additional system of mains and pipes. So far as the parties to this contract are concerned, the restraint is only partial. It is confined to the city of San Diego, or rather to that part of it which did not include the peninsula; and this, we think, was upon a sufficient consideration, and not an unreasonable restriction as between the parties. See *Mitchel* v. *Reynolds*, 1 Smith, Lead. Cas. 8th ed. 417. Nor does it injuriously affect the city or its inhabitants. Our constitution provides that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law;" and it further provides that the rate or compensation to be collected for the use of water supplied to any city or town or its inhabitants shall be fixed annually by the governing body of the city and county, or city, or town, and any person or corporation collecting water rates "otherwise than as so established" shall forfeit the franchises and waterworks of such person or corporation to the city, etc. Const. art. 14, § 1. In *Spring Valley Water Works* v. *San Francisco City & County*, 82 Cal. 286, 6 L. R. A. 756, it was held that, when the constitution provides for the fixing of rates or compensation for the use of water, it means reasonable rates and just compensation; that the power of regulating rates is not a power of confiscation, or to take the property of the water company without just compensation.

Under the constitution, and the construction thus given its provisions, we fail to

perceive how the agreement in question can create a monopoly, or in any manner increase the rate or compensation to be paid by the city or its inhabitants for the water supplied. Indeed, it is evident that water can be supplied more cheaply through one distributing plant than through two; and the governing body of the city, in whom is vested the power to fix the water rates, is bound to take that fact into consideration, as well as all other facts which will enable it to fix "reasonable rates" and award a "just compensation." In Morawetz, Priv. Corp. § 1129, it is said that the same rule which applies to traffic arrangements between competing railroads applies also to telegraph, water, and gas companies; and, in relation to traffic arrangements between competing roads, it is said, at section 1131: "It is certainly not true that all agreements or combinations restricting competition are illegal at common law. . . . Even if there were such a rule as has been claimed, applicable to competition in trade, the principle and policy of the rule would not be applicable to traffic arrangements designed merely to prevent ruinous competition and 'wars' among railroad companies. The main objection which has been urged against combinations restraining competition in trade, namely, that such combinations tend to produce monopolies and cause extortion, has no application to combinations among railroad companies, for railroad companies are prohibited by law, irrespective of any combination, to charge more than reasonable rates. . . . Public policy clearly does not demand that railroad companies operating competing lines shall engage in strife causing their financial ruin." With even greater force may it be said in this case that public policy does not condemn nor prohibit an arrangement intended to prevent a competition between these corporations which would inevitably result in the financial ruin of one or both of them, and which could not in any event benefit the city or its inhabitants.

The contention that the agreement in question creates a partnership between these corporations is without force. It does not appear that it covers all of the business of either party, though the whole of the business of each relates to the sale of water. In a partnership, each partner has authority to represent all the partners, and to bind them by his acts so far as they relate to the partnership business. Here the agency is not of that character, but is expressly limited. It simply provides a mode of determining the compensation the defendant shall receive for the water furnished by it to the plaintiff,—an arrangement made necessary by the fact that neither of the parties nor both, combined, could determine the rate at which the water could be sold to consumers, nor accurately fix the cost of distribution, nor the quantity of water required.

The judgment should be reversed, with directions to overrule the demurrer to the complaint.

We concur: **Vanclief**, *C.*; **Belcher**, *C.*

29 L. R. A.

Per Curiam:

For the reasons given in the foregoing opinion, *the judgment appealed from is reversed*, with directions to overrule the demurrer to the complaint.

PEOPLE'S HOME SAVINGS BANK
v.
SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO, (Department No. 4).

(104 Cal. 642.)

1. **A by-law providing that no proxy shall be voted** by any one who is not a stockholder of the corporation is invalid under Civ. Code, § 312, providing generally that stockholders may be represented by proxies.

2. **The substitution of an attorney** for a corporation in a proceeding to restrain a receiver cannot be prevented by the prior attorney on the ground of disqualification by reason of his relations to the receivers, so long as the parties do not object.

NOTE.—*Right to vote by proxy in private corporations.*

I. *At common law.*
II. *Under statutes and by-laws.*
 a. *Statutes.*
 b. *By-laws.*
III. *Form of proxy.*
IV. *When and for what purpose a proxy may be used.*
V. *Rejection of proxy by inspectors.*
VI. *Revocation of proxy.*
VII. *Directors voting by proxy.*
VIII. *Miscellaneous matters.*

I. *At common law.*

It must be regarded as entirely settled that there is no common-law right of voting by proxy on shares of stock in a corporation. While there is no attempt in this note to make a collection of the statutes of the different states on the subject, it may be said that in most of the states enactments have been made giving the right of shareholders to be represented by proxies. For many years these provisions in the state of New York were limited in their scope and were different for different classes of corporations, but by the Corporation Law of 1892 a sweeping provision is made authorizing the use of proxies in all private corporations except religious corporations. The statutes of the different states generally provide now for such proxy voting. A collection of them is made in Thompson on Corporations, vol. 1, § 738.

That proxies could not be used at common law by a member of a corporation unless some specific provision enabled him to do so, is declared in Harben v. Phillips, L. R. 23 Ch. Div. 14, 48 L. T. N. S. 334, 31 Week. Rep. 173.

The proposition that the right of voting by proxy is not a general right, and that the party who claims it must show a special authority for that purpose, is affirmed in People v. Twaddell, 18 Hun, 427.

So, it is held in Pennsylvania that in the absence of any express authority to vote by proxy, given either by the charter of the corporation or by any by-law, the stockholders cannot vote by proxy. Com. v. Bringhurst, 103 Pa. 134, 49 Am. Rep. 119;

See also 35 L. R. A. 209.

(December 3, 1894.)

APPLICATION for a substitution of another attorney in place of those representing petitioner in a proceeding to obtain a writ of prohibition requiring the Superior Court of the City and County of San Francisco to abstain from continuing to take jurisdiction in a proceeding to annul the petitioner's charter. *Application granted.*

The facts are stated in the opinion.

Mr. **John H. Durst**, with *Mr.* **James Alva Watt**, *in propria persona*, in support of the application:

The code gives to stockholders the absolute right, not merely of voting their stock in person, but of voting it by proxy.

Civil Code, §§ 307–312.

The code gives to corporations the power of regulating by the by-laws the mode of voting by proxy.

Civil Code, § 303.

It does not confer power by by-law to abridge or restrict the statutory right of voting by proxy.

By-laws must not be in violation of the provisions of the charter or general laws under which the corporation was formed, nor can the substantial rights of a shareholder be abridged thereby.

1 Morawetz, Priv. Corp. 2d ed. § 487; 2 Am. & Eng. Encyclop. Law, p. 707, *note 2*, and cases cited.

The right to vote at a meeting cannot be taken away or restricted.

Morawetz, Priv. Corp. § 496; 17 Am. & Eng.

Wilson v. American Academy of Music, 43 Leg. Int. 86, 2 Pa. Co. Ct. 280.

While the right to vote by proxy is declared not necessarily to arise in the case because the use of the proxies did not change the result, the court in Philips v. Wickham, 1 Paige, 590, expressed the opinion that the right of voting by proxy is not a general right, and that the party who claims it must show a special authority for that purpose, declaring that the only case in which it is allowable, at common law, is by the peers of England, and that is said to be in virtue of special permission of the king. The court proceeds to say: "It is possible that it might be delegated in some cases by the by-laws of a corporation, where express authority was given to make such by-laws, regulating the manner of voting. I am not aware of any other case in which the right was ever claimed; and the express power which is generally given to the stockholders of monied and other private corporations is opposed to the claims in this case, where there is no express or implied power contained in the act."

Without proceeding to collect here all the citations to cases in which the same doctrine is recognized, if not expressly declared, and which are set forth in detail under the subsequent headings of this note, it may be said that the doctrine above stated is fully established without conflict of the decisions. It is universally conceded that the right to vote by proxy in private corporations must depend on express authority of statute or by-law.

II. *Under statutes and by-laws.*

a. *Statutes.*

When statutes expressly authorise voting by proxy, as is now quite generally the case, there is no question as to the right, except so far as it may arise in construing the statute. The validity of such statutes is unquestioned.

Where the charter of a corporation expressly gives power to vote in person or by lawful proxy, a stockholder is bound by the vote cast by his duly constituted proxy, whether it is cast in his interest or not. Mobile & O. R. Co. v. Nicholas, 98 Ala. 92.

The main case of PEOPLE'S HOME SAV. BANK v. SAN FRANCISCO CITY & COUNTY SUPER. CT. cites as an authority the case of *Re* Lighthall Mfg. Co., 47 Hun, 256, which held that under a statute providing in general terms that the election shall be made by such stockholders as attend either in person or by proxy, a by-law providing that proxies can be held and voted upon only by persons who are stockholders is void, because it restricts the right which the statute gives.

See a somewhat similar decision in *Re* White v. New York State Agri. Soc. 45 Hun, 580, *infra*, III.

The right to vote by proxy, expressly given by the act of incorporation, is involved in the case of Monsseaux v. Urquhart, 19 La. Ann. 482, in which the test was respecting other requisites of the right to vote.

But, expressing an opinion without deciding that stockholders cannot vote by proxy in ordinary cases, it is decided in Brown v. Com., 3 Grant, Cas. 209, that, where the charter declares that "each person being present at the election" shall be entitled to vote, without making any provision for proxies, proxy voting cannot be allowed.

Although the statutes provide for certain regulations of elections of corporations, and designate the mode of voting by proxy, this does not defeat the jurisdiction of equity to issue an injunction against voting certain shares of stock. Webb v. Ridgely, 38 Md. 364. But the ground of the injunction in this case does not appear to have been connected with the use of proxies, but rather the evasion of the statute limiting the number of votes to be cast by any stockholder by means of a colorable transfer of shares without consideration.

On a motion for a preliminary injunction made in a federal court sitting in one state to prevent voting by proxy at a corporate election in another state, on which it was contended that voting by proxy could be authorized only by express statute, the court refused to interfere on that ground, but acted on the presumption that the officers conducting the election would recognize and be governed by the laws of the state in which the election was held. Woodruff v. Dubuque & S. C. R. Co. 30 Fed. Rep. 91.

b. *By-laws.*

In deciding that stockholders might by by-law provide for the right to vote by proxy in the absence of any statute to the contrary, it is said in Com. v. Detwiller, 131 Pa. 614, 7 L. R. A. 357: "When the methods of voting are not fixed by general law, the corporators may make the law for themselves, subject to the qualification that such laws and regulations as they make shall not conflict with the laws of the state or of the United States." The court again says also: "They had the power to refuse to receive votes unless offered by the voters in person, but, upon consideration, they decided that votes might be cast by proxy. This also was a reasonable regulation, uniform in its application, works no wrong to any shareholder, and conflicts with no law of the commonwealth. It is therefore a valid and binding law, made by the shareholders for their own government."

But the power of a corporation to authorize by by-law the practice of voting by proxy is expressly denied in Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33, in the absence of express authority by statute to enact such by-laws. It is declared that the right to make such a by-law is not incident to a corporation, as it is not essential or even apparently necessary to carry into effect its objects, and it is further decided that charter authority to make by-laws, provided they be not repugnant to that act nor to the constitution and laws of the state, is not sufficient to authorize a by-law permitting proxies. The court disapproves of the

Encyclop. Law, p. 45; *Brewster* v. *Hartley*, 37 Cal. 24, 99 Am. Dec. 237.

Where there is no conflict between the interests of two parties, although on different sides, an attorney may appear for both without professional impropriety.

Weeks, Attorneys at Law, 2d ed. § 120 *a*, p. 256.

Sometimes in chancery suits he may appear for different parties, some of whom are plaintiffs and some defendants.

Id. 2d ed. § 271, p. 548.

So for plaintiff and intervenor.

Deering v. *Hurt* (Tex.) 2 S. W. Rep. 42; Weeks, Attorneys at Law, 2d ed. § 120 *a*, p. 256.

The solicitor of the complainant in a chancery cause may, without impropriety, draw and file answers for any of the defendants who admit the allegations of the bill and make no defense.

Cargile v. *Ragan*, 65 Ala. 287; Weeks, Attorneys at Law, 2d ed. § 120 *a*, p. 256.

In the case at bar the petitioner desiring to dismiss, what impropriety is there in the attorney for respondent appearing for them to make such dismissal? No other parties are before the court. It is only where, in the same action, or in a different action, where the same matter comes necessarily into controversy, that an attorney without breach of professional obligation cannot appear at the same or at different times, for different parties.

Herrick v. *Catley*, 30 How. Pr. 208; *Re Cowdery*, 69 Cal. 32, 58 Am. Rep. 545; *People* v. *Spencer*, 66 Cal. 128, and other authorities cited.

Connecticut case of State v. Tudor, 5 Day, 329, 5 Am. Dec. 162, which, it says, stands alone. The clause of the charter prohibiting by-laws repugnant to the law of the land is held to prohibit a by-law of this kind on the ground that such a by-law is repugnant to the common law as part of the law of the land, under which all votes were required to be given in person. After an elaborate opinion in this case the court says: "Finally, the by-law in question is not authorized by the charter; is inconsistent with the popular spirit and design of the institution; is not essential or necessary to effect the object the legislature had in view; is contrary to the great principles and policy of our laws; and is not even for the apparent good of the company itself. It is therefore void."

But it is this New Jersey case, rather than the Connecticut case, which stands alone. We have found no other case which denies the validity of by-laws authorizing proxies.

In the Connecticut case just mentioned, State v. Tudor, 5 Day, 329, 5 Am. Dec. 162, the court holds that such a by-law is a reasonable one and in the absence of any statute to the contrary is valid, although at common law votes by members of a corporation could be given only in person. So, under the act of incorporation of a benevolent society providing for an election of trustees, directors, or managers, in such manner as may be specified in its by-laws, a by-law authorizing members to vote either in person or by proxy is held valid in People v. Crossley, 69 Ill. 195. A constitutional provision that the general assembly shall provide that in all elections for directors or managers of incorporated companies every stockholder shall have the right to vote in person or by proxy for the number of shares owned by him, either for as many persons as are to be elected or to cumulate said shares is said to be a constitutional expression in favor of voting by proxy in private corporations, whether or not it applies to corporations of this character, and therefore it cannot be said that the by-law is inconsistent with the constitution and laws of the state.

Such a by-law is also held valid in Wilson v. American Academy of Music, 43 Leg. Int. 86, 2 Pa. Co. Ct. 280.

III. *Form of proxy.*

Inspectors of election cannot reject a vote offered by proxy when proxies are authorized by statute, merely because the written proxy was not acknowledged or proved. *Re* Election of Directors of St. Lawrence S. B. Co. 44 N. J. L. 529. In this case the court said: "A stockholder who desires to exercise his right to vote on his stock by proxy is undoubtedly bound to furnish his agent with such written evidence of the latter's right to act for him as will reasonably assure the inspectors that the agent is acting by the authority of his principal. But the power of attorney need not be in any prescribed form, nor be executed with any particular formality. It is sufficient that it appear on its face to confer the requisite authority, and that it be free from all reasonable grounds of suspicion of its genuineness and authenticity; and the court, in reviewing the proceedings at an election, must be satisfied that the inspectors had reasonable grounds for rejecting the proxy."

But a provision in articles of association that a proxy "shall be attested by one or more witnesses" is held to be mandatory and not merely directory, and a resolution of the company changing the form of proxies, which was fixed by another, by leaving out the words respecting attestation, was held insufficient to change this requirement. Harben v. Phillips, L. R. 23 Ch. Div. 14, 48 L. T. N. S. 334, 31 Week. Rep. 178.

A proxy is not invalid because it varies from the form prescribed by articles of association merely by describing the person giving the proxy as a "proprietor of shares" instead of describing him as a "member." *Re* Indian Zoedone Co. L. R. 26 Ch. Div. 70, 53 L. J. Ch. 468, 50 L. T. N. S. 547, 32 Week. Rep. 451.

The fact that the day of the month is left blank in a proxy, which is otherwise regular in form, does not make it insufficient. *Re* Townsend, 43 N. Y. S. R. 135.

A proxy purporting to be given by a cashier without even alluding to the bank which owned the stock is held insufficient in *Re* Mohawk & H. R. R. Co. 19 Wend. 135. The court says the bank should have been named as principal and the proxy sealed with its corporate seal, if it had power to delegate the right to vote on the stock. Such right is denied in this case on the ground that the stock did not stand in the name of the bank on the transfer books.

Another defect in the above case was that it was given by a person named as cashier, while the stock stood in the name of a former cashier on the books of the corporation, and therefore the statutory provision that stock could be voted only in the the name standing on the transfer books, either in person or by proxy, would permit the use of a proxy only when it was given by that person whose name appeared on the books.

At a meeting of creditors who were entitled to vote by person or proxy on a scheme of arrangement or compromise of the affairs of a corporation under the English Joint-Stock Companies Arrangement Act of 1870, where Australian creditors were present by proxy or agent, but his proxy papers were not in England, it was ordered by the court that the particulars of the proxies might be communicated by telegraph to the official receiver for use at such meeting. On appeal from such order it was held to be valid, and that it was not necessary to have the proxy papers produced at the meeting. This was based on section 2 of such Act giving the

Where the same matter is not necessarily in litigation, although collaterally involved, the attorney may appear.

Musselman v. *Barker*, 26 Neb. 737.

Messrs. **Delmas & Shortridge,** *contra.*

Garoutte, *J.*, delivered the opinion of the court:

The present proceeding is a motion for a substitution of attorneys in the above entitled cause. Mr. James Alva Watt, claiming authority to represent the petitioner, makes the motion. The solution of the question here presented is dependent upon the following state of facts: One E. H. Knight, a creditor, commenced an action in the superior court of the city and county of San Francisco, Department No. 4, against the petitioner, People's Home Savings Bank, and its directors, for the purpose of enforcing his demand, and asked that the board of directors be enjoined from the further transaction of business; that they be removed from office; that a receiver be appointed; and that the bank corporation be thrown into liquidation. Certain allegations of plaintiff's complaint, charging fraud of the board of directors in the administration of the business of the corporation, and insolvency of the bank, form the basis for the relief prayed for. In this action, John F. Sheehan was by the court appointed receiver to take possession of the assets of the corporation, etc., and he retained James Alva Watt as his attorney and legal adviser in carrying on the business of the receivership. Thereafter, the petitioner in the above-entitled cause, to wit, the People's Home Savings Bank, made an applica-

court power to order that the meeting of the creditors be summoned in such manner as the court shall direct as well as a provision in the Act of 1862, § 91, providing that the court may direct such meetings to be held and conducted in such manner as the court directs for the purpose of ascertaining the wishes of the creditors. *Re* English S. & A. Chartered Bank [1893] 3 Ch. 385.

Such proxies not having been stamped, but being subject to the 10s. stamp under clause 6 of the Stamp Act of 1891, § 80, which did not expressly provide when the stamp should be affixed, it was held that section 15 applied, providing that in case of instruments executed abroad they might be stamped within thirty days after their receipt in the united kingdom. *Ibid.*

The fact that the name of the person who was to be agent was specified in the instruments of proxy was held no objection in this case; neither was it any objection that there was no special day named in the proxy paper. *Ibid.*

Where objection to voting by proxy is based solely on the claim that it is not lawful to vote in that manner, it will be presumed by the court that the proxies were in valid form and properly executed. People v. Crossley, 69 Ill. 195.

A resolution of the New York State Agricultural Society to the effect that no proxy shall be voted unless shown, within itself, that it was specifically intended to be used at the meeting at which it is offered, is held to be void because repugnant to the statute, where its charter provided that members should be entitled to vote at all elections for officers by proxy. *Re* White v. New York State Agri. Soc. 45 Hun, 580.

IV. *When and for what purpose a proxy may be used.*

The extent of the right of a proxy to vote is considered in Forsyth v. Brown, 18 Pa. Co. Ct. 567, 33 W. N. C. 72, 2 Pa. Dist. R. 765, where it is held that persons holding proxies can vote on motions to take a ballot or to adjourn, and do all which a stockholder may do which is necessary to a full and free exercise of the stockholder's right to vote at such meeting.

A proxy given by stockholders of a railroad company for the purpose of voting upon the question of an issue of bonds was held entirely insufficient to authorize a vote for the issue of bonds to be secured by a third mortgage upon the property of the company, since a proxy is nothing more than a power of attorney which must be governed by the rules applicable to that class of instruments. Marie v. Garrison (by Dwight, referee) 13 Abb. N. C. 210.

Proxies authorizing a vote on the single question of the increase of capital stock are held insufficient to give any validity to votes thereon for the disposal of capital stock. *Re* Wheeler, 2 Abb. Pr. N. S. 361.

A proxy is a delegation of an authority for a particular purpose; and, although not defined on the face of it, it will be held to be for the election then in contemplation, and for no other. Where proxies were given in contemplation of an election for the post of surgeon in an infirmary, but the contemplated election was not proceeded with, and the matter dropped, the proxies were not valid at an election several months afterward, which was not resolved upon until about six weeks after the matter had been dropped. Howard v. Hill, 5 R. R. & Corp. L. J. 255.

Under a provision in the articles of association of a company that a poll may be taken if demanded by "shareholders qualified to vote" who hold a certain number of shares, persons holding proxies cannot be regarded as shareholders qualified to vote, for the purpose of demanding a poll. Queen v. Government Stock Invest. Co. L. R. 3 Q. B. Div. 442, 47 L. J. Q. B. 478, 39 L. T. N. S. 230.

The proxies cannot be used upon a show of hands at a general meeting of a company, where its articles of association allow voting by proxy, but a poll must be taken for the purpose. *Re* Caloric Engine & S. F. Signals Co. 52 L. T. N. S. 846.

But the case of *Re* Caloric Engine & S. F. Signals Co. *supra*, is not followed in *Re* Bidwell Bros. [1893] 1 Ch. 603, 41 Am. & Eng. Corp. Cas. 580, in which it is said by Vaughan Williams, *J.*: "I have come to the conclusion that the votes of the members who were present only by proxy ought to be taken into consideration, even though no poll was demanded." In respect to the former case he says: "I do not know what the particular articles in that case were, and the question does not seem to have been argued at any great length." In the latter case the articles expressly said that votes may be given either personally or by proxy, and this is held to justify voting by proxy whether a poll is demanded or not. This conclusion is also fortified by reference to the decision in Reg. v. Government Stock Invest. Co., *supra*, which denies the right of proxies to demand a poll.

In counting votes by proxy when the vote is taken under a provision requiring a three-fourths majority of the number present personally or by proxy, it is held in *Re* Bidwell Bros., *supra*, that each person present by proxy must vote as one person only, as if actually present, and not according to the number of shares held.

Under an act of incorporation of a bank which to protect small shareholders made a scale of the number of votes proportioned to the number of shares held, and limited the number of votes in any event to sixty, where a firm had bought more than 2,000 shares and transferred them to divers persons unknown, taking in return a power of attorney to vote the shares at their own discretion, it was held that this was an attempt to operate a fraud upon the statute, and an injunction against

tion to this court for a writ of prohibition, asking that the proceedings of the superior court in the matter of the appointment of the receiver be annulled as being in excess of its jurisdiction. This application was made to the court by the petitioner through its regularly appointed attorneys, Messrs. Delmas & Shortridge. Thereafter, a motion for a substitution of James Alva Watt as attorney for petitioner in the above-entitled cause, to act in the place and stead of Messrs. Delmas & Shortridge, was made. This motion was based upon a showing by affidavits to the effect that subsequent to the inception of the prohibition proceeding the directorate of the petitioner corporation had been changed at an election held by the stockholders, and that the corporation petitioner, by its new board of directors, appointed said Watt attorney for the corporation in the above-entitled cause, and revoked the authority of Messrs. Delmas & Shortridge to act for it in any litigation then pending. The legality of Watt's appointment as attorney for the bank depends upon the validity of the election of the board of directors appointing him, and the only serious question presented as to the validity of such election involves the right of a person not a stockholder to participate in the election by virtue of his position as a proxy of a bona fide stockholder, and to this question we shall direct our attention.

While it is provided by section 312 of the Civil Code that stockholders of corporations

voting under these powers of attorney was sustained. Campell v. Poultney, 6 Gill & J. 94, 26 Am. Dec. 559.

V. *Rejection of proxy by inspectors.*

The rejection of votes by proxy because the persons holding the proxies would not submit to a sort of inquisitorial examination on oath, which the inspectors under a by-law of the company claimed the right to require when votes were challenged, was held irregular and reprehensible where the act of incorporation gave each stockholder one vote on each share which had been held in his own name at least fourteen days prior to the time of voting. People v. Kip, 4 Cow. 382, *note*.

The genuineness of proxies offered to be voted upon is a question which the inspectors of election have no power to pass upon if the proxies are regular in form and apparently executed by stockholders, but if the proxies are invalid for any reason not apparent upon their face, redress must be sought from the courts after the election, if the use of the proxies has worked any detriment. *Re* Cecil, 36 How. Pr. 477.

The declaration by the president of a corporation presiding at a meeting that neither of the proxies which have been given for certain stock should vote upon it, is insufficient to give the proxy who is entitled to vote any cause to attack the vote actually taken, if he did not offer to vote, as he will be held to have acquiesced in the vote actually taken. State v. Chute, 34 Minn. 135.

VI. *Revocation of proxy.*

A stockholder who has given a proxy for a valuable consideration may revoke it on a discovery that it is about to be used for a fraudulent purpose, even if such purpose is not invalid as against public policy. Reed v. Bank of Newburgh, 6 Paige, 337.

An irrevocable power of attorney to vote upon stock is regarded in Brown v. Pacific Mail S. S. Co. 5 Blatchf. 525, as differing very little from a mere proxy, and it is held not contrary to public policy.

Under N. Y. Laws 1892, chap. 687, § 20, which expressly provides that no stockholder shall sell his vote, or issue a proxy to vote upon any stock for any sum of money, or anything of value, a proxy coupled with an interest cannot be given, and another section provides that every proxy shall be revocable at the pleasure of the person executing it. *Re* Germicide Co. 65 Hun, 606.

VII. *Directors voting by proxy.*

The right of a director to vote at a meeting of the board of directors by proxy, when this is not authorized by the by-laws or the general laws, is emphatically denied in Perry v. Tuskaloosa Cotton Seed Oil Mill Co. 96 Ala. 364.

A proxy authorizing a person to vote for stockholders at a stockholders' meeting cannot give him authority to vote for them at a directors' meeting. Craig Medicine Co. v. Merchants' Bank, 29 L. R. A. 59 Hun, 561. This was a peculiar case in which only four persons constituted the corporation, and three of them gave to the fourth a proxy, authorizing him to vote for them at the first meeting of the stockholders on account of the fact that it was inconvenient for them to attend the meeting. As the corporation was to be organized in another state the person holding the proxy went to such state and was the only person present at the stockholders' meeting, at which he proceeded to elect directors. Following that election he, as one of the directors and holding the proxies which had been given him by the other members of the corporation, proceeded to organize the board of directors and elect president, treasurer, and secretary. The court said: "The proxy or power of attorney put in evidence did not give . . . the right to vote in the name of the directors who should be chosen at the stockholders' meeting; and if it did it would have been utterly void."

A letter from one of the directors of a corporation to another authorizing the latter to act for the former in any matters relating to the company cannot make the latter count as two in determining whether there is a quorum of the directors present or not. The court says an absent director could not confer all his powers on another director who was present, the absent director not being told what was going to be done and not having consulted about it on hearing the reasons pro and con. *Re* Portuguese C. C. Co. 60 L. T. N. S. 857.

A director of a company is not bound by the vote of his proxy, even at a shareholders' meeting attempting to bind the company and make the shareholders liable for an obligation outside of the deed of settlement of the company. In reply to the claim that the deed enables the managing directors to attend and vote by proxy, it was said by Parke, B., "but only for purposes within the scope of the deed, which this is not." Brown v. Byers, 16 Mees. & W. 252, 16 L. J. Exch. 112. This was a case of bills accepted by a resident director of the company without authority and which the general meeting of the shareholders resolved was a part of the indebtedness of the company. The distinction between voting as shareholders and as directors is not mentioned in the case.

Proxies given to directors of a corporation for voting on shares of stock at a stockholders' meeting do not necessarily create a trust for the corporation itself. The court says: "Whether it does or not depends upon whether what is done in this behalf is done with corporate funds for the corporation." Woodruff v. Dubuque & S. C. R. Co. 30 Fed. Rep. 91.

Where trustees are appointed to meet and elect a minister for the parish, being charged with the duty of judging of the qualifications of candidates, they cannot delegate that judgment to others, and a proxy given by a trustee is invalid; even if it specifies the persons for whom the vote is to be given, since this is determining the matter without

may be represented at all elections by proxies, yet the by-law of the petitioner bank provides that no proxy shall be voted by any one not a stockholder of the corporation; and it is upon the validity of such by-law that the merits of this case hinge. It is suggested in argument of counsel that all banking corporations have a by-law of similar import; but, notwithstanding this general practice, we have arrived at the conclusion, after careful consideration, that the making of such a law is without the power of the corporation. Corporations have no power to create by-laws that are unreasonable in their practical application, or that are violative of the statute of the state; and we think this by-law an infringement upon the statute, and a most substantial limitation upon the rights of stockholders granted by section 312 of the Civil Code. That section is broad in its terms, and when it says that a stockholder in a corporation may appoint a proxy—an attorney in fact—to represent him at elections held by the corporation, in the absence of limitations in the law, it must be held that the statute gives him the right to name an attorney in fact of his own selection. Any other construction would entirely nullify all benefits intended to be conferred by its provisions. To declare that, though the statute in general terms gives all stockholders of corporations the right to vote by proxy, yet the corporation, by its by-laws, has the power to say who that proxy shall be, is to give the

bearing the other trustees on the question. Atty-Gen. v. Scott, 1 Ves. Sr. 413.

An objection to the purchase of property by a school corporation on the ground that the vote in favor of the purchase was carried only by counting a vote of one of the directors by proxy, is held not to constitute sufficient ground for an injunction against the purchase, even if the corporation could avoid the purchase on this account. Dudley v. Kentucky High School, 9 Bush, 576.

While the cases immediately preceding are not cases about directors of a private corporation, they are mentioned as analogous, but without any attempt to annotate the general question of the right of members of public boards to act by representatives or proxies. The principles above stated are nevertheless so obvious that there would seem to be little ground for a contrary decision.

The effect of proxies of subordinate lodges on a vote in a grand lodge of Masons is discussed in Smith v. Smith, 3 Desauss. Eq. 557, where it is held that proxies granted for ordinary purposes would not bind them to action attempting to destroy the organization. This seems to involve merely the powers of delegates in such bodies as distinguished from the matter of proxy voting in corporations generally.

VIII. *Miscellaneous matters.*

Voting by proxy is involved in the case of State v. McDaniel, 22 Ohio St. 354, but the right to vote was discussed with reference to the title to the property, and not to the mode of voting.

In a case where stock had been pledged, although the pledgee, in whose name it stands on the corporate records, has a right to vote the stock at a meeting to elect directors, it is held that a court of equity may, in a proper case, compel him to give the pledgeor a proxy. *Re* Argus Printing Co. 1 N. Dak. 434, 12 L. R. A. 781.

And a mortgagee of stock or his trustees was required in Vowell v. Thompson, 3 Cranch, C. C. 428, to give a power of attorney to the mortgagor for voting upon the stock until it should be sold under the mortgage or deed of trust. This was done by bill in equity.

The case of Vowell v. Thompson, *supra*, is cited as authority in Hoppin v. Buffum, 9 R. I. 513, 11 Am. Rep. 291, but in the latter case it was held that acquiescence in the control of the stock and the voting thereon by the record owner until the votes are counted, or are being counted, would prevent an attack upon the result of the election.

The right of a pledgeor to vote on stock hypothecated is declared also in *Ex parte* Willcocks, 7 Cow. 402, 17 Am. Dec. 525, but this case does not seem to involve any question of proxy; and the right of the pledgeor or pledgee to vote on pledged stock is not considered in this note except so far as it is connected with the question of proxies.

A proxy may be given by a corporation as well as by any other shareholder, when a corporation is the owner of shares in another company. *Re* Indian Zoedone Co. L. R. 26 Ch. Div. 70, 53 L. J. Ch. 468, 50 L. T. N. S. 547, 32 Week. Rep. 481.

An agreement between stockholders, which, among other things, provides that none of the signers shall vote by proxy, is held to be void as against public policy, in Fisher v. Bush, 35 Hun, 641.

Parol evidence of the contents of proxies is admitted without search for the instruments, in order to prove that the stockholder had acted as such, where it was proved that the written proxies after being used had been thrown away as useless. Haywood & P. Pl. Road Co. v. Bryan, 6 Jones, L. 82.

A proxy was admitted in evidence in Harger v. McCullough, 2 Denio, 119, together with the affidavit of the maker that the stock had not been hypothecated, for the purpose of showing that he was the owner of the stock at the time he gave the proxy.

The right of a trustee of stock to vote upon it in the choice of directors was sustained in *Re* Barker, 6 Wend. 509, but this was on the ground that he was the legal owner of the stock and the trust was not regarded as in the nature of a proxy.

An agreement that a large number of shares of stock should be held in a block with a view to control the management of a corporation is involved in the case of Clarke v. Central R. & Bkg. Co., 50 Fed. Rep. 338, 15 L. R. A. 668, in which the court in substance says it is difficult to perceive how the instrument differs from an ordinary proxy. The court decides that proxy for voting stock of a corporation, made by the holder of the stock while enjoined from voting it directly on the ground of public policy, cannot carry the right to vote it. With the above case is a note on voting trusts of corporate stock.

Where stockholders, who were widely separated, deposited their stock in the hands of a person whose vote was to be directed by a committee appointed by themselves and subject to their control, it was held to be a mere arrangement of convenience from which each could recede at any time and demand the return of his stock, and therefore was not objectionable on grounds of public policy. Ohio & M. R. Co. v. State, 49 Ohio St. 668, affirming State v. Ohio & M. R. Co. 6 Ohio C. Ct. 415.

The right of one railroad company to vote the stock of another company, either by itself or by other persons acting in its interest, is denied in Memphis & C. R. Co. v. Woods, 88 Ala. 630, 7 L. R. A. 605; but this case did not involve any question of proxies, but the decision is based on the rule that one corporation cannot acquire a majority of the stock of another and by voting thereon govern and control the management of the latter.

R. A. R.

corporation full power to throttle the statute. The stockholders of many of our corporations are limited in number, and the case would undoubtedly often arise where the absent stockholder, desirous of being represented at an election, would be unable to find a friend among them in whom to trust his interests. The statute contemplates no such conditions, and neither says nor intended to say that such a stockholder would be deprived of his right to vote by proxy. If you may limit by by-law the right of holding a proxy to stockholders, you may limit it to directors, or the president, or the secretary, and thus the interests in control would have the power to compel the minority interests, if unable to be present in person, to be represented by the very interests to which they are opposed, and to reinstate in office the very men whose election they desire to defeat. The principle of cumulative voting has been authorized and approved in the interests of minority representation, yet this by-law squarely strikes at this principle which has been so carefully fostered. The substantial rights of a stockholder under the law cannot be taken from him, or even abridged, by the by-laws. The right to vote by proxy is a most substantial right, and this by-law handicaps this right out of all usefulness.

While no authority for or against the principles we have here declared was cited by counsel upon the elaborate argument of the case, we had no doubt at the time that they rested upon solid grounds, and since the submission of the cause our investigation has brought to light a recent case fully in line with all that we have said upon the question. The principle here involved was the sole question there involved, and in an opinion covering the entire ground the court there said: "It has not restricted the right of the stockholder to select any person whom he may consider to be advisable for that object to vote under his authority upon his shares as a stockholder. In this respect the largest liberty has been secured and provided for the stockholders, and, being entirely unrestrained by the legislature, this privilege was maintained by the authority of the law. Without having so declared expressly, the clear implication of the section is that it was not intended to impose any restriction whatever upon the stockholder as to the person he should be at liberty to select to act under his proxy; and, the statute having in this manner created this right in as general a manner as it did, the trustees of the corporation were not at liberty to restrict it or declare by their by-laws that it should not be so used." *Re Lighthall Mfg. Co.* 47 Hun, 258. Section 303 of the Civil Code provides: "A corporation may by its by-laws, where no other provision is especially made, provide for: . . . (3) The mode of voting by proxy." This provision does not give the corporation power to pass the by-law here assailed. It refers to the preliminary requirements to be followed in order that the proxy may be entitled to vote, as that the authorization must be in writing, properly witnessed, acknowledged, filed with the records, etc. In creating this provision it was not in the mind of the legislature to curtail the right of voting by proxy, but rather that such right might be exercised by stockholders within any reasonable restrictions which the corporation deemed proper to incorporate into their by-laws. The statute gives to the corporation the power to regulate the exercise of the right, but no power to either qualify or limit the right, and certainly no power to so shackle the right as to result in its nullification.

As a second ground of opposition to the granting of the motion for substitution, it is insisted that James Alva Watt, by reason of his relations to the respondent as attorney, is disqualified to represent the petitioner in the prohibition proceeding. We attach but little importance to this contention, and do not deem it necessary to enter into a discussion of the questions, namely: (1) Are the interests of the receiver and the bank antagonistic? or (2) Is Watt attorney for the respondent in the above-entitled cause? The conclusion we have arrived at upon the preceding question discussed declares the business relations theretofore existing between the bank and its attorneys, Messrs. Delmas & Shortridge, were severed by virtue of the action of the newly and legally elected board of directors, and, such being the case, the attorneys opposing this motion stand before us as strangers to the proceeding, having no interest or standing in the litigation; and we are unable to see that it is of any concern to them who represents the various parties in this preceding. As to Mr. Watt's conduct in the litigation, all that he has done has been open and upon the record. There has been no concealment, no imposition practiced upon the court, but, upon the contrary, all that has been done in the past, and all that he proposes to do in the future, he has done and proposes to do under a claim of right, supported by the law. These things being so, until some party to the litigation objects, we will not investigate. If all parties to the litigation are satisfied, we know of no proper party to object. We might suggest, in conclusion, that Mr. Watt states in open court that he desires to be substituted as attorney for the petitioner bank, in order that he may dismiss the prohibition proceeding. The bank retains him as its attorney to dismiss the proceeding, and there is no reason why it has not the right so to do. Such a dismissal in no aspect of the case prejudices the interests of the respondents, and the bank, the petitioner, has the right to dismiss its petition if it deem such the proper course.

The motion for a substitution as prayed for is granted.

We concur: **Beatty**, *Ch. J.*; **McFarland**, *J.*; **Van Fleet**, *J.*; **Harrison**, *J.*

NEBRASKA SUPREME COURT.

Robert HARE, *Plf. in Err.*,
v.
E. W. MURPHY.

(.....Neb.....)

***Where real estate encumbered by a mortgage is sold and conveyed,** and there is inserted in the deed a clause which states that the grantee assumes and agrees to pay the mortgage debt, and the deed is accepted by the purchaser of the land with knowledge that it contains the clause; or where the purchaser of land agrees, as a part of the consideration for the sale of the property to him, to assume and pay a mortgage indebtedness existing against the land,—he becomes personally liable for the payment of the mortgage debt. And this is true whether his immediate grantor was so liable or not; and the liability thus created may be enforced by the mortgagee or his assigns, as it was for his or their use and benefit that such promise was made.

(September 18, 1895.)

ERROR to the District Court for Lincoln County to review a judgment in favor of defendant in an action to enforce payment of a mortgage debt by an assignee of the mortgaged property. *Reversed.*

The facts are stated in the opinion.

Mr. F. S. Howell, for plaintiff in error:

A deed containing an assumption clause found of record is presumptive evidence of the liability of the grantee.

Tracy v. *Reed*, 38 Fed. Rep. 69, 2 L. R. A. 773; *Heil* v. *Redden*, 45 Kan. 562.

A purchase of real estate expressly subject to encumbrance makes the property a fund for the discharge of the encumbrance.

George v. *Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Kruger* v. *Adams & French Harvester Co.* 18 Neb. 100; *Thompson* v. *Thompson*, 4 Ohio St. 333.

The acceptance of a deed containing a clause of the kind herein mentioned binds the grantee to the performance of the conditions thereof, and this is equally true if made by an agent.

Jones, Mortg. § 752; *Bishop* v. *Douglass*, 25 Wis. 696; *Taylor* v. *Whitmore*, 35 Mich. 97; *Fairchild* v. *Lynch*, 10 Jones & S. 265.

And where the grantee in a deed instructs another to have the deed recorded, he thereby makes him his agent, and is bound by the terms of the deed.

Adams v. *Ryan*, 61 Iowa, 733.

The deed was left for several weeks after the alleged discovery of the assumption clause, and until after the plaintiff had purchased the notes and mortgage, relying upon the clause in the deed, thereby becoming an innocent purchaser, and defendant was then estopped to set up his defense. Innocent purchasers will be protected.

Hayden v. *Snow*, 9 Biss. 511; Jones, Mortg. § 764; *New Orleans Canal & Bkg. Co.* v. *Montgomery*, 95 U. S. 16, 24 L. ed. 346; *Carpenter* v. *Longan*, 83 U. S. 16 Wall. 271, 21 L. ed. 314; *Kilmer* v. *Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Ohio Life Ins. & T. Co.* v. *Urbana Ins. Co.* 18 Ohio, 220; *Hayden* v. *Drury*, 3 Fed. Rep. 782; *Pierce* v. *Faunce*, 47 Me. 507.

A grantee cannot be released from his liability incurred by assuming a mortgage as against a purchaser of a mortgage who may have relied upon the contract of assumption as it appears of record.

Jones, Mortg. § 764.

Where one of two innocent parties must suffer a loss by reason of the fraud of another, the loss must fall upon the one whose acts furnished the means for the commission of the fraud.

Dinsmore v. *Stimbert*, 12 Neb. 438.

Where one person makes a promise to another for the benefit of a third person, the third person may maintain an action on it.

Shamp v. *Meyer*, 20 Neb. 227; *Keedle* v. *Flack*, 27 Neb. 840; *Merriman* v. *Moore*, 90 Pa. 80; *Dean* v. *Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Bay* v. *Williams*, 113 Ill. 91, 54 Am. Rep. 209.

Messrs. **Grimes & Wilcox** and **T. C. Patterson,** for defendant in error:

To create a personal liability on the part of a grantee in a deed to pay a prior mortgage or lien on the premises conveyed, the covenant or words used therein must clearly import that the obligation was intended by the grantor, and knowingly assumed by the grantee.

Holcomb v. *Thompson*, 50 Kan. 598; *Lewis* v. *Day*, 58 Iowa, 575.

A grantee is not liable on a covenant to assume and pay a mortgage, if inserted in the deed without his knowledge, and without intent of parties.

Kilmer v. *Smith*, 77 N. Y. 226, 33 Am. Rep. 613; *Albany City Sav. Inst.* v. *Burdick*, 87 N. Y. 40; *Dey Ermand* v. *Chamberlin*, 88 N. Y. 658.

The plaintiff stands in the same position as either Schuster, Sproul, or Callender would stand, and defendant is entitled to the same defense against plaintiff as he would have against either Schuster, Sproul, or Callender.

Trimble v. *Strother*, 25 Ohio St. 378; *Brewer* v. *Maurer*, 28 Ohio St. 554, 43 Am. Rep. 436.

A person for whose benefit a promise is made cannot maintain an action to enforce the promise, when the promise is void between the promisor and promisee, because of want or failure of consideration, or fraud.

15 Am. & Eng. Encyclop. Law, p. 838, *note 1; Dunning* v. *Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617.

A grantee is not liable to his grantor, unless his grantor is compelled to pay the debt assumed.

Ayers v. *Dixon*, 78 N. Y. 318.

To make the promise of a grantee to pay a mortgage on land conveyed to him available

*Headnote by HARRISON, J.

NOTE.—The above case is against the doctrine hitherto asserted in some courts, that a vendee who assumes payment of a mortgage on the property will not be liable, unless his grantor was liable. For cases on this subject, see *note* to Jefferson v. Asch (Minn.) 25 L. R. A. 257, especially the part beginning on p. 275.

See also 40 L. R. A. 861; 46 L. R. A. 623.

to the mortgagee, it must be made to a person personally liable for the mortgage debt.

15 Am. & Eng. Encyclop. Law, p. 841, *note 2*, and cases there cited; 1 Jones, Mortg. 2d ed. §§ 760, 762; *Wise* v. *Fuller*, 29 N. J. Eq. 257; *Halsey* v. *Reed*, 9 Paige, 446, 4 L. ed. 769.

The person to whom the covenant is given is not a debtor to the one who seeks its benefits.

King v. *Whitely*, 10 Paige, 465, 4 L. ed. 1052; *Meech* v. *Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Vrooman* v. *Turner*, 69 N. Y. 281, 25 Am. Rep. 195; 15 Am. & Eng. Encyclop. Law, p. 838, *note 1; Brown* v. *Stillman*, 43 Minn. 126; *Nelson* v. *Rogers*, 47 Minn. 103; *Stover* v. *Tompkins*, 34 Neb. 467; *Reeves* v. *Wilcox*, 35 Neb. 779.

Harrison, J., delivered the opinion of the court:

The plaintiff, as assignee and owner of two promissory notes, and a mortgage on certain real estate, given to secure their payment, instituted this action against the defendant, to whom the real estate had been sold by the grantee or party purchasing from the mortgagor, to recover the amount due upon the notes and mortgage, basing the suit upon a clause in the conveyance of the lands to defendant, by which, it is claimed, defendant assumed and agreed on his part to pay the mortgage indebtedness. The petition in the case recites that on December 26, 1889, D. A. Spraul executed and delivered to Maggie Callender two promissory notes, each in the amount of $250, and a mortgage, to secure their payment, on tracts of land therein described, and situate in Logan county; the conveyance by the mortgagor, on the succeeding day, to William L. Schuster, and the sale and conveyance of the lands again on the 31st day of December, 1889, by Schuster to the defendant, E. W. Murphy, and his agreement, as a part of the consideration or purchase price of the property, to pay the indebtedness shown by the notes and mortgage; and that, pursuant to such promise, and evidencing it, there was inserted in the deed of the lands by Schuster to defendant a clause in which it was stated that the real estate was encumbered, and that the purchaser assumed and agreed to pay the encumbrance. It also states the purchase of the notes and mortgage by the plaintiff, and their transfer and assignment to him, and nonpayment, etc., and closes with a prayer for judgment. The answer contained a denial of any assumption of or agreement by defendant to pay the mortgage indebtedness; a statement that defendant never received or accepted the conveyance or deed described in plaintiff's petition, and that no deed of the lands had ever been delivered to him; that he never entered into or had possession of the premises described in the petition; that a deed, a copy of which was attached to the petition, was caused to be recorded in Logan county by some person unknown to defendant, and without his knowledge or consent; that there was no consideration in the purchase of the lands, or the "equity" of the vendor, Schuster, therein, for an assumption or agreement on his part to pay the amount of the encumbrances or mortgages; and, further, that his grantor, Schuster, had not assumed the payment of the encumbrances, and no liability existed against such grantor for their payment. The reply of plaintiff was, in the main, a general denial of the allegations of the defendant's answer, and also stated that the deed of the lands executed by Schuster, and to defendant, as grantee, was filed for record in the office of the county clerk of Logan county on or about January 2, 1890. That on or about the 7th day of January, 1890, the plaintiff, in the course of some business affairs or settlement between him and another party, was offered the notes and mortgage, the basis of this action, and their purchase by him was solicited. That he made, or caused to be made, an examination of the lands, and the titles to the same, and thus discovered of record the conveyance to the defendant, and the clause asserting the assumption and agreement of the defendant to pay the notes and mortgages; and also investigated, or caused inquiries to be made, with reference to the financial standing or circumstances of the defendant, and ascertained that he was solvent; and that plaintiff, in the purchase of the notes and mortgage, was influenced by, and relied upon, the responsibility assumed by and of the defendant for their payment, and, had it not been for the clause in the deed to defendant, which, in terms, bound him to such payment, plaintiff would not have purchased the notes and mortgage, and that such purchase was consummated March 1, 1890. That, very soon after the deed in question was recorded, the defendant had knowledge thereof, and of its contents and recitals, and possessed such knowledge at the time of its execution, and for more than thirty days prior to the date of plaintiff's purchase of the notes and mortgage, and permitted it to remain of record without any effort to have the same annulled or reformed. There was a trial of the issues to the court and a jury, and, at the close of the testimony, the trial judge instructed the jury to return a verdict for defendant, which instruction was complied with by the jury, and, after motion for new trial heard and overruled, judgment was rendered; and the plaintiff brings the case here by petition in error.

Counsel for the parties in the briefs filed agree in the statement that the trial judge was moved to instruct the jury to return a verdict for the defendant by the following considerations: That the petition did not allege, and the evidence failed to show, that defendant's grantor was in any manner, or to any extent, connected with the mortgage debt, or liable or bound for the payment of it; that the rule of law applicable and governing in such cases is that a mortgage indebtedness assumption clause in a deed, or an agreement by the purchaser of lands to pay encumbrances existing against their lands, will not become operative, or is of no validity, and cannot be enforced by the mortgagee, unless it further appears that the grantor in the conveyance, or the person to whom the promise is made, was personally liable for the payment of the mortgage debt. In adopting this view of the law, we think the

learned judge who presided during the trial in the district court erred. It is undoubtedly supported by decisions—many of which are cited by counsel for defendant in their brief—of courts of last resort, the opinions of which, as authority, rank among the very highest, and are entitled to great weight; but we do not think best to follow them. It is an established rule of law that, where one makes a promise to another for the benefit of a third person, such third person can maintain an action upon the promise, though the consideration does not move directly from him. *Shamp* v. *Meyer*, 20 Neb. 228; *Sample* v. *Hale*, 34 Neb. 220; *Barnett* v. *Pratt*, 37 Neb. 849; *Doll* v. *Orume*, 41 Neb. 655. And in *Keedle* v. *Flack*, 27 Neb. 836,—a case in which the right of a mortgagee to enforce such a promise as the one in the case at bar was in controversy,—the rule just quoted was applied, and held to be the basis of the mortgagee's right to recover. Where a party purchaser of lands agrees, as a part of the contract of purchase, to assume and pay a mortgage debt existing against the lands, the promise so to do is for the benefit of the owner and holder of the debt, and may be enforced by such party. The purchase price of the lands is the consideration moving between the purchaser and his grantor, and it is immaterial, and of no consequence, to the grantee, that his grantor may or may not be personally liable or bound for the payment of the mortgage debt; and, by such promise, the promisor becomes personally liable to the mortgagee or assigns for the mortgage debt, regardless of whether his grantor was so liable or not. *Merriman* v. *Moore*, 90 Pa. 78; *Dean* v. *Walker*, 107 Ill. 540, 47 Am. Rep. 467; *Bay* v. *Williams*, 112 Ill. 91, 54 Am. Rep. 209.

There were some issues of fact in regard to which the evidence was conflicting, and which, if the view of the law with reference to the liability of a grantee who assumes and agrees to pay a mortgage debt which we have announced herein as the correct one had been taken, should, and doubtless would, have been submitted, under proper instructions, to the jury for their consideration and determination.

It follows that *the judgment of the District Court will be reversed*, and the cause remanded for further proceedings.

PAXTON & HERSHEY IRRIGATING CANAL & LAND CO., *Appt.*,
v.
FARMERS' & MERCHANTS' IRRIGATION & LAND CO.

(.....Neb.....)

*1. **The provision of section 11, article 3 of the Constitution,** viz.: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title,"—is intended to prevent surreptitious legislation, and not to prohibit comprehensive titles.

2. **The term "irrigation," as employed in the title of the Act of March 27, 1889,** viz.: "An act to provide for water rights and irrigation, and to regulate the use of water for agricultural and manufacturing purposes," etc.,—is used in its popular sense, and implies the means of conducting water to the land to be supplied. The provision therein for the acquiring by irrigating companies of the right of way for canals and ditches—accordingly, *Held*, to be within said title, and not to conflict with section 11, article 3 of the Constitution.

3. **To the legislature, and not to the courts,** has been committed the power to determine when the exigencies of the public demand the taking of private property; the limit of judicial interference being the duty to declare void acts clearly in conflict with the constitution.

4. **There is no arbitrary standard** by which to determine whether the purpose to which property is appropriated possesses the element of public utility. "Public use," in a constitutional sense, may be confined to the inhabitants of a restricted locality or neighborhood, but the use must be common, and not to a particular individual.

5. **The use of water for the purpose of irrigating,** contemplated by the Act of March 27, 1889, known as the "Rayner Irrigating Law," is a "public use," within the meaning of the constitution.

6. **Section 8 of article 2 of the Rayner Irrigating Law** confers upon irrigating companies organized under the laws of this state power to acquire the right of way for necessary canals, reservoirs, etc., by condemnation.

7. **The word "if," in the first line of the section** last above mentioned, is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act.

8. **The provision of section 3, article 1,** of the Irrigation Law of 1889, viz.: "No tract of land shall be crossed by more than one ditch," etc.,—*Held*, to include lands owned by corporations as well as natural persons.

9. **A proviso which would operate to limit the application of an enacting clause,** general in its terms, will be strictly construed, and includes no case not within the letter of the exception.

10. **The Irrigation Law of 1889** does not confer upon one irrigating company any right to connect with the ditches of another, or take water therefrom without the consent of the proprietor.

11. **What is meant by the exception** contained in section 3, article 1, of the Act above mentioned is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches, for the watering of the same territory. The question is not whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed,

*Headnotes by POST, J.

NOTE.—The general subject of public uses for which property may be taken by eminent domain is considered at some length in *notes* to Pittsburgh, W. & K. R. Co. v. Benwood Iron Works (W. Va.) 2 L. R. A. 680; Barre R. Co. v. Montpelier & W. R. Co. (Vt.) 4 L. R. A. 785; also in the case of Wisconsin Water Co. v. Winans (Wis.) 20 L. R. A. 662.

For flowage of lands as public use, see Turner v. Nye (Mass.) 14 L. R. A. 487, and *note*.

As to private roads, see Latah County v. Peterson (Idaho) 16 L. R. A. 81, and *note*.

but whether it may, as constructed, be made to supply the lands within reach of both.

(October 1, 1895.)

APPEAL by plaintiff from a decree of the District Court for Lincoln County in favor of defendant in an action brought to enjoin defendant from appropriating a right of way for an irrigating canal. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Frank T. Ransom** and **T. Fulton Gantt** for appellant.

Messrs. **T. C. Patterson** and **Grimes & Wilcox,** for appellee:

So far as the act declares irrigation to be a public use, and provides for the condemnation of right of way for canals that are projected and built, as the defendant's is, for the purpose of supplying water to the public for irrigation, it clearly comes within the constitutional power and duty of the legislature to legislate for the public welfare.

Re Madera Irrigation Dist. Bonds, 92 Cal. 296, 14 L. R. A. 755; *Cummings* v. *Peters,* 56 Cal. 598; *Lux* v. *Haggin,* 69 Cal. 255; *Lindsay Irrigation Co.* v. *Mehrtens,* 97 Cal. 677; *Talbot* v. *Hudson,* 16 Gray, 425; *Oury* v. *Goodwin* (Ariz.) 26 Pac. Rep. 876; *Barbier* v. *Connolly,* 113 U. S. 31, 28 L. ed. 924; *Head* v. *Amoskeag Mfg. Co.* 113 U. S. 16, 28 L. ed. 892.

If the public interest can in any way be promoted by the taking of private property, it must rest in the wisdom of the legislature to determine whether the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain, and to authorize an interference with the private rights of individuals for that purpose.

2 Kent, Com. 340; *Stockton & V. R. Co.* v. *Stockton,* 41 Cal. 147; *Bankhead* v. *Brown,* 25 Iowa, 540.

To make the use public it need not be for the benefit of the whole public, or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, not to a particular individual or estate.

Welton v. *Dickson,* 38 Neb. 767, 22 L. R. A. 496; *Coster* v. *Tide Water Co.* 18 N. J. Eq. 54; *Pocantico Water Works Co.* v. *Bird,* 130 N. Y. 249; Lewis, Em. Dom. chap. 7; *State* v. *Morris Aqueduct Propre.* 46 N. J. L. 495; *Wayland* v. *Middlesex County Comrs.* 4 Gray, 500; *St. Helena Water Co.* v. *Forbes,* 62 Cal. 182, 45 Am. Rep. 659; *Re New Rochelle Water Co.s' Application,* 46 Hun, 525; *Stamford Water Co.* v. *Stanley,* 39 Hun, 424; 6 Am. & Eng. Encyclop. Law, 524; Cooley, Const. Lim. 4th ed. 672.

Section 8, article 1, of the Irrigation Act does not apply to cases between rival canal companies who may also be land owners, but is for the benefit of the land owners only.

San Luis Land, C. & I. Co. v. *Kentiworth Canal Co.* 3 Colo. App. 244.

Plaintiff's canal is completed. It does not extend beyond the lands owned by plaintiff, and does not run through any lands that can be watered from it except the plaintiff's own land. No public duty can be imposed upon it.

Downing v. *More,* 12 Colo. 316.

The true test of the appropriation of water is the successful application thereof to the beneficial use designated.

Thomas v. *Guiraud,* 6 Colo. 530; *Farmers' High Line Canal & Reservoir Co.* v. *Southworth,* 13 Colo. 111, 4 L. R. A. 767; *Dick* v. *Caldwell,* 14 Nev. 167; *Simpson* v. *Williams,* 18 Nev. 432; *Farmers' Independent Ditch Co.* v. *Agricultural Ditch Co.* 3 Colo. App. 255.

The North Platte canal was taxed to its full capacity to supply its customers to whom it was under contract to furnish water, and that being the case its customers would be entitled to an injunction to stop it from selling or contracting to sell water beyond its ability to deliver.

Clifford v. *Larrien* (Ariz.) 11 Pac. Rep. 897; *Wyatt* v. *Larimer & W. Irrig. Co.* 18 Colo. 298; *Cole* v. *Logan,* 24 Or. 304.

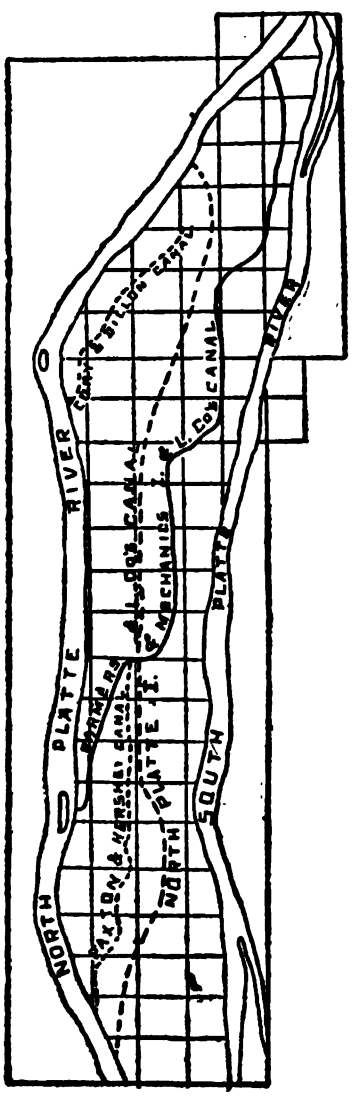
The finding as to the necessity of taking private property is conclusive, and not subject to be reviewed or questioned by another court.

Knoblauch v. *Minneapolis,* 56 Minn. 321; *Barrett* v. *Kemp* (Iowa) 59 N. W. Rep. 77; *Cherry* v. *Matthews,* 25 Or. 484; *Santa Ana* v. *Harlin,* 99 Cal. 538; *Waterloo Water Co.* v. *Hoxie,* 89 Iowa, 317

Post, *J.*, delivered the opinion of the court:

This is an appeal from a decree of the district court for Lincoln county dismissing the action of the plaintiff company whereby it seeks to prevent the appropriation by the defendant of a right of way through its lands for an irrigating canal. In the petition it is in substance alleged that the plaintiff company is the owner of 10,000 acres of land, bounded by the North Platte river, in Lincoln county, and also of an irrigating canal known as the "Paxton & Hershey Ditch," situated on its said lands and on the lands of other adjoining proprietors; that upon its said land, and nearly parallel with the ditch above mentioned, is an irrigating canal known as the "North Platte Irrigating & Land Company's Ditch," and herein referred to as the "North Platte Ditch;" and that in the vicinity of the plaintiff's lands sought to be watered by the defendant's proposed canal is an irrigating canal known as the "Cody & Dillon Ditch." The plaintiff, it is alleged, has constructed a large number of laterals from its said canal, which it is proposed by the defendant company to cross, thus necessitating the construction and maintaining of many bridges, flumes, and conduits, and otherwise needlessly harassing it in the use and enjoyment of its said property. The defendant company, which is organized for the purpose of building and maintaining ditches, canals, aqueducts, and reservoirs for the storage and conveyance of water, and of selling water to consumers for irrigating, power, and other useful purposes, prior to the commencement of this action, entered upon the plaintiff's said land, and located and staked out a ditch thereon 4½ miles in length, and is taking steps to condemn a right of way therefor, but that the three ditches above described afford ample facilities for the irrigation of all of the land sought to be supplied by the defendant company, and that water sufficient to supply the defendant's

wants can be furnished from the ditches already constructed, should connection be made therewith, at less expense than by the construction and maintaining of the proposed ditch through the plaintiff's land to the source of supply,—the North Platte river. The answer, so far as it is deemed necessary to notice it, consists of an allegation that the defendant is engaged in the construction of an irrigating canal some 20 miles in length, for the purpose of supplying with water from the North Platte river certain territory not within the reach of either of the canals already constructed; a denial that the plaintiff's canal is capable of supplying the lands which the defendant proposes to water; and an allegation that the water supplied by said canal is barely sufficient for the irrigation of the plaintiff's own land. Accompanying the pleadings is the following map, showing the



location of the proposed ditch, as well as those already completed, and which is essential to a perfect understanding of the questions at issue.

The district court, upon entering the decree complained of, submitted the following findings of fact and conclusions of law:

"First. The plaintiff is a corporation organized and existing under and by virtue of the laws of this state for the following purposes: To construct, own, operate, and maintain a canal or canals, ditch or ditches, for irrigation purposes; to purchase, acquire, own, sell, and convey all real estate that may be necessary for such purposes, and to acquire, own, sell, and convey real estate in connection with carrying on an irrigating business, and to acquire, own, sell, and convey real estate for other purposes deemed advisable or advantageous to the corporation and its interests, and to cultivate and improve such lands as shall be owned by the corporation; to furnish, sell or rent water for irrigation of lands which shall be owned by said corporation and within its area, and other lands within reach of any canal or canals which shall be owned, operated, or controlled by the corporation, owning live stock, and raising the same in connection with the land held or controlled by this corporation. Second. The plaintiff is the owner of about 7,000 acres of land located on and adjacent to the banks of the North Platte river, in Lincoln county, Neb., as alleged in its petition, and is the owner of an irrigating canal running across its said lands, and the lands of others for a distance of about 10 miles, which canal is finished and constructed for the purpose of irrigating the land under the said ditch, and for the purposes set forth in the articles of incorporation of the plaintiff. Third. The defendant is a corporation organized under the laws of this state for the following purposes, among others: The building and maintaining of canals, ditches, and aqueducts, and reservoirs for the storage and conveyance of water, and the selling of such water to consumers for irrigation, agricultural, power, and other useful purposes. Fourth. The plaintiff is the owner of the tract of land proposed to be crossed by the proposed canal of the defendant, and which lies under the plaintiff's ditch, and which is proposed to be crossed by defendant's ditch for a distance of 4¼ miles. Fifth. All of the land of the plaintiff across which the defendant proposes to construct its canal for a distance of 4¼ miles can be irrigated from and by plaintiff's canal, and it is not proposed by the defendant to water or irrigate any of plaintiff's said land within said 4¼ miles. Sixth. That the defendant corporation is the owner of no land to be watered by its proposed ditch, but that the object of said corporation is for the purpose of constructing and operating a canal or ditch for irrigation purposes for the lands lying contiguous under said ditch for other parties to hire. Seventh. That, at the points where it is alleged that the defendant's ditch crosses the lands of the plaintiff, it is necessary for the defendant to run said ditch across said lands in order to get water out of the North Platte river, with

necessary fall in accordance with the surveyed route of its ditch; that, in the territory covered by the ditch of the plaintiff, it is not the object nor the purpose of the defendant's ditch to irrigate said land, but lands lying below and beyond the territory of the plaintiff's ditch. Eighth. There are about 40,000 acres of land between the North and South Platte rivers, and in this territory the evidence shows that the North Platte Ditch Company has a ditch about 20 miles long running through the middle portion of the peninsula formed by the two rivers. The plaintiff's ditch is also constructed in this peninsula, and is in length about 10 miles. The Cody & Dillon ditch is also in this peninsula, and is about 6 miles in length. A great amount of evidence has been taken to show the capacity of these several ditches for watering the land in the peninsula, including the land proposed to be watered by the defendant's ditch. The location of these several ditches in the peninsula, their dimensions, and their capacity appear from the evidence and the maps introduced in evidence; but the court does not find nor pass upon the evidence relating to the question as to whether or not this water could be supplied by the defendant's constructing their ditch up and to the plaintiff's ditch, and receiving water therefrom, for the reason that there is no provision in the act contemplating that it should be obligatory upon the defendant to so do. Ninth. The court further finds that the defendant's proposed ditch will cross the lands of the plaintiff through which plaintiff's ditch has already been built, which lands are also irrigated from plaintiff's ditch. Tenth. The court further finds that the plaintiff has not given its written consent to cross the lands owned by it proposed to be crossed by the defendant with its said proposed canal, and objects to its appropriation of its lands for the purpose of constructing the defendant's said ditch over the same.

"Conclusions of law: First. That section 2084, Consol. Stat. (Irrigation Law of 1889, § 3, art. 1), is not applicable to the facts in this case, for the reason that the defendant's contemplated ditch is not being constructed for the purpose of irrigating the lands crossed by the plaintiff's ditch, nor the lands lying under the plaintiff's ditch, but for the purpose of irrigating lands beyond and below the plaintiff's ditch. Second. That the defendant is entitled to cross the lands of the plaintiff for the purpose of constructing its said ditch on complying with the necessary requirements of law for said purpose."

It will be observed from the foregoing statement and opinion that the defendant's claim to a right of way for its canal through the plaintiff's land is founded upon the provisions of the Act of March 27, 1889, known as the "Rayner Irrigating Law," entitled "An act to provide for water rights and irrigation, and to regulate the right to the use of water for agricultural and manufacturing purposes, and to repeal sections 158 and 159 of chapter 16, Compiled Statutes of 1889, entitled *Corporations*."

The first contention on this appeal is that the provision for the acquiring by corporations of the right of way for irrigating ditches in the exercise of the power of eminent domain is foreign to the title of the act mentioned, and accordingly violative of section 11, article 3, of the Constitution, viz.: "No bill shall contain more than one subject, and the same shall be clearly expressed in the title." The object of the foregoing provision has been declared, not to prohibit comprehensive titles, but to prevent surreptitious legislation, by advising representatives of the nature and purpose of the measures they are called upon to support or oppose. *Kansas City & O. R. Co.* v. *Frey*, 30 Neb. 790; *Re White*, 33 Neb. 813; *Trumble* v. *Trumble*, 37 Neb. 840; *South Omaha* v. *Taxpayers' League*, 42 Neb. 671. It is said in *White's Case*, *supra*, that the legislature has the right to choose the title to any act passed by it; and, although that chosen may not be the most appropriate, the act will not be held void unless clearly in conflict with the constitution. When tested by that rule, we cannot doubt that the provision assailed is germane to the title of the act, and within the evident purpose thereof, viz., the utilizing of the public waters in the further development of the agricultural resources of the state. The word "irrigation," as employed in the title of the act under consideration, is apparently used in its popular sense, and denotes the application of water to land for the production of crops. *Platte Water Co.* v. *Northern Colorado Irrigation Co.* 12 Colo. 535. The use of water for the purpose of irrigation clearly implies the means of conducting it to the land to which it is applied; and any plan such as contemplated by the Act of 1889, which omits provision for the enforced access by the public to the source of supply, is necessarily partial and ineffective.

2. The act, in so far as it makes provision for the acquiring of the right of way for irrigating canals by condemnation, is also vigorously assailed on the ground that it contemplates the taking of property for private use only, and is therefore in conflict with section 21 of the Bill of Rights, viz.: "The property of no one shall be taken or damaged for public use without just compensation therefor." This provision has been held to prohibit, by implication, the taking of private property for private use, of any character whatever, without the consent of the owner. *Jenal* v. *Green Island Draining Co.* 12 Neb. 163; *Welton* v. *Dickson*, 38 Neb. 767, 22 L. R. A. 496. In the last-mentioned case it was held, following *Coster* v. *Tide Water Co.*, 18 N. J. Eq. 54, that the want of power in the legislature to transfer to one person the property of another does not necessarily depend upon constitutional restrictions, but upon the fact that such authority is in no sense an incident to the powers conferred upon the lawmaking branch of the government. We are thus, for the first time, confronted with the question whether the use contemplated by the statute is a public one, in a constitutional sense, or whether it is a mere private use, and accordingly within the prohibition mentioned. In this connection it should be observed that to the legislature, and not to the courts, has been committed the

power to determine when the exigencies of the public demand the taking of property for public uses, the limit of judicial interference being the duty to declare void acts clearly violative of the fundamental law of the state. There is no arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. It has been said by an eminent jurist that "the use required need not be the use or benefit of the whole public or state, or any large portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals or estates." See *Chancellor* Zabriskie in *Coster* v. *Tide Water Co. supra*. Again, it has been said that "the use is public when it promotes the interests of a considerable portion of the community, although it may not benefit the community at large." Kinney, Irrigation, 94. See also Black's Pom. Water Rights, § 174; *Lux* v. *Haggin*, 69 Cal. 304; *Lindsay Irrigation Co.* v. *Mehrtens*, 97 Cal. 676; *Oury* v *Goodwin* (Ariz.) 26 Pac. Rep. 376; *Umatilla Irrigation Co.* v. *Barnhart*, 22 Or. 389; *Foster* v. *Park Comrs.* 133 Mass. 321; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Wurts* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229; *Pocantico Water Works Co.* v. *Bird*, 130 N. Y. 249. In the last-mentioned case we observe the following pertinent language: "The term 'public use,' as used in connection with the right of eminent domain, is not easily defined. . . . It is doubtless true that in order to make the use public, a duty must devolve upon the persons or corporation holding the property to furnish the public with the use intended. The term implies 'the use of many' or 'by the public,' but it may be limited to the inhabitants of a small or restricted locality, but the use must be common and not for a particular individual." It has been said that if, by any reasonable construction, a designated use may be held to be public in a constitutional sense, the will of the legislature should prevail over any mere doubt of the court (*Bankhead* v. *Brown*, 25 Iowa, 540; *Re Madera Irrigation Dist. Bonds*, 92 Cal. 309, 14 L. R. A. 755; *Coster* v. *Tide Water Co. supra*), which, however, is but the application of a fundamental principle of our system, viz., the independence of each department of the government within its own domain. It should be remembered, too, that the essential features of the Rayner irrigating law appear in the legislation of the several Pacific states, notably of California, whose constitutional provisions on the subject do not differ substantially from ours, and where it had long previous to its adoption by us received a definite construction adverse to the contention of the plaintiff herein. See *Lux* v. *Haggin*, *supra*. The legislature must therefore have intended to adopt, not the statute alone, but the construction placed upon it in the state of California. Such is the well-established rule. *Bohanan* v. *State*, 18 Neb. 57, 53 Am. Rep. 791. But any examination of this subject is necessarily incomplete which omits mention of the recent case of *Bradley* v. *Fallbrook Irrigation Dist.*, 68 Fed. Rep. 948, holding that assessments under the provisions of the district irrigation law of that state contemplate the taking of property for mere private purposes, and are accordingly within the prohibition of the United States Constitution. It is unnecessary, however, at this time, to examine the reasoning upon which that case rests, since it is therein declared inapplicable to the ordinary use of water for irrigating purposes in the arid regions of California, and therefore in harmony with *Lux* v. *Haggin* and later cases, in which the same doctrine is asserted by that court. The varying conditions of society are constantly presenting new subjects of "public utility," which is but another name for "public necessity;" hence the force of *Chancellor* Vroom's remark in *Scudder* v. *Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756, that what shall be deemed a public use depends somewhat on the situation and wants of the community for the time being. Nor were the conditions surrounding the people of the Pacific states when the foundation was laid for the body of their laws upon the subject materially different from those which to-day confront the western half of our own state. We behold what was but yesterday the public domain occupied to the western limit of the "Rain Belt," so called, and settlers eagerly seeking for homes in the semiarid region beyond. We behold thousands of acres of fertile land in the valleys of the Platte, the Loups, the Elkhorn, and the Republican rivers practically worthless under existing conditions for the purpose of agriculture, but which by application of the waters of those streams may be made most productive, thus not only supporting the rapidly increasing population of that region, but adding largely to the wealth and material prosperity of the state. That an undertaking so important can be successfully prosecuted alone through the agency of the state none can doubt. The reclamation of a region so vast, equal in extent to more than one state of the Union, is surely a legitimate function of government; and the exercise of the reserved power of the state in the promotion of an enterprise so beneficial is not even in the technical sense violative of the restrictive features of the constitution.

8. It is next argued that authority to appropriate land for right of way purposes is by the Law of 1889 conferred upon property owners only, and, it being admitted that the defendant company is not the owner of any of the lands lying under its ditch, it is not within the provisions of the act.

The purpose of sections 1–4 of article 2, to which we are referred in support of that contention, was apparently to confer upon individuals and corporations the right of way in certain cases through the premises of adjoining proprietors. It is, however, unnecessary to examine the provisions mentioned, since the plaintiff's argument is based upon an apparent misconception of the defendant's claim, which is under the provisions of sections 8 and 9 of article 2, viz.:

"Sec. 8. If any corporation organized under the laws of this state for the purpose of constructing and operating canals for irrigating or water-power purposes, or both,

may acquire a right of way over or upon any land for the necessary construction of such canal, including dams, reservoirs, and all necessary adjuncts to said canals in the same manner as provided for persons and companies in this act, and such persons, canal companies, and corporations shall have the same power to occupy state lands with their said canals as is given to railroad corporations by section 105, chapter 16, of the Compiled Statutes of 1887, and such corporations shall also have power to borrow money and to mortgage all their property and franchises in the same manner and for the same purposes as railroad companies.

"Sec. 9. Canals constructed for irrigating or water-power purposes, or both, are hereby declared to be works of internal improvement, and all laws applicable to works of internal improvement are hereby declared to be applicable to such canals."

The first word of section 8, as it appears above, is evidently an interpolation, having no relation to the body of the section, without sensible meaning, and should accordingly be disregarded in giving effect to the provisions of the act. *Stone* v. *Yeovil*, L. R. 1 C. P. Div. 701; *United States* v. *Stern*, 5 Blatchf. 512, Fed. Cas. No. 16,389; *State* v. *Beasley*, 5 Mo. 91; *State* v. *Acuff*, 6 Mo. 55. A careful reading of the two sections last named, with the word "if" eliminated from section 8, leaves no room to doubt that the defendant company is within the terms of the act, and that the plaintiff's claim to the contrary is without merit.

4. It is by the plaintiff further argued that it is within the exception contained in section 8, article 1, as follows: "No tract of land shall be crossed by more than one ditch, canal, or lateral without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended." The evidence relating to this branch of the case is quite voluminous, although the district court, as appears from its findings and conclusions of law, held the foregoing exception not applicable to the facts, without determining the question of the capacity of the ditches already constructed. On behalf of the defendant it is contended, in effect, that the exception of the statute applies to owners and proprietors other than irrigating companies, which corporations, it is argued, are not in terms or by implication included therein. The case of *San Luis Land, C. & I. Co.* v. *Kenilworth Canal Co.*, 8 Colo. App. 244, it is conceded, tends to sustain that contention. Referring to the Colorado statute, which provides that no tract or parcel of improved or occupied land shall be burdened with two or more ditches, etc., it is said in the case cited: "We are wholly unable to understand how it can be urged that the defendant company has any right under the provisions of these sections. They clearly and in unmistakable language apply to the right of the owner of the lands to assert that his property shall not be burdened with more than one irrigating ditch, provided that one ditch be of sufficient capacity to carry water for the purposes contemplated by the act." We are, however, unable to accept that case as an authoritative interpretation of our statute. The term "no tract of land," as employed, without qualifications, must be held to include the property of corporations as well as natural persons; and such would have been the construction had the statute read "the land of no person shall be crossed," etc. *Wales* v. *Muscatine*, 4 Iowa, 304; *Ricker* v. *American Loan & T. Co.* 140 Mass. 346; *Norris* v. *State*, 25 Ohio St. 217, 18 Am. Rep. 291. But we reach the same conclusion as the district court,—presumably by the same course of reasoning,—by which the sections are transposed; section 8 of article 2 being regarded as the enacting clause, and section 3 of article 1 as a proviso exempting the exceptional cases therein contemplated from the operation of the act. According to settled rules of construction, a proviso which would operate to limit the application of an enacting clause general in its terms will be strictly construed, and includes no case not within the letter of the exception. Endlich, Interpretation of Statutes, 186; *United States* v. *Dickson*, 40 U. S. 15 Pet. 165, 10 L. ed. 698; *Roberts* v. *Yarboro*, 41 Tex. 450; *Epps* v. *Epps*, 17 Ill. App. 196. Referring again to the proviso involved, we are first impressed with the fact that the primary object thereof is the protection of land owners, rather than the proprietors of irrigating ditches. True, both characters may, as in this instance, be united in one person or corporation, but such cases are exceptions, and apparently not within the contemplation of the legislature. It is, in the second place, noticeable that the act is silent respecting the terms and conditions upon which one irrigating company may make use of the canal or ditch of another; nor is the proprietor of such a ditch in terms required to supply water upon any terms to a rival corporation. It was at the consultation suggested that it is within the power of a court of equity to prescribe the conditions upon which one irrigating company may connect with the ditch of another; but that assertion rests, to say the least, upon doubtful grounds. Conceding irrigating companies, as quasi public corporations, to be subject to the strict obligations of common carriers, it does not follow that they may by the courts be compelled to enter into particular agreements, or assume particular relations, however just and equitable, towards each other. That subject has recently engaged the attention of the Supreme Court of the United States, by which the power to prescribe terms for the interchange of business by connecting carriers is declared to be legislative rather than judicial in character, notwithstanding the provisions of the interstate commerce act. *Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291; *Pullman's Palace Car Co.* v. *Missouri Pac. R. Co.* 115 U. S. 587, 29 L. ed. 499; *Express Cases*, 117 U. S. 1, 29 L. ed. 791; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763. See also Beach, Priv. Corp. 889; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.* 37 Fed. Rep. 567, 2 L. R. A. 289, 2 Inters. Com. Rep. 351;

Shelbyville R. Co. v. *Louisville, C. & L. R. Co.* 82 Ky. 541.

The precise limits within which courts of equity will interfere in such cases in order to regulate or enforce the reciprocal obligations of corporations is a question foreign to the present controversy, although the authorities cited serve to illustrate the difficulties attending the interpretation placed upon the statute by counsel for plaintiff. We are, after a careful analysis of the language of the exception, unable to say that it contemplates the connecting of different canals, or that it imposes upon one irrigating company any duty to supply water for use by the patrons of another. What the statute implies is that no tract of land shall, without the consent of the owner, be burdened with two or more ditches for the watering of the same territory. The question is not whether the first ditch may be so enlarged or extended as to answer the purpose for which the second is designed, but whether it may as constructed be made to supply the lands within reach of both. That the purpose of the defendant is to water lands which cannot be accommodated by the plaintiff, but which, in the language of the district court, "lie below and beyond its ditch" as now constructed, is clearly established by the proofs, and apparent from an inspection of the foregoing map. Nor can the fact that the plaintiff concedes the defendant's right to connect with its ditch, and offers to supply the latter with water on terms confessedly reasonable, be regarded as material, since, as we have seen, the law imposes upon the plaintiff no such duty. It follows without further elaboration that *the decree of the District Court is right, and must be affirmed.*

MICHIGAN SUPREME COURT.

Rudolph MUNZER *et al.*
v.
Henry STERN, *Plf. in Err.*

(.....Mich.....)

1. **Fraud in the purchase of goods is waived** by the seller's entering into a compromise agreement with the purchaser by which the latter returns a portion of the goods and agrees to pay for the balance on terms satisfactory to the seller.

2. **Sellers of goods to one who purchased with intent to defraud,** who have been induced to leave a portion in possession of the buyer under a compromise agreement entered into by the latter with the intent to defraud, may rescind the agreement and retake the goods.

3. **A tender back of what he obtained by the compromise is not necessary** to justify its rescission, where one from whom goods were fraudulently purchased regained a portion of them under a compromise agreement which left the remainder in the buyer's possession, but which was entered into by the buyer with intent to defraud the seller of the property.

4. **Evidence of a conversation** which occurred in defendant's absence is not rendered admissible against him by the fact that it would tend to contradict statements made by defendant's counsel in his opening statement to the jury.

(May 28, 1895.)

ERROR to the Circuit Court for Kalamazoo County to review a judgment in favor of plaintiffs in an action brought to recover possession of certain cloaks which were alleged to have been procured from plaintiffs by fraud. *Reversed.*

Statement by **Grant, J.:**

A firm by the name of Livingston & Block was engaged in the dry goods and retail cloak business in the city of Kalamazoo. In the summer of 1893 plaintiffs sold to this firm cloaks of the value of $2,728.50 shipping the same in July or August. About August 29 the plaintiffs learned that Livingston & Block had purchased a much larger amount of goods than formerly, and that they had been shipping goods away. Munzer thereupon went to Kalamazoo, interviewed Livingston & Block, at first tried to obtain payment, although the purchase price was not due until January following, by informing Livingston & Block that they were in need of money and offering a large discount for cash payment, and falling in this charged them with shipping away goods, and demanded a return of at least a part of the goods which plaintiff had sold to them. Livingston & Block admitted to Munzer that they had shipped away goods, but none purchased of the plaintiffs, and there is no evidence that at that time they had done so. Livingston & Block refused to surrender any of the goods, and Munzer returned to Chicago, leaving the matter in charge of plaintiff's attorneys, Osborn and Mills. Mr. Mills shortly thereafter interviewed Livingston & Block, and testified that he informed them of plaintiff's claim, that they had purchased more goods than usual and had shipped goods away, and that Mr. Block denied having shipped away any goods. At the second interview Mr. Mills informed Livingston & Block that he was instructed to replevin the goods, and should do so at once unless a compromise was effected, whereupon a proposition was made which was submitted to plaintiffs by their attorneys, assented to by them, and, on September 2, 1893, incorporated into the following contract:

"Whereas, R. Munzer & Company, of Chicago, Illinois, has heretofore sold and shipped to Livingston & Block, of Kalamazoo, Michigan, two bills of cloaks, one amounting to $71 and one to $2,657.50, said bills being dated December 1, 1893, due in thirty days with 7 per cent discount if paid in ten days and six per cent discount if paid

NOTE.—In connection with the above case, see Sisson v. Hill (R. I.) 21 L. R. A. 206, and *note.*

in thirty days; and whereas a misunderstanding has arisen between the parties in regard to said bills of cloaks; and whereas, it is desired by all parties to settle said differences amicably: Now, therefore, it is hereby agreed between the parties that said Livingston & Block shall return to said R. Munzer & Co. $1,600 worth of said cloaks, and that the same shall be received by R. Munzer & Co. in payment of said bills to that amount, and that said Livingston & Block shall keep the balance of said cloaks and shall pay for the same upon the terms of the original sale; that is to say, they shall pay for the same on January 1, 1894, and by so doing said Livingston & Block have a discount of 6 per cent, and if said Livingston & Block so desire they may pay for said cloaks on December 10, 1893, less a discount of 7 per cent. The cloaks that are to be reshipped to R. Munzer & Co. are to be shipped this day, and in consideration of the foregoing said R. Munzer & Co. are not to bother said Livingston & Block in the possession of the cloaks retained by them, or to bring suit for the recovery thereof, until the bill for the same becomes due, as herein agreed."

Livingston & Block reshipped the goods according to this contract. On September 18, Livingston & Block executed a chattel mortgage on the entire stock to the defendant Stern as trustee, to secure certain alleged creditors, most of whom were relatives of either Livingston or Block. Between that date and the close of the month fifteen replevin suits were brought against Stern by the creditors of Livingston & Block to recover goods claimed to have been purchased fraudulently. Plaintiffs also brought this suit of replevin and recovered $849 worth of their goods out of $1,128.50. Verdict and judgment were for the plaintiffs.

Messrs. **Howard & Roos** and **Boudeman & Adams**, for plaintiff in error:

When no questions are asked, no false pretenses, no artifice resorted to, silence is not fraud.

Cobbey, Replevin, § 268; *Norwich Union F. Ins. Soc.* v. *Girton*, 124 Ind. 217; *Strobridge Lithographing Co.* v. *Randall*, 78 Mich. 195; *King* v. *Williams*, 71 Iowa, 74; *Morgan* v. *Joy*, 121 Mo. 677; *Ham* v. *Hamilton*, 29 Ga. 40; *Sowle* v. *Holdridge*, 17 Ind. 236; *Adams* v. *Sage*, 28 N. Y. 103; *Home Ins. Co. of New York* v. *Howard*, 111 Ind. 544; *Cates* v. *Bales*, 78 Ind. 285.

A party cannot affirm and avoid a contract at the same time. If it is void for fraud, then it must be wholly void, and before plaintiffs can take the position that it is void they must deliver or tender back what they have received under it and place the other parties in the same position as they were before.

Town v. *Waldo*, 62 Vt. 118; *Hart* v. *Gould*, 62 Mich. 268; *Crippen* v. *Hope*, 88 Mich. 344; *Pangborn* v. *Continental Ins. Co.* 67 Mich. 688; *Home Ins. Co. of New York* v. *Howard*, and *Cates* v. *Bales*, *supra*; *Merrill* v. *Wilson*, 66 Mich. 243; *Wilbur* v. *Flood*, 16 Mich. 40, 93 Am. Dec. 203; *Dunks* v. *Fuller*, 82 Mich. 242; *Wylie* v. *Gamble*, 95 Mich. 564.

Messrs. **Osborn, Mills & Master**, for defendants in error:

The plaintiffs were not required to tender back to the defendant or Livingston & Block the goods they had received from Livingston & Block before commencing this suit.

Stevens v. *Austin*, 1 Met. 557; *Pearse* v. *Pettis*, 47 Barb. 276; *Frost* v. *Lowry*, 15 Ohio, 200.

Impossible and unreasonable things which do not tend to the accomplishment of equity in the particular transaction are not required, and when it appears that the value of the goods replevined does not exceed the goods to which the plaintiffs are entitled, no tender back before suit is essential.

Sloane v. *Shiffer*, 156 Pa. 59; *Schofield* v. *Shiffer*, Id. 65.

In cases in which the judgment sought will substantially restore the party to the situation he was in when the agreement was made, no tender back before suit is required.

Springfield Fire & Marine Ins. Co. v. *Hull*, 51 Ohio St 270, 25 L. R. A. 37; 1 Bigelow, Fr. 426; *Smith* v. *Salomon*, 7 Daly, 216; *Pearse* v. *Pettis*, *supra*.

Exceptional circumstances excuse a tender back upon rescission.

Smith v. *Holyoke*, 112 Mass. 517; *Clough* v. *London & N. W. R. Co.* L. R. 7 Exch. 26; *Smith* v. *Salomon*, *supra*; *Montgomery* v. *Pickering*, 116 Mass. 227.

Grant, J., delivered the opinion of the court:

1. The defendant requested the court to direct a verdict for the defendant, for the reason that under the evidence the plaintiffs were fully advised of the circumstances and conditions surrounding the case, and entered into the compromise agreement with full knowledge of the facts. The court instructed the jury that the plaintiffs by this agreement waived every right to bring suit in replevin because of any claim on their part that the goods were fraudulently purchased, and that they could not repudiate the agreement unless they had shown that the plaintiffs or their agents were misled into making such agreement by reason of some fraud practiced by Livingston & Block; and that they must show that some active fraud was perpetrated to induce them to enter into said agreement.

We think the instruction was correct. If the jury believed the evidence on the part of the plaintiffs, which of course they did, they were justified in reaching the conclusion that this compromise agreement was not entered into in good faith by Livingston & Block; that they were then hopelessly insolvent; that they had purchased at a time when business was depressed, nearly five times the usual amount of their purchases; that they did this without intending to pay for them; that they themselves, without the knowledge of their clerks, secretly packed and shipped a large amount of goods to fictitious consignees, and that they sold goods at cost less a discount of from 10 to 18 per cent, and that some were shipped in the original packages. There was other evidence upon this point which it is unnecessary to state. These things were done within a few days

after the receipt of the goods. Plaintiffs had the right to assume that this agreement was made with a view to the continuance of their business, whereas the evidence on plaintiff's part tends strongly to show that they had no such intention. There was evidence to sustain the finding, not only that they purchased these goods and others with intent to defraud, but also that they entered into this agreement with intent to retain the goods mentioned therein for the like purpose. In such case the plaintiffs were justified in rescinding the contract and re-taking the goods.

2. It was not necessary for the plaintiffs to offer to return the goods obtained by the agreement before bringing replevin for the remainder. Such action would be an idle ceremony not required by the law. Neither does the law require a party to tender back or surrender that to which he is entitled. Defendants had paid nothing. Their purchase was fraudulent. Both the original purchase and the compromise agreement were tainted with fraud. By retaking the remainder of the goods the plaintiffs placed themselves in the situation in which they were before the perpetration of the fraud, and this was their clear legal right.

The general rule requiring the surrender, or offer to surrender, what has been received, upon the rescission of a contract voidable for fraud, is not one of universal application, and has many exceptions. It does not require unreasonable or impossible things to be done. *Sloane* v. *Shiffer*, 156 Pa. 59–65; *Springfield Fire & Marine Ins. Co.* v. *Hull*, 51 Ohio St. 270, 25 L. R. A. 37; *Pearse* v. *Pettis*, 47 Barb. 276; *Smith* v. *Salomon*, 7 Daly, 216; *Montgomery* v. *Pickering*, 116 Mass. 227.

The rule has no application to the present case.

3. The only remaining question arises upon the admissibility of evidence. Mr. Mills was permitted to testify to a conversation between himself, Mr. Munzer, and one Einstein, who represented a New York firm who had sold goods to Livingston & Block. Livingston & Block were not present, and, among other things, Mr. Mills testified to a statement made by Einstein of a conversation he had with a gentleman, whose name was not given, upon a street-car in New York, that he had sold Livingston & Block a large bill of goods, and that Mr. Einstein further said that he ascertained that they had purchased several thousand dollars more than they had gotten of him. It is attempted to support its admission upon the opening statement to the jury of counsel for defendant that they would show that Mr. Munzer was the sole cause of all the difficulty in which Livingston & Block were involved, and that he had written to various creditors for the express purpose of breaking up their business. It was furthermore insisted that this conversation was substantially told to Livingston & Block by Mr. Mills. The admission of the testimony cannot be justified under any rule of evidence. The opening statement of counsel did not make it competent. It was hearsay. Testimony is not admissible to rebut a statement made by counsel which there is no evidence to sustain. We do not find that the most damaging statements in this conversation were repeated to Livingston & Block by Mr. Mills. The record states that the defendant introduced evidence tending to controvert that given by the plaintiffs. We do not, therefore, feel at liberty to hold that this was error without prejudice.

For this reason *judgment must be reversed*, and a new trial ordered.

Hooker, *J.*, did not sit.
The other Justices concurred.

SOUTH DAKOTA SUPREME COURT.

Town of DELL RAPIDS, *Appt.*,
v.
Margaret IRVING, *Respt.*

(.....S. Dak.....)

***1. The provisions of section 1302, Comp. Laws,** imposing upon township supervisors the duty of assessing the damages sustained by the owner of land by reason of the laying out, altering, or discontinuing of any road,—the right to an appeal and a jury trial being given to the party who feels aggrieved by any such determination or award of damages made by such supervisors (Comp. Laws, § 1324),—are not in conflict with the provisions of section 13, article 6, of the state Constitution, which reads as follows: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken."

2. The purpose of the provisions of the constitution evidently is to secure to a party whose property is taken or damaged for public use the right to a jury trial upon the question of damages, and that right is secured by giving to the party whose land is so taken or damaged the right to an appeal to a court in which such a jury trial may be had.

3. The term "municipal corporation," as used in chapter 94, Laws 1891, does not include townships organized under the laws of this state.

4. The term "other corporations" does not include townships organized under the laws of this state.

5. Chapter 94, Laws 1891, was designed to affect "municipal" and "other corporations" referred to in section 18, article 17, of the Constitution only, and has no application to quasi corporations organized under the laws

*Headnotes by CORSON, *P. J.*

NOTE.—In connection with the above case on the question as to the nature of a town as a municipal corporation, see also Floyd v. Perrin (S. C.) 2 L. R. A. 242, and Brownell v. Greenwich (N. Y.) 4 L. R. A. 685.

of this state for political and governmental purposes.

(August 3, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Minnehaha County allowing damages to defendant in a proceeding to lay out a road over her property. *Reversed.*

The facts are stated in the opinion.

Messrs. **Henry Robertson** and **Palmer, Preston & Rogde,** for appellant:

If the provisions of chapter 112, Laws of 1883, were repealed by chapter 94 of Laws of 1891, then the circuit court was without jurisdiction, and could only dismiss the appeal, but could not render a judgment.

The provisions of chapter 94, Laws of 1891, were not intended to, and do not, apply to actions of township boards. Nor is any provision of the constitution in the way of township supervisors proceeding under chapter 112, Laws of 1883.

The judgment is against law.

Civil townships (quasi corporations only) are not embraced within any of the classes enumerated in section 1 of the Laws of 1891.

Messrs. **R. W. Hobart** and **Bailey & Voorhees,** for respondent:

The provisions of the territorial statute in regard to the awarding of damages by boards of supervisors is in conflict with the provisions of the constitution, and, even if they had been constitutional, they were repealed by the enactment of chapter 94, Laws of 1891.

Corson, *P. J.*, delivered the opinion of the court:

This is an appeal by the plaintiff from a judgment rendered by the circuit court in favor of the defendant upon an appeal from an order of the board of town supervisors of the town of Dell Rapids, laying out a highway over the land of the defendant. The appeal from the order to the circuit court seems to have been taken upon the ground that said board refused to assess any damages in favor of the defendant, and in her notice of appeal she claims $300 damages.

The appellant contends that the judgment of the circuit court is erroneous, in that it reverses and sets aside the proceedings of the board of supervisors when, under the theory of the case adopted by the court, a judgment dismissing the appeal, only, should have been entered; but as both parties seem to desire a decision upon the more important questions presented, namely, whether or not the provisions of the compiled laws relating to the subject of assessing damages in laying out town roads are in conflict with the state constitution, or have been repealed by chapter 94, Laws 1891, we express no opinion as to the form of the judgment.

When the case was called for trial in the circuit court the counsel for the defendant objected to the introduction of any evidence, "for the reason that the statute under which the proceedings in this action have been attempted to be had is in violation of the provisions of the constitution of the state of South Dakota, and especially in violation of the provisions of the bill of rights, and also in that the statute has been repealed by chapter 94 of the Laws of South Dakota of 1891." The motion was granted, and the court directed a verdict for the defendant.

Two questions are presented by the record for our determination: First. Are the provisions of the compiled laws relating to the assessment of damages in proceedings for laying out town roads in conflict with section 13, article 6, of the state Constitution? Second. Are the provisions relating to the assessment of damages contained in the compiled laws repealed by the provisions of chapter 94, Laws 1891?

Section 13, article 6, of the Constitution reads as follows: "Private property shall not be taken for public use, or damaged, without just compensation as determined by a jury, which shall be paid as soon as it can be ascertained and before possession is taken. No benefit which may accrue to the owner as the result of an improvement made by any private corporation shall be considered in fixing the compensation for property taken or damaged. The fee of land taken for railroad tracks or other highways shall remain in such owners, subject to the use for which it is taken." It is contended by the respondent, in support of the judgment of the circuit court, that by the terms of that section damages can only be assessed by a jury, and that the provisions of section 1302, Comp. Laws, providing for assessing damages, is in conflict with said section of the constitution. But we are of the opinion that there is no conflict between the provisions of the compiled laws and the provision of the constitution. The object of the constitutional provision evidently is to secure to parties whose property is taken for public use the right to a jury trial upon the question of damages. This we think is secured to them by providing for an appeal to the proper court in which a jury trial can be had. Comp. Laws, § 1824. If the parties agree upon the amount of damages to be awarded, or the party is satisfied with the amount awarded by the town supervisors, there would be no necessity for a jury trial. If, however, the parties cannot agree, or the party is dissatisfied with the award made by the supervisors, he can by an appeal secure a trial by a jury upon the question of damages. This right of an appeal and a jury trial carries into effect the constitutional provision. Hence we discover no conflict between the provisions of the statutes and the constitution.

We cannot agree with counsel for respondent that the damages must in all cases be assessed by a jury, and that no highway can be laid out over the land of a private party until the damages are assessed, notwithstanding the party may be satisfied with the amount awarded by the town board of supervisors, or be satisfied with the amount that the board may be willing to allow. To so hold would require a very strict construction of the constitutional provision, and would not, in our opinion, carry out the evident intention of the framers of that instrument, which seems to have been to secure to the party such right if he desired to avail himself of it. That such was the design of the

constitution is quite evident from the subsequent section upon this subject under the title of "Corporations." Section 18, article 17, reads as follows: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed, by the construction or enlargement of their works, highways, or improvements, which compensation shall be paid or secured before such taking, injury, or destruction. The legislature is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages against any such corporation or individuals made by viewers or otherwise, and the amount of such damages in all cases of appeal shall, on the demand of either party, be determined by a jury as in other civil cases." It will be observed that this section clearly contemplates that damages in the first instance may be assessed by "viewers or otherwise," as the legislature is "prohibited from depriving any person of an appeal from any preliminary assessment by viewers or otherwise." A constitution, like a statute, is to be read as one instrument, and all its provisions may be considered in ascertaining the intention of its framers as to any provisions it contains.

It is further contended by the respondent that, assuming the provisions of the compiled laws relating to the assessment of damages are constitutional, the provisions of chapter 94, Laws 1891, have in effect repealed the provisions relating to damages, and that all proceedings to assess the amount of damages must be had under the provisions of the latter act. But we are unable to agree with the counsel in this contention. The Act of 1891 seems to have been intended to carry into effect the provision of section 18, article 17, heretofore given. The first section of the Act of 1891, chapter 94, reads as follows: "In all cases when municipal or other corporations, or individuals, invested with the privilege of taking private property for public use or damaging the same in making, constructing, or repairing any work or improvement allowed by law, shall determine to exercise such privilege, it shall be the duty of such corporation or individual to file a petition in the circuit court of the county in which the property to be taken or damaged is situated, praying that the just compensation to be made for such property may be ascertained by a jury." As has before been stated, this section of the constitution is found in the article entitled "Corporations," and, as will be observed, it only applies to "municipal or other corporations" and individuals invested with the privilege of taking property for public use. Unless, therefore, towns organized under the laws of this state are included within the terms "municipal or other corporations," the Law of 1891 does not apply to them. *Judge* Dillon, in his work on Municipal Corporations, defines a municipal corporation as follows: "The incorporation by the authority of the government of the inhabitants of a particular place or district, and authorizing them, in their corporate capacity, to exercise subordinate specified powers of legislation and regulation with respect to their local and internal concerns. The power of local government is the distinguishing feature of municipal corporations proper, and is used with us in the strict and proper sense just mentioned." Dill. Mun. Corp. § 20. In the American & English Encyclopædia of Law a municipal corporation proper is thus defined: "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality of its people. The primary idea is an agency to regulate and administer the internal concerns of the locality in matters peculiar to the place incorporated and not common to the state or people at large. Cities and incorporated villages, either created by special charter or organized under a general act, are the principal examples of municipal corporations proper." Quasi corporations are thus defined: "Involuntary quasi corporations, such as counties, towns, and school districts, are created almost exclusively with a view to the policy of the state at large for the purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transportation, and for the general administration of justice. They are not bodies corporate and politic with the general power of corporations, but are mere political subdivisions of the state, having the powers expressly granted to them, and such implied powers as are necessary to enable them to perform their duties, and no more. They are denominated in the books, and known to the law, as quasi corporations rather than as corporations proper. They possess some corporate functions and attributes, but are primarily political subdivisions—agencies in the administration of civil government—and their corporate functions are granted to enable them more readily to perform their public duties." 15 Am. & Eng. Encyclop. Law, pp. 954, 955. From the numerous cases cited we select the following in which the subject is very fully discussed: *Hamilton County Comrs.* v. *Mighels*, 7 Ohio St. 109; *Riddle* v. *Proprietors of Locks & Canals*, 7 Mass. 169, 5 Am. Dec. 35; *Fourth School-Dist.* v. *Wood*, 13 Mass. 193; *Beach* v. *Leahy*, 11 Kan. 23; *Mower* v. *Leicester*, 9 Mass. 247, 6 Am. Dec. 63; *Eastman* v. *Meredith*, 36 N. H. 284, 72 Am. Dec. 302; *Bailey* v. *Lawrence County* (S. Dak.) 59 N. W. Rep. 219; *Heller* v. *Stremmel*, 52 Mo. 309; *State* v. *Leffingwell*, 54 Mo. 458.

We are of the opinion that the framers of our constitution intended, by the term "municipal corporations," to use it in its restricted sense, as applicable only to incorporated cities, towns, or villages invested with the power of local legislation. This is quite apparent from other sections of the constitution. Article 9, entitled "County and Township Organizations," requires the legislature to provide by general law for organizing the counties into townships but nowhere in that article are townships designated as municipal corporations. Article 10 is entitled "Municipal Corporations," and requires the legislature to pro-

vide by general law for the organization and classification of municipal corporations, and provides that such classes shall not exceed four. This article seems to be limited to municipal corporations proper. In article 13 it is provided that "neither the state nor any county, township, or municipality shall loan or give its credit," etc. It will be observed that the term "township" is here used in connection with the term "municipality," thus clearly indicating that, in the minds of the framers of the constitution, "municipality did not include a township. The term "town" seems to be sometimes used in the constitution in a somewhat different sense, but, when so used, clearly indicates that the town referred to is an incorporated town. Thus, section 23, article 5, contains the following clause: "The legislature shall have power to provide for creating such police magistrates for cities and towns as may be deemed from time to time necessary, who shall have jurisdiction of all cases arising under the ordinances of such cities or towns." The use of the term "ordinances" clearly indicates a regularly incorporated town, as townships as organized under the laws of this state are not authorized to adopt ordinances. Section 773, Comp. Laws, provides that "whenever any incorporated village or town which is laid out into streets is included within the limits of any organized township," etc. It will be noticed that the legislature here makes a distinction between an incorporated town and an organized township, clearly indicating that a distinction is made by the legislature between an incorporated town and an organized township. At an early day the territorial legislature passed a law providing for the incorporation of towns. Comp. Laws, §§ 1022-1188, inclusive. By these provisions a board of trustees with power to enact ordinances was provided for. This law being in force when the constitution was adopted, we may fairly presume that when the framers of the constitution speak of towns, ordinances, etc., in connection with the term "incorporated towns, cities, and villages," they have reference to towns incorporated under the provisions of this law which are municipalities, and when they speak of organized towns or townships they refer to those towns which embrace a portion of the state organized into townships for political and governmental purposes. In *Bailey* v. *Lawrence County* (S. Dak.) 59 N. W. Rep. 219, the distinction between quasi corporations and municipal corporations was fully considered. In the case of *Norton* v. *Peck*, 3 Wis. 714, in construing a similar provision in the constitution of that state, the court held that, although towns were bodies corporate, they were not included in the term "municipal corporations." This decision was cited with approval by the same court in *Eaton* v. *Manitowoc County Supvrs.* 44 Wis. 489. In that case the court says: "Whether towns are 'municipal corporations,' in a strict legal sense, is a question which the lamented *Chief Justice* Whiton, in *Norton* v. *Peck*, 3 Wis. 714, says 'is not of easy solution;' but, in construing the meaning of this designation in the statute considered in that case, it was held that 'municipal corporations,' as used in the constitution of this state, do not embrace towns. Towns are often called, in common parlance, and sometimes unguardedly in statutes, 'municipal corporations,' in connection with counties, cities, and villages; but, when so called, it is in the sense of mere corporations or quasi corporations, or of corporations *sub modo*, only, and not in the sense of municipalities proper. These words, when used in our own statutes, must be received in their strict and constitutional sense, unless it was clearly the intention of the legislature, in a given statute, that they should have a more extended signification. No such intention seems to be apparent in the proviso of section 1, chapter 112, Laws 1867, in the use of the words 'counties or municipal corporations;' and this language should not be construed to embrace towns and school districts, but rather to exclude them." *Van Antwerp* v. *Dell Rapids Twp.* 3 S. Dak. 305; same case on rehearing, 59 N. W. Rep. 209. It will also be observed that section 1 of chapter 94 of the Laws of 1891, while it follows quite closely the language of the first clause of section 18, article 17, of the Constitution, has omitted the term "highways." This omission is significant, and seems to indicate an intention on the part of the legislature to exclude township highway proceedings from the provisions of the act. It will hardly be contended that, if towns are not included within the term "municipal corporations," they are included within the term "other corporations," as they are not strictly corporations in any sense but quasi corporations. There being nothing in the provisions of the Laws of 1891 requiring us to give an extended or enlarged meaning to the term "municipal corporation," we feel at liberty to give to it its restricted construction, and as applicable only to incorporated towns, cities, or villages invested with legislative powers for the benefit of its inhabitants. Giving to the term "municipal corporations" this construction, there would seem to be no conflict between the provisions of the compiled laws relating to the assessment of damages and the Laws of 1891. The court, in holding that the Laws of 1891 repealed the statutory provisions then existing upon the subject of laying out township highways and assessing damages for the property taken, was in error. As the proceedings, so far as the record discloses, seem to have been regular, and the appeal properly taken, the evidence relating to damages should have been admitted.

The judgment of the court below is therefore reversed, and a new trial ordered.

END OF CASES IN BOOK 29.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK.

SHOWING the Changes, Progress, and Development of the Law during the First Quarter of the Judicial Year Beginning with October 1, 1895, Classified as Follows:

I. Public, Official, and Statutory Matters.
II. Contractual and Commercial Relations.
III. Corporations and Associations.
IV. Domestic Relations.
V. Fiduciaries.
VI. Torts; Negligence; Injuries
VII. Property Rights.
VIII. Civil Remedies; Rules and Principles.
IX. Criminal Law and Practice.

I. Public, Official, and Statutory Matters.

The constitutional right to acquire and possess property is held to preclude a statute imposing liability on a person for acts of others over whom he has no control, and this is applied to the Pennsylvania statute attempting to make a mine owner liable for negligence of a certified foreman whom the statute compels him to employ without the right to control him. (Pa.) 807.

Constitutional rights of persons are held to be infringed by a statute prohibiting the employment of females in factories or workshops more than eight hours per day or forty-eight hours per week. (Ill.) 79.

The statutory attempts to restrict contracts between master and servant are increased by a Missouri statute making it unlawful to impose, as a condition of employment, that employés should not belong to labor unions. (Mo.) 257.

A statute allowing attorneys' fees in an action for wages, if not paid within three days after demand in writing, is condemned as an unconstitutional denial of the equal protection of the laws to the class of citizens who would be defendants in such cases. (Ohio) 886.

Health.

A resolution of a state board of health that no pigpen shall be built within 100 feet of any street or inhabited house is held unreasonable and invalid. (Vt.) 578.

Destruction of bedding used by a person who had scarlet fever is held to be within the lawful authority of sanitary inspectors, and to give the owner no right to compensation. (Ga.) 808.

Vaccination.

The constitutionality of a statute requiring vaccination of pupils as a condition of attendance on public schools is sustained in a Connecticut case. (Conn.) 251.

Eminent domain.

Condemnation of land for irrigating ditches is held to be for a public purpose. (Neb.) 853.

Interstate commerce.

The validity of a statute requiring fire screens on vessels burning wood is sustained against the objections that it interferes with interstate commerce and imposes an unreasonable burden. (Mich.) 468.

See also *Licenses; Taxation, infra.*

Licenses.

A state statute requiring a license to sell patent rights is held to be a clear infringement of the rights of the patentee under federal law. (Ky.) 786.

Requiring a license fee of transient merchants is held not to discriminate against nonresidents, but a charge of $250 per month, or $25 per day for shorter periods, is held to be excessive, amounting to a tax rather than an exercise of police power. (Iowa) 734.

An attempt to impose a municipal license tax on the right to operate a branch railroad in a city, where such road was part of an interstate line, is held to be a tax on interstate commerce as much as if the main line, and not the branch, was in question. (Cal.) 827.

An ordinance requiring a license to hawk and peddle is sustained in case of one selling and delivering chairs from house to house, although the chairs had been imported into the state and the title remained in the nonresident owner on conditional sales by the peddler. (Ind.) 531.

A license fee imposed by a city on street cars is held enforceable by penalty. (Colo.) 606.

Taxation.

A school is denied to be a purely public charity, so as to be free from taxation, where tuition is paid for all pupils, and the manager conducts it as a business enterprise, paying one eighth of the gross receipts from tuition for the use of the property, although the corporation out of other funds pays the tuition for a few pupils. (Pa.) 600.

Exemption of public property does not extend to private property leased for a public market. (Minn.) 777.

The exemption of property from taxation is held to be beyond the power of a town in the absence of constitutional legislative authority, but an omission of property by mistake of law is held not to defeat the assessment. (R. I.) 526.

The power of a city to tax the franchise of a bridge company whose bridge spans a river between states is sustained, although the company has privileges granted it by the adjoining state and by congress; and such a tax does not interfere with interstate commerce. (Ky.) 78.

Taxation in the town in which the land lies, of land under water of a dam, is sustained according to the enhanced value for furnishing power, although the power is used in another town. (N. H.) 57.

The meaning of the word "railroad" is held to extend to a street railroad, as used in a Florida statute providing for sales of railroad property for taxes. The question is regarded as one depending entirely on the text and general intent of the statute. (Fla.) 507.

The doctrine that debts due from a foreign corporation cannot be deducted from the amount of its investments to be taxed is limited in a New York case by holding that the unpaid part of the purchase money for property bought in the state is to be deducted in determining the sums invested there. (N. Y.) 393.

A railroad bridge used exclusively for railroad purposes, and leased forever to a railroad company, subject to the termination of the lease for default, is not assessable as railroad property when owned by a bridge company. (Ill.) 69.

Real estate of a partner is held subject to the lien of a tax on the personal property of the partnership. (Iowa) 278.

Local assessments.

A sale of a railroad freight-house and a portion of its track and right of way, although at the terminus, is held to be invalid as a mode of collecting a local assessment. (Mich.) 195.

Officers.

The certificate of eligibility to the office of county court clerk, required by the Kentucky constitution, is held to be sufficient when obtained after election but before the term of office begins. (Ky.) 703.

The contention that appointment to office is a function essentially executive is held to be contrary to the positive terms of the Indiana constitution giving the legislative assembly control of the appointment of some officers; and the joining of state auditor, secretary of state, treasurer, and attorney-general with the governor as a board to choose prison directors, is held valid under a provision making the executive department include the administrative. (Ind.) 113.

Elections.

The constitutionality of a statute requiring official ballots is sustained in Massachusetts, although it makes such ballots compulsory in city elections, but optional in town elections. (Mass.) 668.

The Michigan ballot law, allowing a candidate to have his name appear on the official ballot but once, although he may be nominated on different party tickets, is held constitutional notwithstanding the fact that voters of one party, unlike those of another, may be compelled to mark the ballot more than once in order to vote for all their candidates, and be unable to have all their candidates on their own ticket. (Mich.) 330.

A blurred spot or erasure on a ballot, innocently made with intent to correct a mistake, is held not to defeat the vote, but it is otherwise with a blurred spot made for the purpose of identifying the ballot. (Nev.) 781.

Various marks to distinguish ballots are considered in a California case, which also holds that the election is invalidated by the violation of the statute in respect to the time of opening the polls and the removal of the ballot box from them. (Cal.) 678.

Lack of an official stamp upon ballots, or lack of an initial which an election officer should have placed upon them, is held not to defeat the counting of such ballots after they have been cast in good faith. (Wash.) 670.

Counties.

The relation of counties to municipalities therein in respect to the use of county funds is touched upon in a Florida case, which holds that a statute providing that one half the funds raised by county taxes for highways and bridges shall be turned over to municipal authorities for city streets is not unconstitutional as diverting the funds from county purposes. (Fla.) 416.

Municipalities.

The right to contest the validity of annexation to a city is denied in a suit for injunction against taxes, on the ground of acquiescence, as well as the inability to raise that question in a private action. (Wash.) 445.

The attempt of the mayor to adjourn one of the branches of the general council of the city when they cannot agree on an adjournment is held invalid. (Ky.) 110.

The attempt by an ordinance to limit the price of gas to private consumers is held invalid in the absence of legislative authority,—at least where this was not imposed as a condition of consent to the use of streets. (Kan.) 898.

The right of a city to shut off water from a consumer to coerce payment of an old claim is denied after the acceptance of rates and the furnishing of water for a later period. (Me.) 876.

The invalidity of a contract between a city and a corporation in which any city officer is interested is held not to defeat the liability of the city for gas furnished by a company of which the mayor was president, where this was not done under a contract, but the company was compelled by law to furnish it. (Cal.) 468.

The constitutional prohibition against donations by municipal corporations to private corporations is applied to defeat a statute giving to certain charities a portion of the fees received from licenses. (Ill.) 798.

The right of a municipality to make its bonds payable in gold coin of the present standard of weight and fineness is denied under a statute providing for payment in gold coin or lawful money of the United States. (Cal.) 512.

Highways.

A very clear statement of the law respecting the proper use of streets and rights of abutting owners is found in an Oregon case, which denies that an approach to a bridge of a private corporation can be made, to the damage of an

abutting owner, without compensation. (Or.) 88.

Vacating a portion of a city thoroughfare across railroad tracks, and erecting a viaduct on one side of the location so as to shut off land cornering on the vacated portion from access, so far as to destroy its former availability for business purposes, are held to give the owner a right to damages. (Ill.) 568.

A city ordinance exacting rent from a telegraph company for the use of the streets for poles and wires is held invalid where the statutes authorized telegraph lines without any provision for making compensation to cities. (Miss.) 770.

A novel statute making the driver of live stock over a highway on a hillside liable for damage to the banks or by rolling rocks into the highway is upheld as constitutional. (Utah) 97.

A constitutional provision against poll taxes is held in Maryland not to apply to compulsory work in repairing highways, with a privilege of commuting or furnishing a substitute. (Md.) 404.

The use of a bicycle on a sidewalk along a turnpike is held to be subject to the penalty of the Pennsylvania act against riding or driving a horse or other animal on a sidewalk, when construed with the Act of April 28, 1889, extending the same privileges and restrictions to the use of the bicycle as are prescribed for persons using carriages drawn by horses. (Pa.) 365.

Railway crossings.

A street railway track in a highway, which is laid across a railroad crossing, is held to be a part of the public use of the street for which the railroad company cannot claim compensation. (Ill.) 485.

The right to make a grade crossing at the intersection of a street railway and a steam railroad is sustained under a special statute, notwithstanding general statutes to a different effect. (Conn.) 867.

State boundary.

A shallow lake having no current at ordinary stages of the water, but connected with the Mississippi river, is held not to be a part of the boundary of Iowa so as to be excluded from the operation of the state against the use of seines in the waters of the state. (Iowa) 390.

II. CONTRACTUAL AND COMMERCIAL RELATIONS.

The fact that a contract made by letters and telegrams was intended to be put into a formal writing is held not to prevent the contract from being completed without such writing. (N. Y.) 481.

A city is held liable for the paving of a street when assessments prove invalid, although the paving was done under a contract which required the contractor to accept the assessments in payment, whether they were collectible or not. (C. C. App. 3d C.) 401.

Validity of contracts.

A contract for the purchase of property, made by a city through an officer who receives a commission from the other party, is held invalid and subject to repudiation by the city on discovering the facts. (C. C. App. 6th C.) 188.

See also *supra*, I., *Municipalities*, and *infra*, III.

A stipulation against liability for negligence is sustained in a lease by a railroad company providing that the lessor shall not be liable for any damages caused by fire. Such an agreement is held not to be void as against public policy. (Cal.) 751.

A similar provision in such a lease is held in another case to be ineffectual as against an agent of the lessee whose property was on the premises, where he was a stranger to the lease. (Cal.) 755.

Failure to obtain a license is held not to prevent a broker from recovering commissions, where the ordinance requiring a license imposes a penalty for such failure, and the object of it is simply to enforce payment of a tax. (S. C.) 215.

A contract by the owners of mines, furnaces, and a railroad therefrom, to give all their traffic to a connecting railroad which had aided in developing the business, is sustained in a Pennsylvania case, against the contention that it was in violation of the constitution of the state, and that it was *ultra vires*. (Pa.) 423.

The invalidity of an agreement for a divorce is held not to defeat the recovery by the wife of the consideration of a contract for release of her dower rights, which she has performed, and after which she has resumed marital relations with her husband, although the agreements were contemporaneous. (Pa.) 292.

Negotiable paper.

Corporate bonds secured by mortgage payable to bearer are held to be negotiable so far as to sustain an action by the holder in his own name, although the statute as to negotiable paper applies in terms only to promissory notes. (R. I.) 103.

Refusing to adopt the doctrine of other courts, the court of appeals of Kentucky adheres to the doctrine that a subsequent promise without consideration will not prevent the release of the indorser for lack of notice. (Ky.) 805.

A payee's guaranty of attorneys' fees if the note has to be collected by law is sustained so as to bind him for such fees in case of the dishonor of the note and the expenditure of the fees. (Ga.) 616.

Writing one's name on the back of a note to which he is not a party is held in Minnesota to be open to explanation by parol evidence, but, when done in accordance with a parol contract of guaranty, to be sufficient to justify writing a guaranty over the name, and thus satisfy the statute of frauds. (Minn.) 612.

Bona fide holders of a negotiable note are held unaffected by usury in the note, where the statute declares that usurious contracts shall be deemed to "be for an illegal consideration." (Va.) 827.

Taking interest in advance on a negotiable

note at the highest rate allowed by the constitution is held not to constitute usury, although the note is running for one year. (Ark.) 761.

Banks.

The doctrine that a bank to which paper is sent by another bank, with which it is deposited for collection, will be regarded as the agent of the owner, and not of the sending bank, is applied to a case in which worthless drafts were received and credited as proceeds of the collection before knowledge of the insolvency of the drawer of them. This was held to leave the depositor still liable for the loss. (Ill.) 794.

Insurance.

Insurance on a butcher shop and contents, and a smoke-house and contents, is held to cover smoked meats in a storage room to which they are taken from the smoke-house as fast as cured. (Pa.) 55.

Insurance on a building with personal property therein is held not to be forfeited as to personal property by lack of title to the real property, which defeats the insurance as to that. (Tex.) 706.

Carriers.

A ticket bearing a prior date is not invalid on the day of sale because it states that it is good only within one day of date of sale. (Iowa) 173.

The relation of carrier and passenger is held not to exist between a street railway company and a person struck by the sudden switching of a street car which he had signaled and was waiting for. (Conn.) 297.

Assuming mortgage.

Personal liability of a purchaser of land for a mortgage upon it which he assumes and agrees to pay is sustained in a Nebraska case, although the grantor may not have been liable on the mortgage. (Neb.) 851.

Hotel.

The responsibility of a hotel keeper to a regular boarder, as distinguished from a transient guest, is shown in a decision denying liability for the theft by a night clerk of money from the hotel safe. (Mich.) 92.

III. CORPORATIONS AND ASSOCIATIONS.

Forfeiture of the charter of a waterworks company is enforced on account of its failure to supply to a city pure, wholesome, deep-well water in accordance with the requirements of its charter. (Ala.) 743.

The duty of a railroad company to operate a ferry which has become unprofitable, but which constitutes an extension of its road, is held to be enforceable by suit in court. (Mass.) 169.

Officers of a corporation are compelled to account for salaries voted and paid, where it was done largely for the purpose of depriving the stockholders of the results of litigation brought by them if successful, although it was nominally and partly to pay for services rendered. (R. I.) 100.

Preferences to directors of a corporation are sustained in a Missouri case, when their debts were honestly and justly due. As to this see *note*, 22 L. R. A. 802. (Mo.) 830.

An agreement between corporations to cooperate in furnishing water to a city is sustained, although they appointed an officer of each as trustee to carry on the business. (Cal.) 839.

See also *supra*, II., *Validity of contracts.*

Promoters.

Promoters of a corporation are discussed at much length in a case which denies the enforcement of a mortgage received by them on the property of a corporation. (Md.) 262.

Fraud of promoters in inducing a person to subscribe to a corporation, where he has carried out his contract and united with others in forming the corporation, is held to be no defense to an assessment on the stock, but to give a remedy only against the wrongdoers. (Mich.) 63.

Proxies.

A by-law restricting proxies to stockholders is held invalid where a statute provides generally for proxies. (Cal.) 844.

De facto.

Failure to comply with the statutory requirement expressly made a condition of corporate existence is held to prevent a company from being a *de facto* corporation, but it leaves it the privileges as well as liabilities of a partnership. (Colo.) 143.

Foreign company.

Contrary to many other authorities, it is held in Arkansas that an unauthorized foreign insurance company, though guilty of a misdemeanor in issuing a policy and subject to a penalty therefor, may enforce its claim for a premium due under the contract. (Ark.) 712.

Public corporations.

A state university is held to be a corporation subject to quo warranto, and an invalid attempt to charge a library fee for the use of the library by students is defeated by such writ. (Kan.) 578.

The claim that a state agricultural society was a public corporation, such that it could not be held liable for negligence in the management of a horse race whereby a person was injured, is denied, although it was required to report to the state and received state aid. (Minn.) 708.

Building and loan associations.

The powers of a building and loan association under the Indiana statutes are held to include assessments to equalize the members at the winding up of the association. (Ind.) 177.

A forfeiture of the stock of a member of a building and loan association is held lawful, although it leaves a mortgage given by him in force for the full amount of principal and interest, without deduction of any payments made by him on his stock. (Ala.) 120.

But the claim that membership in a building and loan association and the loan to a member are distinct contracts, and that the stock of a member and payments made thereon may be forfeited without applying any previous payment on the mortgage when that is foreclosed, is denied in a case which holds that a rigid provision of the contract allowing for-

forfeiture of stock on default will not be given this effect. (Neb.) 133.

Monthly payments of shares of stock in a building and loan association are held in a South Carolina case to be applicable to a mortgage given for a loan, where the shares were pledged as collateral and the interest and dues consolidated. (S. C.) 127.

A mortgage given to a building association, containing a stipulation for payment of assessments on the members, is held to cover assessments for shortages in the assets after the appointment of a receiver. (Ohio) 184.

Labor union.

A statute protecting a labor union in the use of its labels is sustained in case of a label on cigars. (Mo.) 200.

Church.

The constitutional law of a church organization is extensively discussed in a case which involves the split of the Evangelical Association. It is held, among other things, that the secession of the majority leaves the minority as the rightful church, but that less than a quorum of an annual conference cannot take any action which will be binding on the absent majority, even after subsequent ratification by the highest tribunal of the denomination. (Pa.) 476.

Partnership.

The assumption of individual debts by a partnership is held to convert them into firm debts, which may share equally with other firm debts in case of dissolution. (Mo.) 681.

An agreement by one member of a law firm in a private transaction to collect a chose in action without charge is held not binding on his partner so as to make the property of the latter liable to attachment for the failure of the other to pay over the money collected. (Ga.) 496.

IV. DOMESTIC RELATIONS.

A divorced wife is denied the right to recover from her former husband for necessaries furnished their children in her custody under the divorce decree, which made no order for their maintenance. (Or.) 678.

The right of action for alienation of a husband's affections and depriving the wife of his society is sustained in Iowa. (Iowa) 150.

V. FIDUCIARIES.

Compound interest is charged upon an executor for money of the estate which he had used, in a case which extensively reviews the question. (Mont.) 632.

VI. TORTS; NEGLIGENCE; INJURIES.

Fraud.

The rule that a misrepresentation honestly made with reason to believe it true will not create a liability for fraud is applied to a case in which the president of the corporation omits from a statement of its assets and liabilities any mention of a claim then in litigation, which he did not believe to be valid. (N. Y.) 860.

Libel.

Falsely publishing that a person would be an anarchist if he thought it would pay is held to be libelous. (Md.) 59.

A pleading is held libelous when defamatory allegations therein are wholly irrelevant, gratuitous, and immaterial. (Minn.) 153.

Wrongs to or by passengers.

An accidental blow by a railroad employé, received by a passenger but which was aimed in play at another employé, is held not to make the railroad company liable, as it was not within the line of employment. (Ala.) 729.

Theft by a sleeping-car employé of the property of a passenger in a sleeping car, including such money as she had a right to carry, is held to make the sleeping-car company liable. (Ga.) 498.

The liability of a carrier for illegal arrest of a passenger, which a conductor causes to be made, is sustained where the arrest was made without a warrant while the passenger was quietly seated in a car. (Kan.) 465.

Profanity of a passenger on a street car is held to justify his ejection therefrom. (Me.) 580.

Negligence.

Licensees walking on a path upon a railroad right of way are denied a remedy against the railroad company for injuries caused by the sliding of the bank on which the path ran, in consequence of the removal of a boulder which was in danger of falling upon the track. (Va.) 825.

The negligence of a child nine years old in climbing over the coupling of a car when a train is standing at a crossing is held to be a question for the jury, together with the question of negligence on the part of the trainmen in starting the train. (Ohio) 757.

Negligence of a bandman walking close to an electric railway track while playing his instrument is held to be a question for the jury, like the question of the motorman's negligence when the bandman is struck by a car. (Mich.) 287.

The duty of a railroad company to signal the approach of a train at a crossing is held not to extend to a private crossing, or to persons driving parallel to the railroad without using or intending to use a crossing. (C. C. App. 8th C.) 695.

Negligence of master or servant.

A railroad company which requires employés to be engaged on duty nineteen hours per day

without time for food is held responsible for an accident by the backing of a train insufficiently manned while part of the crew were temporarily absent for food. (Ind.) 104.

The law of fellow servants is discussed at length in a case which denies that a foreman or boss of a railroad gang is an *alter ego* whether he has authority to discharge the men or not. (Mich.) 821.

The doctrine of fellow servants is discussed in a Nebraska case, which holds that consociation in the same department or line of employment is necessary to that relation. (Neb.) 137.

A cable street railway is held not to be a railroad within the meaning of a statute abolishing the fellow-servant doctrine in case of railroads. (Minn.) 208.

Explosion of gas.

Liability for an explosion of natural gas during transportation is held under the Ohio statute to be independent of the question of negligence. (Ohio) 337.

Negligence in conducting natural gas through leaking pipes on the surface of the ground and across a highway is found in a case where the chief contention was as to contributory negligence. (Ind.) 342.

VII. PROPERTY RIGHTS.

See also *supra*, I., *Health; Highways.*

The value of permanent improvements and repairs made by a coparcener, although he cannot compel contribution therefor, may be allowed him out of the proceeds of the property when sold for a division of interests because it was unsusceptible of partition. (W. Va.) 449.

Permitting another person to have his name and occupation painted on a wagon in his possession is held to estop the owner to assert title as against an innocent purchaser from the possessor. (Pa.) 607.

Assigning forged copy of mortgage.

An assignee of a mortgage and indorsee of forged copies of notes secured thereby is held not to have so good a title to the mortgage as a subsequent assignee of a forged copy of the mortgage who was a bona fide purchaser of the genuine notes before their maturity. (Ohio) 317.

Records.

Failure to index a mortgage on the records is held not to be fatal to its validity, in the absence of any statute making the indexing a part of the recording. (S. C.) 772.

Quitclaim deed; notice.

The effect of possession as notice is involved in some degree in a case where a woman in possession under an unrecorded deed giving her only a life estate concealed and afterwards destroyed the deed, and gave her vendee a later quitclaim deed from the person holding the record title. The latter is held to be protected by the records. (Mo.) 89.

The effect of a quitclaim deed to sustain the claim of a bona fide purchaser is discussed in differing opinions in a case in which the grantee was charged with notice by reason of his relations to the grantor, who had acted as his agent. (S. Dak.) 88.

Inheritance.

Descent of property to an heir who killed his ancestor to obtain the inheritance is permitted in Pennsylvania. One consideration is the constitutional provision against [attainder. (Pa.) 145.

That half-blood brothers and sisters are included in the general words "brothers and sisters" is held in an Indiana case, which also supports the right of descendants of such of them as are deceased to take by representation. (Ind.) 541.

Trust.

Funds in the hands of a receiver of a consignee are held not chargeable with a trust on account of goods, where the consignee dissipated the proceeds of the goods sent in paying current expenses of the business. (Or.) 664.

Tenancy.

The occupancy of part of a schoolhouse by a teacher is held to be that of an employé rather than a tenant, but his holding over without right is held to make him a tenant at sufferance. (Mich.) 576.

Easement.

An implied easement of light is held not to arise on the purchase of a strip of land 40 feet wide on which a building stands 11 feet from the boundary. (Conn.) 582.

An unusual instance of an easement by prescription is found in a Massachusetts case, which holds that the liability of a servient estate to pay a portion of the expense of repairs to a dam which supplies its water power is established by long-continued and regular payment of such contributions. (Mass.) 500.

Lien.

Funds in the hands of a receiver of a bank are held not to be chargeable with an equitable lien in favor of a depositor of money for a special purpose, where the bank was permitted to use the money in the course of regular business. (Or.) 667.

The lien of a judgment for damages under the Illinois dramshop act is held inferior to that of a pre-existing mortgage on the premises. (Ill.) 571.

The lien of a judgment against a railroad company is held to be unaffected by foreclosure to which the judgment creditor is not made a party, but when judgments were obtained pending foreclosure they are held to be subject thereto on the ground that the pendency of the suit is constructive notice. (Ohio) 488.

Tradename.

The use of the letters "U. S." on the windows of a dental office, in connection with the words "dental rooms," is held to be unlawful, when another person has adopted them as a tradename, and the attempt is to mislead the public. (R. I.) 524.

Boundary.

The low-water mark bounding land on a navigable lake is held to be the ordinary low-

water mark, and not the point to which the water recedes in an exceptionally dry season. (Vt.) 539.

See also *supra*, I., *State boundary*.

The boundary of premises described by metes and bounds, which is identical with the line of navigability of water on which they front, is held to extend to the middle of the stream where the grantor was the owner to that extent. (Ohio) 52.

VIII. CIVIL REMEDIES; RULES AND PRINCIPLES.

An order to restore and operate a passenger train that had been discontinued, made by the Kansas railroad commissioners, is held not final or conclusive, and mandamus to enforce it is denied. (Kan.) 444.

Jury.

An appeal with a right to a jury trial in the proper court is held to be a sufficient compliance with the constitutional right to a jury in a condemnation proceeding. (S. Dak.) 861.

Injunction.

An injunction against slander of title to property is denied in a Florida case, which declares it to be well settled that such relief cannot be granted; but see 16 L. R. A. 243, *note*. (Fla.) 66.

Choice of remedy.

Enforcement of a chattel mortgage upon exempt property is held not to be defeated by a prior judgment for the mortgage debt, with an attempt to enforce it by levy upon the exempt property. (Ill.) 803.

Action by shipper.

A shipper of goods subject to payment of a draft against the bill of lading, who guarantees payment of freight, is held entitled to sue the carrier for damages to the goods, although when first notified of the injury he refused to give directions as to their disposition on the ground that he no longer had title, where the carrier had not been prejudiced thereby. (Va.) 578.

Action for nuisance.

The doctrine that a private action cannot be maintained for a purely public nuisance is limited, in case of the obstruction of navigation, by a decision that a grievance which is not common to the whole public may sustain such an action, although it is a common misfortune of a number or even of a class of persons. (N. C.) 700.

Rescission.

Tendering back what was obtained on a compromise where goods had been purchased by fraud is held not necessary to justify a rescission of the compromise and a retaking of the goods. (Mich.) 859.

Nonresidents.

The right of nonresidents to enforce their claims is held the same as that of citizens of the state, under the Tennessee statutes, provided that the nonresidents have exhausted their remedies in their own state. (Tenn.) 164.

A nonresident's shares of stock in a foreign corporation are held not subject to attachment, although the corporation does business and has officers in the state. (R. I.) 429.

Judgment.

A distinction between the effect of a judgment for a special assessment as against the property, and as against the owner, is sharply made in a case holding that such judgment does not preclude the owner, who did not appear or defend, from bringing an action for damages to the property in making the improvement on which the assessment was based. (Minn.) 778.

A judgment of another state, made payable in United States gold coin, is enforced as for the nominal amount in lawful money, in a case in which it is declared upon without describing the clause as to payment in coin. Such a judgment is held to be an obligation to pay in money, or an amount of gold ascertainable by count of coins. (Ill.) 598.

As to attorneys' liens and right to set off judgments, it is held, reviewing conflicting decisions, that the more equitable rule is to make the set-off of independent judgments subject to such liens. (Tenn.) 705.

Levy on railroad.

The enforcement of a judgment against a railroad company by levy on a portion only of its property is denied in a Minnesota case as against mortgagees of the whole property, on the ground that the remedy of creditors must be by proceeding against the property as an entirety. (Minn.) 212.

Priority of state.

A state or municipality is denied any right to priority or preference in payment from an insolvent's estate after a general assignment for creditors passing title to the property. (Wyo.) 226.

Notice by mail.

The constitutional guaranty of due process of law is held to be complied with in a *scire facias* to revive a judgment by notice to a resident of the state, who cannot be found, served by mail as well as by publication. (Ill.) 782.

Limitation of actions.

Garnishment of funds in the hands of a resident to enforce the claim of one nonresident against another is held within a provision that the statute of limitations shall not aid a person absent from the state when the cause of action accrues, so long as the absence continues. (Md.) 273.

Pleading.

The sufficiency of a pleading charging negligence in allowing natural gas to escape, from which an explosion resulted, is denied, where no agency causing the explosion is alleged on the part of the defendant. (Ind.) 855.

Evidence.

A receipt is held to be only a hearsay declaration and inadmissible as against strangers, on the question of the payment of money. (Neb.) 787.

Presumptions.

Setting a house on fire by sparks from a fire-

pot placed on the roof by workmen raises a presumption of their negligence. (Pa.) 254.

The maxim *res ipsa loquitur* is denied application against the person conducting a public exhibition of horse racing, in case of an injury to a spectator by a runaway horse. (Ill.) 492.

A presumption of negligence is held to arise from an unexplained explosion in a nitro-glycerine factory, and the subject of presumptions as to accidents is fully reviewed in the case. (Cal.) 718.

IX. CRIMINAL LAW AND PRACTICE.

The nature of *ex post facto* laws is examined very fully in a case which holds that a statute is not *ex post facto* because it abrogates a provision for change of magistrate or place of examination on account of the prejudice of the magistrate. (Wyo.) 884.

The constitutional provisions against making one a witness against himself in a criminal action, and against searches and seizures, are held not applicable to an examination of a person to compel discovery of assets of a decedent's estate. (Cal.) 811.

The right to place a gun where it will be discharged and kill any person attempting to force open the door of a building is held, on a review of the conflicting doctrines, to be a question for the jury. (Wash.) 154.

Without denying the doctrine that grossly obscene publications may be omitted from an indictment, it is held that where only parts of a book are indecent these must be so described as to be capable of identification, unless they are set out according to their tenor. (Mass.) 61.

After suspension of sentence, the power of the court over the accused is not lost by ordering him to pay costs or committing him for refusal to do so, since the requirement to pay costs is not part of his sentence. (N. C.) 260.

Proof of guilty knowledge is held necessary to convict a person for having cigars for sale with counterfeit trade union labels on them. (Mo.) 200.

A common carrier receiving twelve barrels of lobsters for shipment is held not punishable for having short lobsters in possession, where there was no intent to violate the statute. (Me.) 714.

INDEX TO NOTES.

(The General Index follows this.)

Bailment; conversion of coin by bailee, see CONTRACTS.

Liability of bailee for wrongful appropriation by his servant of thing bailed; in general; where servant has no duty in respect to thing bailed; where servant's duties give him some control of thing bailed; goods not in possession of master; effect of statute; ratification; special contract 98

Bridges. See TAXES.

Building and loan associations; right to apply payments made on stock in a building and loan association upon a mortgage given for a loan by the same member; associations not protected by law; payments not *ipso facto* a reduction of the mortgage; right of third persons to require the application: (*a*) surety for borrower; (*b*) purchaser at sheriff's sale; (*c*) creditors or assignees; (*d*) second mortgagees; associations on the terminating plan; rule under changed conception of loan association; right to a credit of profits; forfeiture; insolvency or abandonment of scheme; change of rules; right of third person to resist application; effect of special agreement 120

Liability of advanced member of building and loan association to assessment for losses:—decisions proceeding on the partnership theory; the original loan association theory; effect of rules or provisions in mortgage; change of rules; liability as members after release of mortgage; statutory provisions 177

Cigar Makers' Union. See TRADE-MARKS.

Coin. See JUDGMENT.

Constitutional law. See also POLL TAXES.

Due process in seizure and production of papers 819

Contracts; sufficiency of contract by offer and acceptance without execution of contemplated formal instrument:—general statements of the law; suggestion of formal contract; understanding that there is to be a formal contract; where some terms unsettled; where the execution of a formal contract is one of the terms of the agreement; agreement to execute formal contract may be binding; where it appears that the contract when finished should be a formal one; failure to execute draft of contract; estoppel; illustrations of proposals for formal contract; intention to have formal contract as evidence 431

Special contracts and obligations to make payment in gold or silver:—(I.) before legal tender act; (II.) application of legal tender act to specific contracts for coin: (*a*) decisions before *Bronson* v. *Rodes:* (1) denying effect to such contracts; (2) supporting such contracts; (3) in equity cases; (4) effect of state statutes; (*b*) doctrine of *Bronson* v. *Rodes* and later cases: (1) federal cases; (2) state decisions generally; (3) alternative provisions; coin or equivalent; (4) municipal and state contracts; (III.) implied contracts or obligations imposed by law: (*a*) in general; (*b*) bailment and conversion of coin; (*c*) bank deposits; (*d*) accounting for trusts; (*e*) other actions for damages 512

Corporations. See also STATE INSTITUTIONS.

Right to vote by proxy in private corporations:—(I.) at common law; (II.) under statutes and by-laws: (*a*) statutes; (*b*) by-laws; (III.) form of proxy; (IV.) when and for what purpose a proxy may be used; (V.) rejection of proxy by inspectors; (VI.) revocation of proxy; (VII.) directors voting by proxy; (VIII.) miscellaneous matters 844

Costs; as to payment in coin 503

Criminal law; constitutional protection against being forced to furnish evidence to be used against one's self in a civil case: (I.) provisions against self-accusation: (*a*) limitation to criminal proceedings; (*b*) application to proceedings for penalties and forfeitures; (*c*) general doctrine as to evidence against one's self; (*d*) the contrary doctrine; (*e*) parties in interest; (II.) unreasonable searches and seizures; (III.) right of trial by jury; (IV.) due process of law; (V.) distinction between civil and criminal or penal proceedings 811

Crimination of self. See CRIMINAL LAW.

Descent and distribution; among kindred of the half blood:—(I.) the common-law doctrine; (II.) in the United States; (III.) meaning of the words: (*a*) in general; (*b*) ancestor; (*c*) blood; (*d*) brothers and sisters; (IV.) no distinction between the whole and half blood; (V.) in the case of ancestral estates; (VI.) when the statute not express; (VII.) cases wherein the whole blood is preferred; (VIII.) when half blood preferred to remote relative of the whole blood; (IX.) when half blood take half portions; (X.) shifting descents; (XI.) equitable conversion 541

Discovery; as affected by constitutional provision against self-crimination 811

Dynamite. See EXPLOSION.

Eminent domain; right of a railroad company to compensation for laying street railway across railroad track on a street crossing 485

Evidence. See also CRIMINAL LAW.
Burden of proof and evidence generally in respect to negligence in escape and explosion of gas 843
Receipt as evidence of payment as against third parties:—(I.) ordinary receipts: (a) not admissible; (b) admissible; (II.) receipts in deeds 737

Executors; liability of, for compound interest 622

Explosion; liability for explosion of gas 337
Negligence in the manufacture and storage of gun-powder, nitro-glycerine, dynamite, and other explosives:—(I.) general doctrine; (II.) the effect of city ordinances; (III.) negligence in the manufacture; (IV.) negligence in the storage 718

Forfeiture; of payments to loan association, see BUILDING AND LOAN ASSOCIATIONS.
Compulsory evidence against one's self in case of 813

Gas; liability for negligence in the escape and explosion of gas:—(I.) general doctrine governing such actions; (II.) legislative and municipal control; (III.) evidence: (a) in general; (b) burden of proof; (c) expert testimony; (d) sufficient to establish negligence; (e) insufficient to establish negligence; (IV.) contributory negligence; (V.) questions for and instructions to the jury; (VI.) effect of contributing causes; (VII.) effect of negligence of third persons; (VIII.) act of fellow servant; (IX.) the question of notice; (X.) as between landlord and tenant; (XI.) rights of the owner of the reversion; (XII.) effect of, upon insurance; (XIII.) gas generated by accident; (XIV.) right of action over 337

Gold; contract to pay in, see CONTRACTS.

Gunpowder. See EXPLOSION.

Homicide; by means of spring gun, trap, or other dangerous instrument killing trespasser 154

Insolvency. See also PARTNERSHIP.
Priority of state or United States in payment from assets of a debtor:—(I.) scope of note generally; (II.) priority of United States: (a) upon what based; (b) constitutionality of provisions for; (c) superiority over state laws; (d) construction and scope of: (1) generally; (2) who are debtors of the United States; (3) what debts are within the statute; (4) what constitutes insolvency; (5) sufficiency of assignment to confer priority; (6) sufficiency of attachment to confer priority; (e) when and to what it attaches; (f) nature and extent; (g) marshaling assets; (h) liability of assignee or representative; (i) subrogation of sureties; (j) what amounts to a devestiture of the right; (k) how asserted; (III.) priority of the states: (a) upon what based; (b) constitutionality of provisions for; (c) nature and extent; (d) to what indebtedness it applies; (e) subrogation of surety making payment; (f) when it attaches and how devested; (IV.) priority of claims for taxes 226

Interest; liability of executors, trustees, etc., for compound interest: (I.) origin, growth, and general statement of the doctrine; (II.) principle of the allowance; (III.) option to take interest or profits; (IV.) grounds for allowance: (a) generally; (b) misconduct or gross delinquency generally; (c) use and admixture of trust fund; (d) failure or refusal to account; (e) neglect to invest; (f) improper investment; (g) unnecessarily calling in investment; (h) neglect in winding up or paying over; (i) nonperformance of trusts for accumulation; (j) neglect or violation of duty imposed by statute; (k) interest or profits made; (l) interest or profits which might have been made; (V.) who are chargeable; (VI.) jurisdiction to allow; (VII.) how computed: (a) method of computing generally; (b) upon what computed; (c) when allowance should commence; (d) rate per cent and length of rests; (e) termination of allowance; (VIII.) what sufficient to release from accountability; (IX.) effect of allowance on compensation; (X.) effect of allowance on costs 622
Lawfulness of taking in advance:—(I.) in discounts; (a) in general; (b) by persons other than banks; (c) on instruments other than bills and notes; (II.) in periodical payments; (III.) for what length of time allowed 761

Joint tenants; liability of cotenants for improvements and repairs:—(I.) improvements: (a) liability at common law; (b) liability in assumpsit for improvements; (c) rule in equity; (d) lien for improvements; (e) interest on improvements; (f) position of grantee of cotenant's share; (II.) repairs: (a) general doctrine; (b) liability in assumpsit; (c) necessity of a demand and notice; (d) lien for repairs 449

Judgment; form of judgment and procedure in case of liability to make payment in coin:—(I.) form of judgment: (a) on contracts to pay coin; (b) on contracts for coin or equivalent; (c) for coin converted or misapplied; (d) for damages in other cases; (e) for obligations created by law; (f) for costs; (II.) pleadings and procedure 889

Labels. See TRADE-MARKS.

Landlord and tenant; negligence of, in respect to gas 889

Marshaling; of assets as affecting priority of state or United States 226

Master and servant. See also BAILMENT.
Negligence of fellow servant causing explosion 889

Money. See JUDGMENT.

Negligence. See EXPLOSION; GAS.

Nitro-glycerine. See EXPLOSION.

Partnership; assumption by a partnership of individual debts of the partners:—(I.) the general rule; (II.) the question of insolvency; (III.) the question of fraud; (IV.) assumption held sufficient; (V.) insufficient assumption; (VI.) by mortgage of firm property; (VII.) by new firm of debts of old firm; (VIII.) assumption of debt originally incurred for firm benefit 661

Patents; power of state to restrict and regulate the sale or enjoyment of patent rights:—(I.) as to sales: (a) sales of patent rights; (b) sales of patented articles; (II.) police regulation of other business in which patents are used; (III.) restricting right of action for infringement; (IV.) taxation of patent rights 786

Penalties; compulsory evidence against one's self in case of 813

Poll taxes; poll taxes:—(I.) what are poll taxes; (II.) power to impose; (III.) restrictions and limitations; (IV.) the restriction and equation of the North Carolina constitution; (V.) upon what imposed; (VI.) place of taxation; (VII.) the levy and collection; (VIII.) disposition; (IX.) payment of poll taxes as a qualification of electors 404

Proxy. see CORPORATIONS.

Quitclaim. See REAL PROPERTY.

Railroads. See EMINENT DOMAIN.

Real property; the effect of a quitclaim deed in an otherwise perfect record title:—as to latent equities; purchaser with notice; other rulings; distinction between conveyance of land and of mere interest; doctrine of United States Supreme Court; where not protected; where entitled to protection; the Iowa doctrine; necessity of care; remote quitclaim in chain of title 33

Receipt. See EVIDENCE.

Records. See REAL PROPERTY.

Searches; to compel one to furnish evidence against himself 813

Seizure; to obtain evidence 813

State institutions; nature of incorporated institutions belonging to the state:—(I.) in general: (a) banks; (b) educational institutions; (c) other state institutions; (II.) liabilities of such institutions; (III.) directors, trustees, and officers: (a) in general; (b) personal liability 873

States. See also PATENTS.
Priority in respect to payment from assets of debtor 226

Street railways. See EMINENT DOMAIN.

Subrogation; of sureties as affected by priority of United States or of state 240, 243
Of person paying tax 223

Taxes. See also POLL TAXES.
Jurisdiction as to taxation of bridge over river forming boundary of a state or its divisions:—general rule; statutory rule; effect on commerce; capital stock 69
Priority of claims for taxes against the assets of a debtor:—(I.) scope of note; (II.) upon what based; (III.) constitutionality and construction of provisions for; (IV.) what is included in the right: (a) taxes generally; (b) claims against collectors; (V.) nature and extent of priority; (VI.) subrogation of person paying the tax; (VII.) what amounts to a devestiture of the right; (VIII.) enforcement of the right 273

Trade-marks; protection of trade-union labels or trade-marks:—(I.) in general; (II.) contents of label; (III.) effect of statutes 200

Trade unions. See TRADE-MARKS.

Trespass; liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments:—(I.) the general doctrine of liability; (II.) liable as for homicide; (III.) when considered as a nuisance; (IV.) the property owner's or the trespasser's act; (V.) the question of notice; (VI.) the act held legal; (VII.) English cases 154

Trial; right to jury as affected by compulsory evidence against one's self 819

Trusts; liability of trustees for compound interest 623

United States; priority in respect to payment from assets of debtor 226

Voters and elections; payment of poll taxes as a qualification of electors 414

GENERAL INDEX

TO

OPINIONS, NOTES AND BRIEFS.

(Separate Index to Notes precedes this.)

ABANDONMENT. See FERRIES, 4.

ACTION OR SUIT. See also CASE.

Trustees appointed by parties to a contract to manage the details of the business done thereunder are not necessary parties to an action thereon. *San Diego Water Co.* v. *San Diego Flume Co.* (Cal.) 839

AFFIDAVIT. See JUDGMENT, 5; WRIT AND PROCESS.

AGRICULTURAL SOCIETIES. See also HORSE RACING, 2.

Annual contributions by the state to a state agricultural society which is required to report to the state are not sufficient to make it a public corporation for the sole purpose of discharging a governmental function, on account of which it will be exempt from liability to persons injured by its negligence. *Lane* v. *Minnesota State Agri. Soc.* (Minn.) 708

APPEAL AND ERROR.

1. A general exception "to these findings of fact and conclusions of law, and to each of them," is not sufficient to raise any question for review by the supreme court in Washington. *Moyer* v. *Van de Vanter* (Wash.) 670

2. A bill of exceptions, embodying the charge, and, immediately following it, stating that one of the counsel said, "The defendant excepts," with the ground of exception, including a refusal to charge as requested and exceptions to the charge as delivered,—sufficiently shows that exceptions to the charge were seasonably taken. *Findlay* v. *Perts* (C. C. App. 6th C.) 188

3. Forty days after the expiration of the trial term may be allowed by the court at such term for filing a bill of exceptions. *Id.*

4. A deposition attached to a bill of exceptions only by placing it between the pasteboard back and the stenographer's report, although held with sufficient tenacity to retain its place, but not marked as an exhibit or identified by the trial judge or the stenographer or any one else, will not be treated as part of the bill of exceptions. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

5. Nothing but the amount is in question, on appeal, where the plaintiffs asked permission to pay the amount due, and the defendants asked that they be required to pay the amount due. *Randall* v. *National Bldg. Loan & P. Union* (Neb.) 133

6. Only errors of which the appellant complains can be considered on appeal. *Dennis* v. *Caughlin* (Nev.) 781

7. The question of the rate at which executor's commissions should be computed cannot be raised for the first time on appeal. *Re Bicker's Estate* (Mont.) 622

8. The New York court of appeals will not reverse a determination of a matter of fact which is supported by some evidence, in case of a certiorari to review an assessment for taxes. *People, Hecker-Jones-Jewell Mill. Co.* v. *Barker* (N. Y.) 892

9. A general verdict in a case where there are several material issues tried cannot be upheld if the jury are given an erroneous charge upon any one of them. *Funk* v. *St. Paul City R. Co.* (Minn.) 208

10. Comment upon the testimony by the court, to the effect that there is nothing to show that lumber was set on fire by sparks from a boat, when there is no attempt to prove any other cause of the fire and several witnesses have sworn to seeing sparks from the boat falling upon the lumber, although the court allowed the case to go to the jury,—requires reversal of a judgment on a verdict for the defendant. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

11. Sustaining a demurrer to one paragraph of an answer is not cause for reversal, if the appellant could avail himself of the same defense under the paragraph remaining. *Wohlford* v. *Citizens' Bldg. L. & Sav. Asso.* (Ind.) 177

12. A decision will not be reversed merely because a seemingly pertinent question was excluded, if it is not shown what the party proposed to prove. *Hickman* v. *Green* (Mo.) 89

13. A judgment upon a verdict for a lump sum of damages and interest will not be modified to exclude the interest, which is found to be erroneous, but a reversal is necessary. *King* v. *Southern P. Co.* (Cal.) 755

14. Any clerical mistake in the amount for which a judgment is entered in the Illinois appellate court may be corrected in the supreme court, where there is sufficient in the record and on the face of the judgment itself to show the correct amount. *Belford* v. *Woodward* (Ill.) 598

15. Variance in a suit upon a judgment alleged to be simply for a sum of money, in that the judgment proved is payable in gold coin, does not constitute cause for reversal, where the judgment recovered thereon contains no direction for payment in any particular kind of money. *Belford* v. *Woodward* (Ill.) 598.

16. The cost of bringing up superfluous matter will be taxed against the party at whose instance it was added to the brief of evidence. *Pullman's Palace Car Co.* v. *Martin* (Ga.) 498

NOTES AND BRIEFS.

Appeal; remission of excess in judgment. 755

APPROACH. See EMINENT DOMAIN, 8.

APPROPRIATIONS. See also STATUTES, 10.

1. Factory inspectors provided for in Ill. Act June 17, 1893, are state officers or officers of the government, within the provision of Ill. Const. art. 4, § 16, providing that bills making appropriations for the pay of members and officers of the general assembly and for the salaries of the officers of the government shall contain no provisions on any other subject. *Ritchie* v. *People* (Ill.) 79

2. A statute regulating factories and providing for the appointment of factory inspectors is not invalidated by the inclusion within it of an appropriation for the salaries of such inspectors, under Ill. Const. art. 4, § 16, declaring that appropriation bills for the salaries of government officers shall contain no provision on any other subject, as such appropriation is merely subordinate to the main purpose of regulating factories. *Id.*

ARREST. See CARRIERS, 8.

ASSAULT. See CARRIERS, 7.

ASSESSMENT. See BUILDING AND LOAN ASSOCIATIONS, 3–6; JUDGMENT, 6; JUDICIAL SALE, 1.

ATTACHMENT. See also CONFLICT OF LAWS, 1, 2.

1. That a nonresident creditor has exhausted his remedy against his debtor in the state of his residence, so as to be enabled to take advantage of Mill. & V. (Tenn.) Code, § 5040, permitting him to subject property in Tennessee to the payment of his claim, is shown by the fact that the property of the debtor in the state of his residence has been placed in the possession of a receiver under a statute forbidding interference with it. *Commercial Nat. Bank* v. *Matherwell Iron & S. Co.* (Tenn.) 164

2. A nonresident's shares of stock in a foreign corporation cannot be reached by attachment in a state where the corporation is doing business, although its officers are also in such state. *Ireland* v. *Globe Milling & R. Co.* (R. I.) 429

3. Property of one partner in a law firm cannot be attached for failure of his copartner to account for money collected under contract made by the latter in the firm name, but in his own purely personal transaction and without the knowledge of the other partner that the firm would make such collection free of charge. *Davis* v. *Dodson* (Ga.) 496

ATTAINDER. See DESCENT AND DISTRIBUTION, 1.

ATTORNEY GENERAL. See QUO WARRANTO, 8.

ATTORNEYS. See also ATTACHMENT, 3; SET-OFF AND COUNTERCLAIM.

1. It is not within the scope of the business of a law partnership to collect choses in action without charging for services rendered in so doing,—especially by virtue of an agreement made by one member as part of an individual transaction for his own benefit only. *Davis* v. *Dodson* (Ga.) 496

2. The substitution of an attorney for a corporation, in a proceeding to restrain a receiver, cannot be prevented by the prior attorney on the ground of disqualification by reason of his relations to the receiver, so long as the parties do not object. *People's Home Sav. Bank* v. *San Francisco Super. Ct.* (Cal.) 844

ATTORNEYS' FEES. See BILLS AND NOTES, 3; CONSTITUTIONAL LAW, 23.

NOTES AND BRIEFS.

Attorneys' fees; constitutionality of provision for. 887

BAILMENT. See CARRIERS; INNKEEPERS.

NOTES AND BRIEFS.

Bailment; conversion of coin by bailee, see CONTRACTS.

Liability of bailee for wrongful appropriation of thing bailed:—in general; where servant has no duty in respect to thing bailed; where servant's duties give him some control of thing bailed; goods not in possession of master; effect of statute; ratification; special contract. 93

BANKS.

1. A bank with which a draft is deposited for collection discharges its duty by transmitting it in due season to a suitable agent at the residence of the drawee, with necessary instructions, and is not liable for loss occasioned by the negligence or default of the latter, as such collecting agent becomes the agent of the holder of the draft, and not of the bank with which it is deposited for collection. *Waterloo Milling Co.* v. *Kuenster* (Ill.) 794

2. Worthless drafts received by a bank with which paper was deposited for collection, from a collecting bank to which the paper was sent, and thereupon credited to the depositor, without knowledge of the insolvency of the collecting agent, do not change the rule that the depositor must bear the loss, since the rights of the parties are the same as if the worthless drafts had been deposited by him. *Id.*

3. The retention of worthless drafts after knowledge of the insolvency of the drawer, by a bank which has received them as proceeds

of paper forwarded for collection and credited to the depositor before learning of such insolvency, and the subsequent proof of a claim on the drafts by the bank in its own name, and the receipt of a dividend thereon from the receiver of the drawer,—do not relieve the depositor from liability to the bank for the loss sustained on the balance of the drafts. *Id.*

4. No equitable lien exists upon funds of a bank in the hands of a receiver, in favor of one who deposited money in the bank for a special purpose, if the bank was permitted to use the money in the course of its regular business, so that no part of it can be identified in the receiver's hands. *Muhlenberg* v. *Northwest Loan & T. Co.* (Or.) 667

5. Public moneys placed by general deposit in a bank do not establish a trust in the estate of the banker on his insolvency, except so far as they can be traced into some specific fund or property. *State* v. *Foster* (Wyo.) 226

6. Money remaining in the vaults of a bank and on deposit by it in other banks when the banker becomes insolvent will be held to constitute part of a trust fund of greater amount, which had been received by the banker; but it is otherwise with commercial paper representing loans made by him before assignment. *Id.*

NOTES AND BRIEFS.

Banks; liability as to collections. 795

BICYCLES. See also INFORMERS.

1. One riding a bicycle on a sidewalk or footway incurs the penalty provided by Pa. Act May 7, 1889, against driving any horse or any other animal upon such walk, by virtue of the Act of April 23, 1889, declaring that bicycles and persons using them are entitled to the same rights and subject to the same restrictions as are prescribed in case of persons using carriages drawn by horses. *Com.* v. *Forrest* (Pa.) 865

2. The fact that a sidewalk was on land appropriated by a turnpike company, and had been constructed and kept up by the turnpike company, aided by contributions from village residents, does not exempt it from the provisions of Pa. Act 1889 prohibiting the use of such walks by persons riding bicycles. *Id.*

3. The consent of a turnpike company to the use by bicyclers of a sidewalk established alongside the highway and on land appropriated by the company cannot make such use lawful under Pa. Act 1889 prohibiting the use of bicycles on sidewalks. *Id.*

4. The unlawful use of a sidewalk by bicyclers for a time without complaint cannot avail as a defense to the prosecution of a person for such offense. *Id.*

NOTES AND BRIEFS.

Bicycles; as carriages; riding on sidewalk. 865

BILLS AND NOTES. See also BONDS, 3; CONTRACTS, 2, 3, 9; MORTGAGE, 1, 2; PLEADING, 4; USURY, 1.

1. A subsequent promise to pay will not bind an indorser who has been released by lack of notice, unless supported by a consideration. *Sebree Deposit Bank* v. *Moreland* (Ky.) 305

2. A failure of the holder of a promissory note to present for payment, or to give notice of nonpayment, discharges the indorser from liability. *Patillo* v. *Alexander* (Ga.) 616

3. A guaranty of attorneys' fees "up to 10 per cent, if this note has to be collected by law, on its prompt payment," without other indorsement, made for the purpose and in the course of negotiation, makes the payee liable as an indorser with a superadded liability for such reasonable sums, not exceeding 10 per cent, as might be expended for attorney's fees by the holder in the collection of the note. *Id.*

BONA FIDE PURCHASER. See VENDOR AND PURCHASER, 1.

BONDS. See also INTEREST, 2; MORTGAGE, 3, 4.

1. Corporate bonds secured by mortgage and payable to bearer are so far negotiable that the holder may maintain an action thereon in his own name. *American Nat. Bank* v. *American Wood Paper Co.* (R. I.) 108

2. That a statute giving a title by delivery and a right of action to the holder of negotiable paper in terms applied only to promissory notes will not prevent the courts from recognizing corporate bonds as negotiable. *Id.*

3. That a bond is payable ten years after date or sooner after five years does not destroy its negotiability. *Id.*

4. A holder of corporate bonds secured by mortgage is not given a present right of action for the principal of the bonds upon default in payment of interest, by the fact that the mortgage provides that upon default the holder of one third of the amount of bonds may require a sale of the property, and the "bonds shall forthwith become due and payable." *Id.*

5. Municipal bonds cannot be made payable "in gold coin of the United States of America of the present standard of weight and fineness," where a statute provides that such bonds shall be payable "in gold coin or lawful money of the United States." *Skinner* v. *Santa Rosa* (Cal.) 512

6. The terms and conditions of municipal bonds, which the statute requires to be stated in a notice of election, including those as to rate of interest and the tax levy required for payment thereof, must substantially follow those stated in such notice. *Id.*

BOUNDARIES.

1. A body of water having well-defined shores and no current, lying entirely in the state of Iowa ¼ of a mile from the main channel of the Mississippi river, and forming no part of that river for the purposes of navigation, is within the provisions of Iowa Acts 23 Gen. Assem. chap. 34, against the use of seines in the waters of that state, and is not within the exception of boundary waters, over which the state has not exclusive jurisdiction. *State* v. *Haug* (Iowa) 390

2. A conveyance of land situated upon a navigable stream, the description being by

courses and distances from a fixed monument, and establishing a boundary line coincident with the line of navigation, conveys the grantor's title as far as the thread of the stream. *Lake Shore & M. S. R. Co.* v. *Platt* (Ohio) 52

NOTES AND BRIEFS.

Boundaries; by low-water mark 539
Of state by river. 890
On navigable waters. 52

BRIDGES. See EMINENT DOMAIN, 8; TAXES, 7, 11, 12; NOTES AND BRIEFS.

BROKERS. See also EVIDENCE, 28.

1. The right of a broker to commissions on a contract the signature of which he has procured is not affected by the fact that, as agent for the buyer, he subsequently seeks to procure from the seller some modification of the terms of sale. *Fairly* v. *Wappoo Mills* (S. C.) 215

2. The recovery of commissions by a broker is not prevented by failure to procure a license under an ordinance imposing a penalty for such failure, where the object of the ordinance is simply to enforce payment of a tax. *Id.*

BUILDING AND LOAN ASSOCIATIONS. See also RECEIVERS, 2.

1. The members of a building association, both borrowers and nonborrowers, must assist in bearing its losses. *Eversmann* v. *Schmitt* (Ohio) 184

2. A borrowing member of a building association is not entitled to cancelation of the mortgage given to secure the loan, until the dues paid and the dividends declared and not paid equal the par value of his shares. *Id.*

3. A borrowing member of a building association whose mortgage stipulates for the payment of such "assessments" as may be levied on him as a member is liable for a *pro rata* assessment on the members, made by a receiver in insolvency of the association. *Id.*

4. An assessment on stock in a building and loan association, for the purpose of covering losses and equalizing the members, so that they may all go out at the final close on an equal footing, is within the liabilities of a member upon a note and mortgage which include a provision for the payment, not only of instalments of dues, but of any fees or assessments. *Wohlford* v. *Citizens' Bldg. L. & Sav. Asso.* (Ind.) 177

5. An assessment to cover losses and equalize members is properly made by the board of directors of a building and loan association, instead of by the association as a whole, under a statutory provision that the business of the association shall be managed by a board of directors. *Id.*

6. A formal acceptance in writing of the provisions of Ind. Act 1885, which expressly grants to building and loan associations power to make assessments or stock calls to cover losses, is not necessary in order that such an association may exercise the enlarged powers granted by that statute, including the power to make an assessment to cover losses and thereby equalize members, so that all at the close may go out on an equal footing. *Id.*

7. Forfeiture of stock in a building and loan association for failure to make required payments, if it is authorized by the contract of the parties, the rules and regulations and by laws of the association, and the statute under which it is created, cannot be relieved against; and the mortgage given by such member may be foreclosed for the full amount of his original loan, with interest, without any abatement for the value of the stock or for payments made by him thereon. *Southern Bldg. & L. Asso.* v. *Anniston Loan & T. Co.* (Ala.) 120
But see contra below.

8. The application upon a mortgage to a building and loan association, of payments made by the mortgagor upon his shares of stock in the association, which were declared forfeited after default, must be allowed on foreclosure of the mortgage, notwithstanding a rigid provision in his contract that his membership and all sums theretofore paid should be forfeited in case of default; and a claim that the loan and membership are separate and distinct contracts cannot be sustained after the termination of the membership and the maturity of the loan by an election to foreclose. *Randall* v. *National Bldg. L. & P. Union* (Neb.) 133

9. The monthly payments for subscriptions to the shares of a building and loan association, which have been pledged as collateral security for a loan secured by mortgage, in which interest and dues are consolidated, should be applied upon the mortgage in determining whether that has been paid, when the association is in the hands of a receiver. *Buist* v. *Bryan* (S. C.) 127

10. Stock payments by a borrowing member of a building and loan association are not *ipso facto* credits upon his indebtedness, so as to reduce *pro tanto* the amount due on his mortgage, but a borrower may elect to have payments on account of stock applied upon his indebtedness to the association. *Randall* v. *National Bldg. L. & P. Union* (Neb.) 133

11. The appointment of a receiver for a building and loan association terminates the contract of a shareholder who is also a borrower and has given a mortgage to secure the loan, so that he is not liable for the monthly dues accruing after such appointment. *Buist* v. *Bryan* (S. C.) 127

NOTES AND BRIEFS.

Building and loan associations; right to apply payments made on stock in a building and loan association upon a mortgage given for a loan by the same member:—associations not protected by law; payments not *ipso facto* a reduction of the mortgage; right of third persons to require the application: (*a*) surety for borrower; (*b*) purchaser at sheriff's sale; (*c*) creditors or assignees; (*d*) second mortgagees; associations on the terminating plan; rule under changed conception of loan association; right to a credit of profits; forfeiture; insolvency or abandonment of scheme; change of rules; right of third person to resist application; effect of special agreement 120

Liability of advanced member of building and loan association to assessment for losses:—decisions proceeding on the partnership theory; the original loan association theory; effect of rules or provisions in mortgage; change of rules; liability as members after release of mortgage; statutory provisions. 177

BURDEN OF PROOF. See EVIDENCE.

BURGLARY. See HOMICIDE.

BY-LAWS. See CORPORATIONS, 9, 10.

CARRIERS. See also CASE; CONTRACTS, 4; DAMAGES, 1, 2; EVIDENCE, 18; FERRIES, 1.

1. The relation of carrier and passenger does not exist between a street-railway company and a person who has given a signal, which is seen and responded to, for a car to stop, but who is struck by the unexpected swinging of the car from its proper track on to a switch track. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

2. The use of indecent or profane language in a street car, which constitutes a breach of the peace for which a person may be punished by fine or imprisonment, justifies the conductor in putting the offender off the car. *Robinson* v. *Rockland, T. & C. Street R. Co.* (Me.) 530

3. A passenger in a crowded street car in which there are many ladies, who on being requested by the conductor to stop swearing denies his guilt, and when told that he has been profane calls the conductor "a damned liar," says that he would swear as much as he "damned pleased," and that he "would be God damned if he would put him off the car," —should be ejected from the car even if the conductor was at first in error in charging him with profanity. *Id.*

4. Failure to pay for a ticket when purchased because of haste to catch a train, and the acceptance of a promise to pay on return, will not defeat the right of the passenger to recover damages for ejection because the ticket bears a prior date. *Ellsworth* v. *Chicago, B. & Q. R. Co.* (Iowa) 178

5. The clause "continuous passage within one day of date of sale" on a railroad ticket does not make the ticket invalid on the day of sale because it bears a prior date. *Id.*

6. A railroad company is not liable for injuries received by a passenger from an accidental blow by one of its employés while making a playful attempt to strike another employé, as the act is not within the line of his employment. *Goodloe* v. *Memphis & C. R. Co.* (Ala.) 729

7. An unjustifiable assault upon a passenger by a railroad employé who owes him the duty of protection renders the carrier responsible for the injuries caused thereby. *Atchison, T. & S. F. R. Co.* v. *Henry* (Kan.) 465

8. Illegal arrest without a warrant, and false imprisonment of a passenger, caused by a conductor in charge of the train on which he was riding, while acting in the line of his employment, render the carrier liable. *Id.*

9. For such a sum of money and such articles as a passenger might for her personal convenience and adornment appropriately carry with her in a sleeping car, if stolen by an employé while the passenger was under his protection, the sleeping-car company is liable. *Pullman's Palace Car Co.* v. *Martin* (Ga.) 498

10. A common carrier who does not know, or have good reason to know, that barrels received by him for shipment contain short lobsters, is not liable for receiving them, under Me. Laws 1889, chap. 292, § 2, making it unlawful to catch or "possess for any purpose" between specified dates any lobster less than 10½ inches long. *State* v. *Swett* (Me.) 714

11. A contract to give all the traffic of certain mines and furnaces and of a railroad therefrom at reasonable rates to another and connecting railroad, which furnishes aid to develop the business, is not *ultra vires* or in violation of Pa. Const. art. 17, §§ 1, 3, 4, requiring railroads to carry each other's traffic without discrimination, and prohibiting discrimination in transportation for individuals, and prohibiting the consolidation of parallel and competing roads. *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.* (Pa.) 423

NOTES AND BRIEFS.

Carriers; effect of ticket; remedy for wrongful expulsion. 178
Liability for assault on passenger. 466
Person waiting for street car as a passenger. 298
Theft of property in sleeping car. 498
Action against, by shipper of goods. 578

CASE.

A shipper of goods may maintain an action on the case against the carrier for their negligent injury, where they were sold and shipped subject to the payment of a draft against the bill of lading, the shipper guaranteeing payment of freight, although, when notified of the injury, he refused to give directions as to their disposition on the ground that he no longer had title, if the carrier did not act upon such claim to his prejudice. *Spence* v. *Norfolk & W. R. Co.* (Va.) 578

CHAMPERTY. See CLOUD ON TITLE.

CHARITIES. See TAXES, 4.

NOTES AND BRIEFS.

Charities; what constitute. 604, 798

CHURCH. See RELIGIOUS SOCIETIES.

CIGAR MAKERS' UNION. See TRADE-MARK, NOTES AND BRIEFS.

CITIZEN. See CONSTITUTIONAL LAW, 7.

CLOUD ON TITLE.

A deed or other instrument purporting to convey land, that shows upon its face that the grantors therein were out of possession of the land granted at the time of its execution, and that such land at the time was adversely

held by another, is void upon its face, as to such adverse occupant, and, as to him, does not create such a cloud upon his title as will authorize the interposition of a court of equity on his behalf for its removal. *Reyes* v. *Middleton* (Fla.) 66

NOTES AND BRIEFS.

Cloud; power of equity to remove. 66

COIN. See BONDS, 5; JUDGMENT, 1, 2, NOTES AND BRIEFS.

COLLECTION. See BANKS, 1-3.

COLLEGES. See also CORPORATIONS, 1; QUO WARRANTO, 3, 4.

Admission into the Kansas State University is made free by statute, and the board of regents has no power to collect a fee of $5 or any other fee for the use of the library, or to exclude students from the use of the library for the nonpayment of such fee. *State, Little*, v. *Regents of University* (Kan.) 378

COMMERCE. See also TAXES, 12.

1. A state statute requiring all vessels using wood for fuel while navigating waters of the state to be provided with suitable fire screens does not conflict with acts of congress or regulations of supervising inspectors, and is not an interference with interstate commerce. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

2. A license tax on the right to operate a branch railroad in a city cannot be imposed by the city, where this branch is part of an interstate line of railroad. *San Bernardino* v. *Southern P. Co.* (Cal.) 327

3. An ordinance imposing a license on hawkers and peddlers does not interfere with interstate commerce in the case of a peddler of chairs imported into the state before his employment begins, even though the sale by him is conditional and the title remains in the foreign owner. *South Bend* v. *Martin* (Ind.) 581

NOTES AND BRIEFS.

Commerce; interstate, as affected by license tax. 327, 582

Game laws as affecting. 715

COMMISSIONERS. See COURTS, 1; MANDAMUS, 2.

COMMISSIONS. See BROKERS.

COMMON LAW. See EVIDENCE, 6.

CONFLICT OF LAWS.

1. Mill. & V. (Tenn.) Code, § 5040, providing that residents of other states, having exhausted their remedies there against debtors residing in such states, may subject to the satisfaction of their claims property situated in Tennessee, gives such creditors a remedy to the same extent and in the same manner and with the same priority as a citizen of Tennessee. *Commercial Nat. Bank* v. *Motherwell Iron & S. Co.* (Tenn.) 164

2. A statute making a judgment confessed by a corporation, after a petition has been filed for its dissolution, void as against the receiver and creditors, is not effective to control the disposition of property attached according to the laws of another state under such judgment. *Id.*

3. Applications for insurance sent by mail to another state, where they are passed upon and accepted, and in which policies are dated and signed and then mailed to the insured, are governed by the laws of that state, so as to be unaffected by statutes at the residence of the insured prohibiting insurance by unauthorized foreign companies. *State Mut. F. Ins. Co.* v. *Brinkley State & H. Co.* (Ark.) 712

NOTES AND BRIEFS.

Conflict of law; as to insolvency proceedings. 164

CONSIGNOR. See TRUSTS, 2.

CONSTITUTIONAL LAW. See also COMMERCE; COURTS, 2; EMINENT DOMAIN; EXECUTORS AND ADMINISTRATORS, 3; LICENSE, 3; OFFICERS, 2; SCHOOLS, 1.

1. The provision of the Illinois constitution prohibiting municipalities from making donations to private corporations is self-executing, and operated as paramount law from the adoption of the constitution. *Washingtonian Home* v. *Chicago* (Ill.) 798

2. A practical construction of a state constitution for nearly forty years will be conclusive of its meaning when that would otherwise be doubtful. *French* v. *State, Harley* (Ind.) 113

3. A constitutional provision on the subject of usury must be presumed to have been adopted with reference to an existing custom which permitted interest to be taken in advance. *Bank of Newport* v. *Cook* (Ark.) 761

4. Associating with the governor, the auditor, treasurer, secretary of state, and attorney general, as a board for the purpose of electing prison directors, is not an unconstitutional commingling of executive with administrative officers in violation of the provision separating the powers of government into three departments, the legislative, executive, and judicial, but including the administrative in the executive department. *French* v. *State, Harley* (Ind.) 113

5. A statute is not an *ex post facto* law because it abrogates the provision existing when an offense was committed, that the accused may secure a change of magistrate or place of preliminary examination upon his affidavit of belief of the prejudice of the magistrate before whom he is brought for examination. *People, Chandler*, v. *McDonald* (Wyo.) 834

6. The courts cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of a citizen, unless such injustice is prohibited or such rights guaranteed or protected by the constitution. *Burrows* v. v. *Delta Transp. Co.* (Mich.) 468

7. The legislature in undertaking to impose

an unreasonable and unnecessary burden upon any one citizen or class of citizens transcends the authority entrusted to it by the constitution, although it imposes the same burden upon all other citizens or class of citizens. *Ritchie* v. *People* (Ill.) 79

8. The right to make contracts is inherent and inalienable under Ill. Const. art. 2, § 1, declaring that all men are by nature free and independent and have certain inherent and inalienable rights, among which are life, liberty, and the pursuit of happiness; and any attempt to unreasonably abridge it is unconstitutional. *Id.*

9. While the right to contract may be subject to limitations growing out of the duties which the individual owes to society, the public, or the government, the power of the legislature to limit such right must rest upon some reasonable basis, and cannot be arbitrarily exercised. *Id.*

10. A statute prohibiting the employment of females in any factory or workshop more than eight hours a day is unconstitutional as a purely arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties, and a substitution of the legislative judgment for that of the employer and employé in a matter about which they are competent to agree with each other. *Id.*

11. The constitutional right to acquire, possess, and protect property prevents making a man liable for the acts and engagements of strangers over whom he has no control. *Durkin* v. *Kingston Coal Co.* (Pa.) 808

12. The imposition of liability on a mine owner by Pa. Act 1891, art. 17, for the failure of a certified foreman, whom he is compelled to employ, and with whose acts he cannot interfere, and whose duties are prescribed by the act, to comply with those duties, is unconstitutional and void. *Id.*

Police power.

13. The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. *Ritchie* v. *People* (Ill.) 79

14. Statutes passed in pursuance of the police power of the state must not conflict with the constitution, and must have some relation to the end sought to be accomplished; and where their ostensible object is to secure the public comfort, welfare, or safety they must appear to be adapted to that end, and cannot invade the rights of person and property under the guise of a police regulation where they are not such in fact. *Id.*

15. A statute prohibiting the employment of women in factories or workshops for more than eight hours a day cannot be sustained as a police regulation for the promotion of the public health, on the ground that it is designed to protect women on account of their sex and physique, as sex is no bar under the Illinois constitution or laws to the right to contract, and the mere fact of sex will not justify the exercise of the police power for the purpose of limiting the exercise of such rights by a woman, unless there is some fair, just, and reasonable connection between such limitation and the public health, safety, or welfare; and there is no reasonable ground why a woman should be deprived of the right to determine for herself how many hours during each day she can and may work in an employment conceded to be lawful in itself and suitable for her to engage in, even if the police power can be exercised to prevent injury to the individual engaged in a particular calling. *Id.*

16. The police power does not extend to a statutory prohibition of the exercise by employers of the right to insist that employés shall not belong to labor unions. *State* v. *Julow* (Mo.) 257

Due process.

17. The privilege of contracting is both a liberty and a property right, of which one cannot be deprived without due process of law. *Ritchie* v. *People* (Ill.) 79

18. The right to labor or employ labor and make contracts in respect thereto, upon such terms as may be agreed upon, is included in the guaranty of Ill. Const. art. 2, § 2, that no person shall be deprived of life, liberty, or property without due process of law. *Id.*

19. A right to insist that employés shall withdraw from or refrain from joining any trade union or labor union, as a condition of employment, or continued employment, is within the constitutional rights of an employer, and protected by the constitutional guaranty of due process of law against a statute which attempts to make it an offense for an employer to impose such conditions. *State* v. *Julow* (Mo.) 257

20. Mailing to a resident of the state, as well as publishing, a notice of a proceeding in scire facias to revive a judgment, as provided in 2 Starr & C. (Ill.) Stat. p. 1789, where his residence is stated in the affidavit, which shows that he has gone out of the state or is concealed within it so that process cannot be served on him,—is sufficient to satisfy the constitutional requirement of due process of law. *Bickerdike* v. *Allen* (Ill.) 782

21. Requiring every taxable person to bring in an account of his ratable estate to the assessors at a time and place of which he has notice, upon which he may be examined and heard, is sufficient to constitute due process of law in a tax assessment. *McTwiggan* v. *Hunter* (R. I.) 526

22. A statute which makes any person who drives a herd of horses, asses, cattle, sheep, goats, or swine over a public highway constructed on a hillside, liable for all damages done by such animals in destroying the banks or rolling rocks into or upon such highway, is not unconstitutional as a denial of equal privileges, immunities, or protection of the laws, or as depriving any person of property without due process of law. *Brim* v. *Jones* (Utah) 97

Equality; class legislation.

23. The provision for an attorney's fee in an action for wages, made by Ohio Rev. Stat. § 6563*a*, in case the wages have not been paid within three days after a demand in writing, is an unconstitutional denial of the equal protection of the laws, since the statute imposes

the restriction upon one class of citizens only. *Hocking Valley Coal Co.* v. *Roeser* (Ohio) 886

24. A statute prohibiting the employment of females in any factory or workshop for more than eight hours a day is unconstitutional as partial and discriminating in its character, whether applying only to manufacturers of wearing apparel and like articles, or as applying to manufacturers of all kinds of products. *Ritchie* v. *People* (Ill.) 79

25. An ordinance applying to all transient merchants, requiring a license fee, is not unconstitutional as class legislation. *Ottumwa* v. *Zekind* (Iowa) 734

26. A statute providing for the protection of trade-marks adopted by associations or unions of workingmen is not void as class legislation or as granting special privileges or immunities. *State* v. *Bishop* (Mo.) 200

27. A statute restricting the right to discharge laborers because of membership in labor unions is within a constitutional provision against special laws. *State* v. *Julow* (Mo.) 257

NOTES AND BRIEFS.

See also POLL TAXES.

Constitutional law; adopting long-continued construction. 777

Due process in seizure and production of papers. 819

Due process in statute providing for attorney's fees. 387

Due process by special statute. 252

Due process in reviving judgment. 782

Arbitrarily imposing liability. 806

As to creating absolute liability for damages. 98

Police regulations by state as affecting commerce. 468

Extent of police power to interfere with contracts. 81

Ex post facto laws. 834

Function of appointing to office. 113

CONTRACTS. See also BROKERS, 2; CARRIERS, 11; CONSTITUTIONAL LAW, 8–10, 17, 18, 24; SALE.

1. Letters and telegrams which constitute an offer and acceptance of a proposition complete in its terms may constitute a binding contract, although there is an understanding that the agreement shall be expressed in a formal writing, and one of the parties afterwards refuses to sign such an agreement without material modifications. *Sanders* v. *Pottlitzer Bros. Fruit Co.* (N. Y.) 431

2. Signing one's name in blank upon the back of a promissory note to which he is not a party, pursuant to an oral agreement to guarantee its payment, although insufficient of itself, will justify the holder to write a contract of guaranty over the signature, and thus satisfy the statute of frauds. *Peterson* v. *Russell* (Minn.) 612

3. The extension of the time of payment of a past-due note is a sufficient consideration to support a promise by a guarantor to pay it. *Id.*

4. Consideration for an agreement by a railroad company and other parties about to construct a railroad from a mine to a furnace, and from the furnace to an established railroad, that they will ship all their products at reasonable rates over the latter railroad, may be found in the purchase by the owner of the old road of a certain quantity of the bonds of the new company at par in order to supply funds for the enterprise. *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.* (Pa.) 423

5. A contract between corporations organized to distribute and furnish water to consumers in a county and city, one of which owns a supply of water and a pipe line ending at the city limits, and the other a distributing plant within the city, for co-operation in supplying water to the city and providing a method of determining the price of water, is not in violation of public policy as a monopoly for its sale, since the California constitution reserves to municipal corporations the power of regulating water rates. *San Diego Water Co.* v. *San Diego Flume Co.* (Cal.) 839

6. The fact that the mayor of a city is also the president and a stockholder of a gas company which furnishes gas to the city, not by virtue of any contract, but by requirement of law, when he has no authority in the matter of procuring the gas, does not defeat the right to enforce payment from the city, although the charter of the city provides that no officer shall be directly or indirectly interested in any contract, work, or business, or the sale of any article for which payment is to be made from the city treasury, and that all contracts in violation thereof shall be void. *Capital Gas Co.* v. *Young* (Cal.) 463

7. A contract for the sale of property to a city through one of its officers, who receives a commission from the other party for effecting it, is illegal and void both at common law and under Ohio Rev. Stat. § 6969, declaring it a penal offense for any public officer, agent, servant, or employé to be directly or indirectly interested in any contract for the purchase of any property of the state, county, or municipality. *Findlay* v. *Perts* (C. C. App. 6th C.) 188

8. A provision in a lease of a warehouse owned by a railroad company, that such company shall not be responsible for any damage caused by fire, is not void as against public policy on the ground that the property of the public will thereby be in danger. *Stephens* v. *Southern P. Co.* (Cal.) 751

9. It is not essential to the recovery of an instalment of the amount agreed to be paid in consideration of a release of dower rights, that the plaintiff should have physical possession of a note which the contract contemplated should be given to represent such instalment until the same became due. *Irvin* v. *Irvin* (Pa.) 292

10. A contract valid when made cannot be rendered invalid by a general statute subsequently passed. *Stephens* v. *Southern P. Co.* (Cal.) 751

NOTES AND BRIEFS.

Contracts; sufficiency of contract by offer and acceptance without execution of contem-

plated formal instrument:—general statements of the law; suggestion of formal contract; understanding that there is to be a formal contract; where some terms unsettled; where the execution of a formal contract is one of the terms of the agreement; agreement to execute formal contract may be binding; where it appears that the contract when finished should be a formal one; failure to execute draft of contract; estoppel; illustrations of proposals for formal contract; intention to have formal contract as evidence. 481

Special contracts and obligations to make payment in gold or silver;—(I.) before legal tender act; (II.) application of legal tender act to specific contracts for coin: (*a*) decisions before *Bronson* v. *Rodes:* (1) denying effect to such contracts; (2) supporting such contracts; (3) in equity cases; (4) effect of state statutes; (*b*) doctrine of *Bronson* v. *Rodes* and later cases: (1) federal cases; (2) state decisions generally; (3) alternative provisions; coin or equivalent; (4) municipal and state contracts; (III.) implied contracts or obligations imposed by law: (*a*) in general; (*b*) bailment and conversion of coin; (*c*) bank deposits; (*d*) accounting for trust; (*e*) other actions for damages. 512

Against liability for negligence. 751
By unlicensed broker. 220
By mail. 712
Public policy as to. 424
Validity; when prohibited. 712
Illegality to prevent remedy. 292
Merger in written instrument. 55
Condition of rescission. 860

COPARCENER. See COTENANCY; IMPROVEMENTS; PARTITION.

CORPORATIONS. See also AGRICULTURAL SOCIETIES; ATTACHMENT, 2; BONDS, 1; CONFLICT OF LAWS, 3; CONTRACTS, 5; FERRIES, 2; FRAUD, 4; INSOLVENCY, 3; MUNICIPAL CORPORATIONS, 8; PARTNERSHIP, 1; QUO WARRANTO, 1, 2; TAXES, 5–14.

1. The Board of Regents of Kansas State University is such a corporation as is subject to the control of the court in an action in the nature of quo warranto. *State, Little,* v. *Regents of University* (Kan.) 378

2. Neither a *de jure* nor a *de facto* corporation can exist where the articles are not filed in the office of the secretary of state and the fee therefor paid as required by Colo. Sess. Laws 1887, p. 406, which expressly prohibits the exercise of any corporate powers until this is done. *Jones* v. *Aspen Hardware Co.* (Colo.) 143

3. Promoters of a corporation to whom stock and mortgage bonds are issued nominally in payment for property transferred to the corporation, which was in fact bought of a third person, will not be permitted to jeopardize such third person's collection of the purchase money by enforcing their mortgage without paying for their stock. *Hooper* v. *Central Trust Co.* (Md.) 262

4. A promoter of a corporation is affected and bound by any fraud contained in a guaranty to one selling property to the corporation by another promoter that money in his hands shall be applied to placing improvements on the property, for the purpose of securing a waiver of the vendor's lien, so that he cannot acquire a right to a judgment for the price of such improvements which he can enforce against the objection of such vendor. *Id.*

5. Promoters of a corporation who secure a waiver of the lien of one selling property to the corporation, in favor of a mortgage taken by themselves upon the property, by a fraudulent guaranty that certain money shall be applied to making improvements on the property, which is not done, will not be permitted to enforce their mortgage against his objection. *Id.*

6. A promoter of a corporation who has not paid his stock subscription will not be permitted to take an assignment of a claim for improvements made on the corporate property, so as to enforce the same in priority to valid mortgages on such property. *Id.*

7. The appointment by a corporation by its board of directors of another corporation to act as its sole agent in the sale of water within a city, to be distributed by means of plants of both corporations, is not in violation of Cal. Civ. Code, § 354, subd. 5, 8, where the agency, although exclusive, is not unlimited or unrestricted. *San Diego Water Co.* v. *San Diego Flume Co.* (Cal.) 839

8. A contract between corporations organized to distribute and furnish water to consumers in a county and city, for co-operation in supplying water to the city, is not *ultra vires* because one officer of each corporation is appointed a trustee, and they together are given general charge of the operation of the works and of keeping the accounts of receipts and expenses, with a limited power of determining what shall be charged to the account of operating expenses, and with other powers and duties simply executory and such as could not be discharged by any board of directors otherwise than through an agent. *Id.*

9. A by-law giving a corporation the first right to purchase stock which is for sale by any of its members is not valid under a statute specifying several subjects upon which by-laws may be enacted, but making no reference to the question of stock transfers. *Ireland* v. *Globe Milling & R. Co.* (R. I.) 429

10. A by-law providing that no proxy should be voted by any one who is not a stockholder of the corporation is invalid under Cal. Civ. Code, § 312, providing generally that stockholders may be represented by proxies. *People's Home Sav. Bank* v. *San Francisco Super. Ct.* (Cal.) 844

11. Directors of an insolvent corporation, who vote themselves preferences over other creditors, must show that all their secured claims are honest and justly due them. *Schufeldt* v. *Smith* (Mo.) 880

12. Officers of a corporation may be compelled to account for all sums withdrawn for salaries, with interest thereon, where they have voted and paid them partly and largely for the

purpose of depriving stockholders of the results of a litigation in case they are successful, although they are paid nominally and partly for services rendered to the company. *Eaton* v. *Robinson* (R. I.) 100

18. Stockholders who are officers of a corporation may be compelled, upon a bill properly framed, to pay directly to other stockholders their share of money which the officers have fraudulently retained as salaries. *Id.*

14. Fraud of promoters in procuring a subscription to stock of a corporation before its organization is not a defense against an assessment on the stock by the corporation after the subscriber has carried out his contract and united with others in forming the corporation, but his remedy is restricted to an action against the wrongdoers. *St. Johns Mfg. Co.* v. *Munger* (Mich.) 63

15. The right of the state to declare the forfeiture of the charter of a waterworks company for infractions of duty imposed by its charter and contract is not taken away by a provision in the contract that the city may rescind the contract if the company's works fail to meet the requirements of the contract. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

16. The charter of a waterworks company which supplies river water, instead of pure, wholesome deep-well water as required by its charter and contract, during four droughts in two years, and refuses for a wholly insufficient reason to sink additional wells in order to furnish a proper supply of water, will be annulled, where the only reasons for not annulling are that if the charter is vacated all water supply will cease, and a promise by the company after suit is begun that it will sink the additional wells necessary to afford an adequate supply of water. *Id.*

NOTES AND BRIEFS.

See also STATE INSTITUTIONS.

Corporations; distinguishing public from private. 798, 708

Compelling operation of franchise by. 169

Ultra vires contracts of. 424, 840

Compensation to directors who have acted wrongfully. 100

Corporations; right to vote by proxy in private corporations:—(I.) at common law; (II.) under statutes and by-laws: (*a*) statutes; (*b*) by-laws; (III.) form of proxy; (IV.) when and for what purpose a proxy may be used; (V.) rejection of proxy by inspectors; (VI.) revocation of proxy; (VII.) directors voting by proxy; (VIII.) miscellaneous matters. 844

Issuing stock for property purchased 264

Fraud of promoters in obtaining subscription to stock 63

Fraud in procuring subscriptions to stock. 263

Restricting transfer of stock by by-law. 429

Preference among creditors of. 880

Forfeiture of charter. 743

COSTS. See also APPEAL AND ERROR, 16.

1. The relator in proceedings in the nature of quo warranto will not be required to give additional security for costs on the ground that the security given is insolvent where the evidence in support of the motion only shows that according to the tax records of the county the security has only $320 of taxable property. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

2. An irregularity in commencing a proceeding in the nature of quo warranto for the dissolution of a corporation before giving security for costs is waived, where such security is subsequently given, and the respondent files a demurrer and motion to quash and afterwards its pleas, and no motion to dismiss on that ground is made until nearly a year after the commencement of the action, when the case comes on for hearing. *Id.*

3. The costs of a resale of railroad property after foreclosure cannot be allowed to a judgment creditor who was not made a party to the foreclosure suit, if nothing remains for him out of the proceeds after paying the superior liens, including those set up in the foreclosure suit. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

NOTES AND BRIEFS.

Costs; as to payment in coin. 593

COTENANTS. See also IMPROVEMENTS, 1; PARTITION.

1. The liability of a joint tenant or tenant in common to account to his cotenants under W. Va. Code, chap. 100, § 14, for receiving more than his just share or proportion of the benfits, does not apply to coparceners. *Ward* v. *Ward* (W. Va.) 449

2. A coparcener merely from sole occupation of the premises is not chargeable in favor of other coparceners, unless he excludes them. *Id.*

3. The right to compel joint tenants, tenants in common or coparceners to contribute to necessary repairs, applies only to mills and houses, and not to fences or other repairs to the property. *Id.*

4. The right of a joint tenant, tenant in common, or coparcener to compel others to contribute to necessary repairs, exists only as to future repairs made, after request to assist and refusal. *Id.*

NOTES AND BRIEFS.

Liability of cotenants for improvements and repairs:—(I.) improvements: (*a*) liability at common law; (*b*) liability in assumpsit for improvements; (*c*) rule in equity; (*d*) lien for improvements; (*e*) interest on improvements; (*f*) position of grantee of cotenant's share; (II.) repairs: (*a*) general doctrine; (*b*) liability in assumpsit; (*c*) necessity of a demand and notice; (*d*) lien for repairs. 449

COUNTERCLAIM. See SET-OFF, ETC.

COUNTERFEIT. See INDICTMENT, ETC., 8; TRADE-MARK, 3.

COUNTIES. See also MANDAMUS, 2.

1. The constitutional provision that money raised by county taxes should not be used for other than county purposes is not violated by

Fla. Acts 1891, chap. 4014, § 17, providing that half the funds raised for county roads and bridges shall be turned over to municipal authorities for town or city streets. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

2. Suit for the refunding of an illegal tax cannot be maintained against the county until the claim has been presented to the board of supervisors, under a statute providing that that board shall direct the treasurer to refund illegal taxes. *Bibbins* v. *Clark* (Iowa) 278

NOTES AND BRIEFS.

Counties; use of funds for county purposes. 418

COURTS. See also LIS PENDENS.

1. The mere fact that opinions are prepared by the commissioner of the supreme court of Nebraska is no indication that such cases have not been examined by the judges; but all questions of law, and, so far as practicable, questions of fact, are considered by each of the judges and commissioners, and opinions are invariably submitted for examination and criticism by the entire membership of the court. *Randall* v. *National Bldg. L. & P. Union* (Neb.) 133

2. It is the province of the courts to determine whether a statute purporting to be an exercise of the police power of the state, but taking away the property of a citizen or interfering with his personal liberty, is an appropriate measure for the promotion of the comfort, safety, and welfare of society. *Ritchie* v. *People* (Ill.) 79

3. The jurisdiction of the Supreme Court of the United States on writ of error to a state court, where a stay bond is executed after levy on a judgment, is not interfered with by an action the purpose of which is in effect to vacate the levy. *Central Trust Co.* v. *Moran* (Minn.) 212

NOTES AND BRIEFS.

Courts; rule as to declaring statutes void. 89–97

COVENANT. See also LANDLORD AND TENANT, 1.

1. The intention of the parties to a covenant respecting real property is the controlling element in determining—at least on a bill of equity—whether or not the covenant shall bind subsequent owners of the property. *Bald Eagle Valley R. Co.* v. *Nittany Valley R. Co.* (Pa.) 428

2. An obligation to pay a portion of the expense of the repairs to a dam is not created by a stipulation in a deed that the grantee shall pay a part of the sums which have to be paid for flowage or damages to proprietors of lands above the dam. *Whittenton Mfg. Co.* v. *Staples* (Mass.) 500

3. An obligation in the nature of a servitude upon an estate conveyed with a water privilege may be enforced, without any personal obligation of the owner, under a stipulation that the grantee, his heirs and assigns, shall pay a certain part of the sums paid for flowage or damages to the proprietors of land above a reservoir. *Id.*

NOTES AND BRIEFS.

Covenants; running with land. 423

CREDITORS' BILL. See also ATTACHMENT, 1.

The satisfaction or discharge of a judgment may be shown as a defense against a creditors' bill to enforce the judgment after revival on scire facias, as well as to defeat the revival. *Bickerdike* v. *Allen* (Ill.) 782

CRIMINAL LAW. See also EXECUTORS AND ADMINISTRATORS, 3.

Sentence in a criminal case may lawfully be suspended at the pleasure of the court, and the court's power over an accused is not affected or lost by an order to pay costs, both of himself and a codefendant, or even by committing him for refusal to do so, since the requirement to pay costs is not part of the sentence. *State* v. *Crook* (N. C.) 260

NOTES AND BRIEFS.

Criminal law; constitutional protection against being forced to furnish evidence to be used against one's self in a civil case:—(I.) provisions against self-accusation: (*a*) limitation to criminal proceedings; (*b*) application to proceedings for penalties and forfeitures; (*c*) general doctrine as to evidence against one's self; (*d*) the contrary doctrine; (*e*) parties in interest; (II.) unreasonable searches and seizures; (III.) right of trial by jury; (IV.) due process of law; (V.) distinction between civil and criminal or penal proceedings. 811

Innocent violation of statute 715

CRIMINATION OF SELF. See CRIMINAL LAW, NOTES AND BRIEFS.

CROSS-BILL. See PLEADING, 10, 11.

CUSTOM. See also CONSTITUTIONAL LAW, 8; EVIDENCE, 23, 24.

NOTES AND BRIEFS.

Custom; as part of contract. 220

DAMAGES.

1. Exemplary damages may be recovered by a passenger for an ejection which was malicious as well as wrongful. *Ellsworth* v. *Chicago, B. & Q. R. Co.* (Iowa) 178

2. A passenger is not called upon to submit to a wrongful ejection for the purpose of economizing the damages to be recovered, but may make any resistance not amounting to a criminal disturbance of the peace. *Id.*

3. Damages for detention of a boat by obstruction of navigation, where other means of transportation were not provided, will not include the cost of loading and unloading and of damage to the cargo by exposure after unloading. *Farmers' Co-Op. Mfg. Co.* v. *Albemarle & R. R. Co.* (N. C.) 700

NOTES AND BRIEFS.

Damages; right to make exemplary. 530

DAMS. See COVENANT, 2; EASEMENTS, 1; TAXES, 2.

DECEIT. See FRAUD.

DEED. See also CLOUD ON TITLE; FERRIES, 6; MAXIMS, 1, 2.

The releasee in a quitclaim deed who purchases in good faith and for full consideration will be protected in Connecticut from secret unrecorded encumbrances on the property. *Robinson* v. *Clapp* (Conn.) 583

NOTES AND BRIEFS.

Deed; conveying appurtenances. 52

DEFINITIONS. See CONSTITUTIONAL LAW, 18; TAXES, 10, 14.

DELEGATION OF POWER. See RELIGIOUS SOCIETIES, 1.

DEPOSITIONS. See APPEAL AND ERROR, 4.

DESCENT AND DISTRIBUTION.

1. One killing his ancestor for an estate which would naturally come to him under the statutes of descent and distribution may take it under a constitution prohibiting attainders working corruption of blood and forfeiture of estate, and statutes providing no penalty for murder except death by hanging. *Carpenter's Appeal* (Pa.) 145

2. Brothers and sisters of the half blood are included in a statutory provision for descent to brothers and sisters, unless a contrary intention appears. *Anderson* v. *Bell* (Ind.) 541

3. Inheritance is not confined to brothers and sisters of the half blood to the exclusion of descendants of deceased ones, by a statute which excludes the half-blood kindred from inheriting an estate which came to the intestate by gift, devise, or descent from an ancestor, unless they are of the blood of such ancestor, if there are any of his blood. *Id.*

NOTES AND BRIEFS.

Descent and distribution; among kindred of the half blood:—(I.) the common-law doctrine; (II.) in the United States; (III.) meaning of the words: (*a*) in general; (*b*) ancestor; (*c*) blood; (*d*) brothers and sisters; (IV.) no distinction between the whole and half blood; (V.) in the case of ancestral estates; (VI.) when the statute not express; (VII.) cases wherein the whole blood is preferred; (VIII.) when half blood preferred to remote relative of the whole blood; (IX.) when half blood take half portions; (X.) abifting descents; (XI.) equitable conversion. 541

Right of murderer to inherit. 146

DESCRIPTION. See EASEMENTS, 1.

DISCOUNT. See USURY, 8.

DISCOVERY.

NOTES AND BRIEFS.

Discovery; as affected by constitutional provision against self-crimination. 811

DUE PROCESS. See CONSTITUTIONAL LAW, 17, 18, 20-22.

DYNAMITE. See EVIDENCE, 16; EXPLOSION, NOTES AND BRIEFS.

EASEMENTS. See also COVENANT, 3.

1. A servitude by prescription charging property with the payment of a portion of the expense of repairs to a dam from which a water power is furnished to the premises is created, where for more than fifty years an annual contribution by the owner of the servient estate has been paid as a duty and collected by the other party as a right. *Whittenton Mfg. Co.* v. *Staples* (Mass.) 500

2. A purchaser of a tract of land 40 feet wide and on which is a building 11 feet wide from land retained by the grantor, with a bay window 5 feet from such land, does not obtain by implied grant the right to the light which the building will receive from the unconveyed portion, as against a subsequent purchaser for value of the remaining land. *Robinson* v. *Clapp* (Conn.) 583

NOTES AND BRIEFS.

Easement; when implied. 582

EIGHT HOUR LAW. See CONSTITUTIONAL LAW, 10, 15, 24; MASTER AND SERVANT, 1; STATUTES, 8.

ELECTRIC RAILWAYS. See RAILROADS, 2; STREET RAILWAYS.

EMINENT DOMAIN. See also INJUNCTION, 3.

1. The use of water for irrigating purposes contemplated by Neb. Act March 27, 1889, is a "public use" for which private property may be condemned without the owner's consent. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 853

2. Lands owned by corporations as well as by natural persons are included within Neb. Act March 27, 1889, art. 1, § 8, providing that no tract of land shall be crossed by more than one irrigating ditch without the consent of the "owners thereof." *Id.*

3. Irrigating companies organized under the laws of the state have power to acquire by condemnation the right of way for necessary canals, reservoirs, etc., under Neb. Act March 27, 1889, art. 2, § 8, providing that such corporations may acquire a right of way for such purposes over any land. *Id.*

4. The right of an owner whose property is condemned for public use, to a jury trial upon the question of damages, guaranteed by S. D. Const. art. 6, § 18, providing that private property shall not be taken for public use without just compensation as determined by a jury, is preserved by the Dakota Compiled Laws relating to the subject of assessing damages, § 1324 of which provides for an appeal and a jury trial if the parties cannot agree or the owner is dissatisfied with the award made by the supervisors. *Dell Rapids* v. *Irving* (S. D.) 861

5. The use of a street for other than legiti-

mate street purposes, which constitutes any impairment of or interference with the easements of an abutting owner, is a taking of his property within the meaning of the constitution. *Willamette Iron Works Co.* v. *Oregon R. & Nav. Co.* (Or.) 88

6. No portion of a public street can lawfully be appropriated to the exclusive and permanent use of a private corporation, under the guise of an exercise of power to alter or change the grade. *Id.*

7. Any structure on a street, which is subversive of and repugnant to its use and efficiency as a public thoroughfare, is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made. *Id.*

8. A solid structure 30 feet wide erected in the middle of a street 66 feet wide and curving so as to leave on one side a passageway only 8 feet wide, built as an approach to a toll bridge owned by a private corporation, not forming a part of or extension of any public highway, although authorized by the legislature and city authorities, can lawfully be made only on payment of damages to the abutting owner. *Id.*

9. Erections upon a public street impose no additional servitude where they aid and facilitate its use for the purposes of travel and transportation. *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* (Ill.) 485

10. The question whether a new method of using a street for public travel results in the imposition of an additional burden upon the fee must be determined by the use which such method makes of the street, and not by the motive power which it employs in such use. *Id.*

11. The permission to a street-railway company to lay its tracks in a street already appropriated to public use is not a grant of the right to appropriate an additional easement in the soil of the street, but the construction of such road is merely a mode of facilitating existing travel, and of modifying or changing the existing public use, adding an additional mode of conveyance to those already upon the street, and inflicting no damage upon the owner of the fee of the street. *Id.*

12. A railroad company owning the fee of the street at the point where the street is crossed by its tracks is not entitled to compensation as for an additional burden, upon the construction of street-railway tracks along the street under permission from the city, where its own tracks are not injured. *Id.*

13. The interest of a street railway company in the street upon which its tracks are laid, although a valuable one, is part of the public easement in the street, accessory and ancillary to the existing right in the public of passing over the street. *Id.*

14. A railroad company which by city ordinances has acquired a permanent easement in streets crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway laid along the street under permission from the city, as such easement is in subordination to the right of the public to pass along the streets, and the propelling of street cars is only a form of the exercise by the public of such right of passage, and does not operate as an infringement upon such easement. *Id.*

See also RAILROADS, 2.

NOTES AND BRIEFS.

Eminent domain; right of railroad company to compensation for laying street railway across railroad track on a street crossing. 485

What purposes are public for exercise of. 854

ESTOPPEL.

1. A city does not, by an appropriation and payment of its revenue for many years in violation of the constitution, estop itself to assert that it is prohibited in future from making such payment. *Washingtonian Home* v. *Chicago* (Ill.) 798

2. Acquiescence for nearly three years in the annexation of one's land to a city will prevent his questioning the validity of the annexation, —at least when the attack is based on mere irregularities and informalities not affecting jurisdiction. *Kuhn* v. *Port Townsend* (Wash.) 445

3. The owner of a wagon who permits the name and occupation of another person who is in possession of it to be painted thereon, for the purpose of inducing the public to believe that it belongs to and is used by the latter in his business, cannot assert ownership against an innocent purchaser from the person who had it and whose name was on it. *O'Connor* v. *Clark* (Pa.) 607

EVIDENCE.

Judicial notice.

1. Courts may take judicial notice of long-prevailing construction of a statute by executive officers. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

2. The court will take judicial notice that a street-railway company is a common carrier of passengers. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

3. It is a matter of common knowledge that natural gas will not explode spontaneously without some agency acting upon it. *McGahan* v. *Indianapolis Natural Gas Co.* (Ind.) 855

4. It is a matter of common knowledge that race-courses are visited by invited spectators, who drive into the grounds in their own carriages or other vehicles under the control of themselves or their own drivers. *Hart* v. *Washington Park Club* (Ill.) 492

5. The jury must determine the facts in the case from testimony given by witnesses, and not from their own judgment or experience or knowledge. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

Presumptions and burden of proof.

6. In a suit upon a contract made and to be executed in another state, in the absence of any evidence to the contrary, the court will presume that the rules of the common law prevail there. *Patillo* v. *Alexander* (Ga.) 616

7. A person seeking to establish title to an office against another in possession of it has

the burden of proving his right thereto. *Tillman* v. *Otter* (Ky.) 110

8. The burden of proof to show that, notwithstanding a substantial compliance with the California statutes as to the care of ballots, they have been tampered with, or have been exposed under such circumstances that a violation of them might have taken place, resting upon one objecting to their admission as evidence, is not discharged by simply showing that it was possible for a person to have molested them. *Tebbe* v. *Smith* (Cal.) 678

9. Funds in the hands of a trustee who has become insolvent, which are less than the amount of the trust funds, are presumed to belong to the trust. *State* v. *Foster* (Wyo.) 226

10. The burden is on the seller to show the purchaser's inability to carry out his contract, in order to avoid the payment of the broker's fees, where he accepted him without any misrepresentation or suppression of knowledge by the broker as to the purchaser's financial ability. *Fairly* v. *Wappoo Mills* (S. C.) 215

11. No presumption that grade crossings expressly authorized by a special statute were intended to be subject to the general law requiring approval of the railroad commissioners can arise from the mere fact that they are numerous, while the general policy of the law has been to restrict such crossings, if the act does not increase the total number, and indicates that they will be temporary because of the possible elevation of the track. *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 867

12. The burden of proof is upon a city in an action for the value of property destroyed by it as a nuisance without first condemning the same, to show that its destruction was really necessary to the public health or safety. *Savannah* v. *Mulligan* (Ga.) 303

13. An accident to a person waiting for a street car, who is struck by the sudden switching of the car upon a side track, does not make a prima facie case of negligence on the part of the carrier. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

14. Negligence of the person conducting a public exhibition of horse racing cannot be presumed from the mere fact that a spectator was injured by a runaway horse while within the place reserved for spectators. *Hart* v. *Washington Park Club* (Ill.) 492

15. The burning of a house through fire set from the sparks of a firepot placed upon its roof by workmen engaged in repairing it will be presumed to have been caused by their negligence. *Shafer* v. *Lacock* (Pa.) 254

16. An explosion of nitro-glycerine in process of manufacture into dynamite raises a presumption of negligence, in the absence of any explanation of the real cause of the explosion. *Judson* v. *Giant Powder Co.* (Cal.) 718

17. A plaintiff must be presumed to have caused an explosion of natural gas by his own act, where his complaint against a gas company for the explosion does not charge the company with any negligence except in failing to cut off the supply, and does not make any allegation as to the cause of the explosion. *McGahan* v. *Indianapolis Natural Gas Co.* (Ind.) 335

Documentary.

18. A certificate of the clerk that he has mailed a notice of scire facias addressed to the defendant, which under Ill. Rev. Stat. chap. 22, § 12, is declared to be evidence, is prima facie evidence that the notice so sent by mail was received. *Bickerdike* v. *Allen* (Ill.) 782

19. A recital in a judgment that due proof was made is at least prima facie evidence of that fact. *Id.*

20. As against strangers thereto a receipt is incompetent evidence of the payment thereby acknowledged, for as against them it is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination, and independently of his oath. *Ellison* v. *Albright* (Neb.) 737

Parol.

21. Parol evidence is admissible to ascertain the intention of the parties, where one who is not a party to a promissory note signs his name upon the back of it. *Peterson* v. *Russell* (Minn.) 613

22. Evidence of a contemporaneous agreement by a wife to procure a divorce from her husband is inadmissible to defeat recovery by her upon a written agreement valid upon its face for the release of her dower rights in real property of the husband, where she has performed the written agreement upon her part, which of itself constitutes a consideration for the undertaking of the other party, and after such agreement she resumed marital relations with her husband, although such an agreement would be admissible if the action were upon a bond, bill, or note, to prove that the consideration was unlawful. *Irvin* v. *Irvin* (Pa.) 293

23. Liability for brokerage upon a contract for the sale of a certain quantity of a commodity, "seller paying brokerage at 10 cents per ton," cannot be reduced by proof of a custom to pay brokerage only on the amount actually delivered. *Fairly* v. *Wappoo Mills* (S. C.) 215

24. Evidence of custom and usage is not admissible to explain or vary the terms of an express contract, whether written or verbal, unambiguous in its terms, unless to show the meaning of certain terms used in the contract, which by well-established custom or long usage have acquired a meaning different from that which they primarily bear. *Id.*

Declarations.

25. Evidence of a conversation which occurred in defendant's absence is not rendered admissible against him by the fact that it would tend to contradict statements made by defendant's counsel in his opening statement to the jury. *Munzer* v. *Stern* (Mich.) 859

26. That both defendants jointly sued for alienating a husband's affections, and who are shown to have acted in concert, were not present at a conversation with one of them respecting an inducement held out to the husband, will not prevent the admission of the evidence of such conversation. *Price* v. *Price* (Iowa) 150

27. Evidence of conversations between a

husband and his father, and between the latter and the wife's father, may be proved in an action for alienating the husband's affections, in order to show the weight and probable effect of a property inducement held out to him to abandon her. *Id.*

28. Evidence that a grantor of a part of a tract of land told a grantee that a well nearly on the boundary line, but on the land not conveyed, "belonged to" and "would be sold" with the land conveyed, is inadmissible to show the legal effect of the deed as against a subsequent purchaser of the remaining land. *Robinson* v. *Clapp* (Conn.) 582

29. Declarations of the workmen of one employed in repairing a house which is burned during such employment, as to the cause of the fire, are admissible to charge him with liability when made while the fire is in progress. *Shafer* v. *Lacock* (Pa.) 254

Relevancy; weight.

30. The right to prove the good character of an accused is properly confined to a few years previous to the crime, without allowing proof of his reputation long before, in boyhood days. *State* v. *Barr* (Wash.) 154

31. Evidence that it is practicable to place railings about the top of tenders to increase their capacity, and that this was not done in the case in hand, is admissible on the question of negligence in loading a tender so that coal fell from it and injured the plaintiff. *Union P. R. Co.* v. *Erickson* (Neb.) 137

32. Permanent lung trouble need not be specifically alleged to admit proof of it in an action for damages for personal injuries, if the injuries are alleged to be permanent and the evidence shows that the lung trouble would probably result from the injury received. *Montgomery* v. *Lansing City Elec. R. Co.* (Mich.) 287

33. An answer under oath has no greater force as evidence than the bill, under Ill. Rev. Stat. chap. 22, § 20, where the bill waives the oath. *Bickerdike* v. *Allen* (Ill.) 782

34. A provision in a judgment for a specific sum of money, with interest, that it be paid in United States gold coin, does not constitute it a variance from a declaration describing the judgment as for a certain number of dollars or for money simply,—especially where the complaint upon which it was rendered describes the note upon which the suit was brought as notes for the payment of so many dollars, and not so many dollars in United States gold coin, and the judgment was one by default. *Belford* v. *Woodward* (Ill.) 593

NOTES AND BRIEFS.

See also CRIMINAL LAW.

Evidence; presumption of negligence. 256, 298

Burden of proof as to negligence. 493

Burden of proof and evidence generally in respect to negligence in escape and explosion of gas. 342

Burden of proof as to excessive force. 580

To overthrow written contract. 55

Parol, as to writing. 293 612

Of repairs after accident. 138

Declarations of employés. 256

Receipt as evidence of payment as against third parties: (I.) ordinary receipts: (*a*) not admissible; (*b*) admissible; (II.) receipts in deeds. 737

EXCEPTION. See APPEAL AND ERROR, 1–4.

EXECUTION. See also JUDICIAL SALE, 2.

A levy on a portion of the property of a railroad company is not valid under Minn. Gen. Laws 1868, chap. 56, §§ 1–3, as against mortgagees of the property as to whom the road, rolling-stock, and personal property constitute an entirety, but the remedy of creditors in such a case must be against the property as an entirety. *Central Trust Co.* v. *Moran* (Minn.) 213

EXECUTORS AND ADMINISTRATORS. See also INTEREST, 3; TRUSTS, 1.

1. The mere fact that a debtor to the estate has the legal title to a piece of land does not show that a compromise with him by an executor of a claim due the estate was improper. *Re Ricker's Estate* (Mont.) 622

2. An executor may lawfully be allowed his commissions on the disbursements of the year on his accounting at the close of the year. *Re Ricker's Estate* (Mont.) 622

3. Compelling a person to disclose his possession of any property of a decedent's estate, or his knowledge concerning such estate, on penalty of imprisonment for refusal, in proceedings on behalf of the estate, being a remedial, and not a penal, proceeding, is not within the constitutional provisions against making any person a witness against himself in a criminal action, and against unreasonable searches and seizures. *Levy* v. *San Francisco Super. Ct.* (Cal.) 811

NOTES AND BRIEFS.

Executors; liability of, for compound interest. 622

EXPLOSION. See also EVIDENCE, 3, 16, 17; GAS, 2.

1. The duty of keeping natural gas under control while it is being transported is imposed by Ohio Rev. Stat. § 3561*a*, and damages resulting to others without their fault by its explosion while being thus transported by a gas company will make such company liable therefor, although not negligent in regard thereto. *Ohio Gas Fuel Co.* v. *Andrews* (Ohio) 337

2. The risk of damages from an explosion in a dynamite factory is not assumed by conveying land for use in that business, and by continuing to carry on business near by after one explosion has occurred. *Judson* v. *Giant Powder Co.* (Cal.) 718

NOTES AND BRIEFS.

Explosion; liability for explosion of gas. 337

Negligence in the manufacture and storage of gunpowder, nitro-glycerine, dynamite, and

other explosives:—(I.) general doctrine; (II.) the effect of city ordinances; (III.) negligence in the manufacture; (IV.) negligence in the storage. 718

FENCE. See RAILROADS, 1.

FERRIES.

1. A railroad company owning a ferry franchise, which runs a ferry as part of its line, cannot, while operating the rest of its line, discontinue the ferry because it is not profitable, and refuse to obey a legislative requirement to operate it. *Brownell* v. *Old Colony R. Co.* (Mass.) 169

2. Duty to operate a ferry under a franchise may be specifically enforced by a suit in court authorized by statute; and forfeiture of the charter is not the only remedy. *Id.*

3. An order by the court to operate a ferry may be, in the first instance, to provide a suitable ferry, without definitely deciding what kind of a ferry is suitable. *Id.*

4. Acquiescence by the state in the abandonment of a ferry is not shown by mere failure of officers to take action to compel its operation. *Id.*

5. The enforcement of a penalty due to the state under Mass. Stat. 1894, chap. 392, for failure to operate a ferry, cannot be had in a suit on petition of individuals to compel the operation of the ferry. *Id.*

6. Special mention of a ferry franchise is not necessary to convey it, in a transfer of a railroad of which the ferry is practically an extension. *Id.*

NOTES AND BRIEFS.

Ferry; franchise of; duty to operate. 169

FIRE. See also COMMERCE, 1; CONTRACTS, 8; EVIDENCE, 15; TRIAL, 8.

A statute requiring screens "of the best approved kind, shown by experience to be proper and suitable for protection from fire," to be used on vessels burning wood, is not unreasonable and imposes no greater burden than the common-law rule in most states imposes in the case of railroad locomotives. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

FISHERIES. See also BOUNDARIES, 1.

NOTES AND BRIEFS.

Fisheries; state regulation of. 715

FORFEITURE. See also BUILDING AND LOAN ASSOCIATIONS, 7, 8; CORPORATIONS, 15, 16.

NOTES AND BRIEFS.

Forfeiture; of payments to loan association, see BUILDING AND LOAN ASSOCIATIONS.

Compulsory evidence against one's self in case of. 813

FRANCHISE. See also CORPORATIONS, 15, 16; FERRIES; TAXES, 8–12.

NOTES AND BRIEFS.

Franchise; compelling operation of. 169

FRAUD. See also CORPORATIONS, 14; SALE, 4–6.

1. Intentional fraud, as distinguished from mere breach of duty or omission to use due care, is an essential factor in an action for deceit. *Kounize* v. *Kennedy* (N. Y.) 360

2. A representation upon which an action for fraud can be based must be false, material, and made knowing it was false, or recklessly made not knowing or caring whether it was true or false. *Id.*

3. A misrepresentation designed to influence the conduct of another and upon which he acts to his prejudice, if honestly made believing it to be true, cannot create liability to an action for deceit. *Id.*

4. The omission of a claim then in litigation from a statement of the entire assets and liabilities of a corporation, which is made by the president of the company, but not stated or understood to be made upon his personal knowledge, does not make him liable for fraud and deceit to a person purchasing bonds of the company on the faith of such statement, where the president believed and had reasonable cause to believe that the claim was not valid or enforceable against the company. *Id.*

NOTES AND BRIEFS.

Fraud; liability for misrepresentations made in good faith. 361

GAME LAWS. See also CARRIERS, 10.

NOTES AND BRIEFS.

Game laws; innocent violation of. 715

GAS. See also EVIDENCE, 3; EXPLOSION, 1; HIGHWAYS, 1; PLEADING, 6.

1. A company actually using natural gas which flows through a pipe over a highway crossing cannot escape liability for the dangerous condition of poorly jointed and leaking pipes, because the contractor who laid them has not yet formally turned over the plant to the company or fully completed his contract. *Lebanon Light, H. & P. Co.* v. *Leap* (Ind.) 342

2. The acts on previous occasions of a person injured by an explosion of natural gas in defective pipes may be taken into account in determining his contributory negligence by showing his experience and knowledge of the danger,—especially when previous disturbances of the pipes are charged to have been the occasion of the explosion. *Id.*

3. Conducting natural gas at high pressure through poorly jointed pipes with numerous leaks, lying loose upon the ground where the public, including children and other inexperienced persons, daily pass,—especially when it is laid on a public highway in violation of law,—constitutes actionable negligence. *Id.*

4. An ordinance limiting the price to be charged for gas furnished to private consumers is, in the absence of legislative authority, invalid,—at least as affecting a gas company which has obtained consent to the use of streets without any condition imposed except as to the rates to be charged for public buildings. *Re Pryor* (Kan.) 896

NOTES AND BRIEFS.

Gas; liability for negligence in the escape and explosion of gas:— (I.) general doctrine governing such actions; (II.) legislative and municipal control; (III.) evidence: (*a*) in general; (*b*) burden of proof; (*c*) expert testimony; (*d*) sufficient to establish negligence; (*e*) insufficient to establish negligence; (IV.) contributory negligence; (V.) questions for and instructions to the jury; (VI.) effect of contributing causes; (VII.) effect of negligence of third person; (VIII.) act of fellow servant; (IX.) the question of notice; (X.) as between landlord and tenant; (XI.) rights of the owner of the reversion; (XII.) effect of, upon insurance; (XIII.) gas generated by accident; (XIV.) right of action over. 887

GOLD. See also BONDS, 5; JUDGMENT, 1, 2.

NOTES AND BRIEFS.

Gold; contract to pay in, see CONTRACTS.

GOVERNOR.

NOTES AND BRIEFS.

Executive function of appointment. 113

GUARANTY. See CONTRACTS, 3.

GUN. See HOMICIDE.

GUNPOWDER. See EXPLOSION, NOTES AND BRIEFS.

HEALTH. See also NUISANCES, 1.

A resolution of the state board of health without limitation or restriction, that no pigpen shall be built or maintained within 100 feet of any street or inhabited house, is not a reasonable and legitimate exercise of the power conferred by Vt. Acts 1886, No. 93, § 6, and Vt. Acts 1892, No. 82, § 11, providing that the board shall have authority to promulgate and enforce such regulations for the better preservation of the public health in contagious and epidemic diseases, and regarding the causes which tend to their development and spread, as it shall judge necessary. *State* v. *Speyer* (Vt.) 578

NOTES AND BRIEFS.

Health; regulations to preserve. 574

HIGHWAYS. See also BICYCLES; CONSTITUTIONAL LAW, 22; COUNTIES, 1; EMINENT DOMAIN, 5–14; STATUTES, 15; TELEGRAPHS.

1. Pipes for natural gas cannot be lawfully laid on the surface of a highway. *Lebanon Light, H. & P. Co.* v. *Leap* (Ind.) 842

2. An abutting proprietor is entitled to the use of the street in front of his premises to its full width, as means of ingress and egress and for light and air; and this right is as much property as the soil within the boundaries of his lot. *Willamette Iron Works* v. *Oregon R. & Nav. Co.* (Or.) 88

3. The vacation of a part of a public street constituting a thoroughfare across a railroad track, and the erection of a viaduct in another place, damages a land owner whose property is left upon a blind court, otherwise than in the same manner as the general public, and entitles him to damages, although his property did not abut upon the vacated portion of the street, but only touched it at one corner. *Chicago* v. *Burcky* (Ill.) 568

4. The right of a land owner to damages from the vacation of a portion of a street so as to leave his property upon a blind court is not affected by his subsequent opening of a street which separates his property from the vacated portion of the original street, as his rights are fixed at the time of closing the street. *Id.*

5. The facts that the tracks of a railroad company are laid across city streets, and its freight and passenger cars are permitted by the city to pass over such streets upon such tracks, give the company no exclusive use of the crossing, but only a use to be enjoyed in common with the public. *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* (Ill.) 485 See also EMINENT DOMAIN.

6. A constitutional provision against a "levying of taxes by the poll" is not violated by a statute which was substantially in force when the constitution was adopted, compelling ablebodied male residents between twenty and fifty years of age to labor two days at least annually in repairing the roads, with the privilege of furnishing a substitute or paying 75 cents per day instead. *Short* v. *State* (Md.) 404

NOTES AND BRIEFS.

Highways; vacation of part as injury to abutting owner. 569

Structure injuring abutting owners. 89

Legislative power as to use of. 89–97

HOMICIDE. See also DESCENT AND DISTRIBUTION; INDICTMENT, ETC., 2.

The right to fix a loaded gun in a building so that it will be discharged on forcing open the front door, and kill a person attempting to enter is a question of fact or mixed fact and law for the jury. *State* v. *Barr* (Wash.) 154

NOTES AND BRIEFS.

Homicide; by means of spring gun, trap, or other dangerous instrument killing trespasser. 154

HORSE RACING. See also EVIDENCE, 4, 14; PLEADING, 5.

1. Grounds on which a public exhibition of horse racing is given, to which the public are invited, must be kept in a reasonably safe and suitable condition for the spectators. *Hart* v. *Washington Park Club* (Ill.) 492

2. Permitting a horse to run in a race knowing it to be dangerous and unsafe by reason of a vicious habit of track bolting, without warning a woman engaged to ride in the same race, of the character of the horse, of which she is ignorant, renders an agricultural society which is promoting, controlling, and conducting the race liable to her for injuries caused by the bolting of such horse during the race. *Lane* v. *Minnesota State Agri. Soc.* (Minn.) 708.

NOTES AND BRIEFS.

Horse race; negligence in conduct of. 708

HOTEL. See INNKEEPERS.

HUSBAND AND WIFE. See also INFANTS.

Wrongfully depriving a wife of the affection, companionship, and society of her husband, gives her a right of action for damages, under Iowa Code, § 2311, which authorizes a wife to maintain actions "for the preservation and protection of her rights and property as if unmarried." *Price* v. *Price* (Iowa) 150

NOTES AND BRIEFS.

Husband and wife; action for alienation of affection. 150

Support of children after divorce. 678

IMPROVEMENTS. See also COTENANTS, 3.

1. A coparcener allowed for improvements may be charged by way of set-off for use and occupation. *Ward* v. *Ward* (W. Va.) 449

2. Permanent improvements made by one coparcener are chargeable to the others personally or upon their shares in the land, only when made by their request or agreement. *Id.*

INDEX. See also REAL PROPERTY, 1.

NOTES AND BRIEFS.

Index; as part of records. 775

INDICTMENT AND INFORMATION.

1. The parts of a book which are obscene, indecent, and impure, when the whole book is not so, must be described or referred to in an indictment so specifically that they can be identified by the evidence, if they are not set out according to their tenor because unfit to appear on the record. *Com.* v. *McCance*, (Mass.) 61

2. An information charging that defendant purposely killed a person named is not insufficient because there was no intent to kill any particular person, but merely to kill any one who might attempt to enter a certain building, under a statute requiring the fact to be stated, but making an information sufficient against such an attack unless the defendant could be misled to his injury. *State* v. *Barr* (Wash.) 154

3. Exclusive ownership of a label need not be alleged in an information under a statute making it a misdemeanor to vend or keep for sale goods upon which any forged, imitation, or counterfeit label shall be placed to represent the goods as those of some other person, association, or union of workingmen. *State* v. *Bishop* (Mo.) 200

NOTES AND BRIEFS.

Indictment; setting out obscene language. 61

INFANTS. See also NEGLIGENCE, 1; TRIAL, 4, 5.

A woman cannot recover from her former husband for necessaries furnished their children, of whom she was given the custody in a decree of divorce based on her fault, without any order respecting their maintenance, unless he has promised to pay for such necessaries or requested that they be furnished. *Fulton* v. *Fulton* (Ohio) 678

INFORMERS.

One who did not contribute to the construction or maintenance of a sidewalk which he has a right to use may be an informer for unlawfully riding a bicycle on the sidewalk, the penalty for which is for the use of a school district. *Com.* v. *Forrest* (Pa.) 865

INJUNCTION. See also WATERS, 6.

1. A court of equity will never lend its aid, by injunction, to restrain the libeling or slandering of title to property, where there is no breach of trust or contract right involved. *Reyes* v. *Middleton* (Fla.) 66

2. Injunctions which are in substance mandatory—that is, requiring some act to be done—may be granted by the courts in proper cases. *Central Trust Co.* v. *Moran* (Minn.) 212

3. Opportunity to acquire the easement of an abutting owner by agreement or condemnation may be given before making an injunction mandatory against an unauthorized approach of a bridge which is in daily use by a large number of electric cars, wagons, and foot passengers. *Willamette Iron Works* v. *Oregon R. & Nav. Co.* (Or.) 88

4. A temporary injunction mandatory in substance, although it may be granted in a proper case under Minn. Gen. Stat. 1878, chap. 66, tit. 11, ought not to be granted, except under peculiar circumstances, and where it is clear that plaintiff will have a final decree and the court can impose such conditions that defendant shall sustain no detriment. *Central Trust Co.* v. *Moran* (Minn.) 212

5. An injunction will not lie at the suit of an abutting owner who does not own the fee to restrain the laying of a street railway in the street, as the damages which he may suffer are merely consequential. *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* (Ill.) 485

6. An injunction against constructing a trolley road across a steam-railroad track at grade, the effect of which will be dangerous to passengers, cannot be defeated on the ground that it will be simply an injunction against trespassers or involves simply a claim for damages. *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 867

7. A consumer may enjoin a city which has undertaken to furnish water to its inhabitants from shutting off his supply for the purpose of coercing payment of an old claim against him, after it has accepted the rates and furnished water for subsequent periods. *Wood* v. *Auburn* (Me.) 376

8. The use of the words "U. S. Dental Rooms" and of the letters "U. S." upon the

windows of a dental office may be enjoined at the suit of one who has adopted them as a trade-name against another who by their use is plainly attempting to convey the idea that he is carrying on a branch of the former's business, and so profit from his advertising and business reputation. *Cady* v. *Schultz* (R. I.) 524

9. An injunction to restrain a levy on part of the property of a railroad may be granted in favor of mortgagees of the whole property, under Minn. Gen. Laws 1868, chap. 56, §§ 1–3, which make all the property of the company an entirety as to mortgagees. *Central Trust Co.* v. *Moran* (Minn.) 212

10. A grantee of a part of a tract of land, who is told by the grantor that a well on the boundary line, partially on the land unconveyed, will go with the part sold, is not entitled to an injunction against covering such well with a building, where he has never used it since his purchase, and it has been covered with a flagstone all that time, and pipes connecting it with his buildings are entirely on his land. *Robinson* v. *Clapp* (Conn.) 582

11. A decree enjoining the erection of any building on defendant's property "so near as to exclude the light" from plaintiff's dwelling house is bad for indefiniteness. *Id.*

NOTES AND BRIEFS.

Injunction; against taxes. 507

Against structure in street. 89

INNKEEPERS.

A hotel keeper is not liable for the theft by his night clerk, from the hotel safe, of money of a regular boarder who has lived in the house for some months, if ordinary care and diligence were used in the employment of the clerk. *Taylor* v. *Downey* (Mich.) 92

INSOLVENCY. See also BANKS, 4–6; PARTNERSHIP.

1. The right of a state or municipality, if any exists, to priority or preference of payment from an insolvent's estate, cannot be asserted after a general assignment for creditors, which passes the title. *State* v. *Foster* (Wyo.) 226

2. A statute providing for the release of a claim in full by a creditor who accepts a dividend under an assignment cannot apply to the state or a municipality, under a constitutional provision that such liability can be extinguished only by payment into the proper treasury. *Id.*

3. A deed of trust by an insolvent corporation is not void as matter of law from the fact that the directors vote themselves preferences in payment of debt. *Schufeldt* v. *Smith* (Mo.) 880

NOTES AND BRIEFS.

See also PARTNERSHIP.

Insolvency; extraterritorial effect of. 164

Priority of state or United States in payment from assets of a debtor:—(I.) scope of note generally; (II.) priority of United States: (*a*) upon what based; (*b*) constitutionality of provisions for; (*c*) superiority over state laws; (*d*) construction and scope of: (1) generally; (2) who are debtors of the United States; (3) what debts are within the statute; (4) what constitutes insolvency; (5) sufficiency of assignment to confer priority; (6) sufficiency of attachment to confer priority; (*e*) when and to what it attaches; (*f*) nature and extent; (*g*) marshaling assets; (*h*) liability of assignee or representative; (*i*) subrogation of sureties; (*j*) what amounts to a devestiture of the right; (*k*) how asserted; (III.) priority of the states: (*a*) upon what based; (*b*) constitutionality of provisions for; (*c*) nature and extent; (*d*) to what indebtedness it applies; (*e*) subrogation of surety making payment; (*f*) when it attaches and how devested; (IV.) priority of claims for taxes. 226

INSURANCE. See also CONFLICT OF LAWS, 8.

1. The failure of an insurance company of another state to comply with the statutory prerequisites to the right to do business does not prevent such company from enforcing a claim for premiums due for insurance, although the corporation is guilty of a misdemeanor and subject to a penalty by reason of the insurance. *State Mut. F. Ins. Co.* v. *Brinkley Stave & H. Co.* (Ark.) 712

2. The right to recover unearned premiums on the termination of insurance in a mutual company does not exist until the dues or liabilities which the insured may be liable to pay under the charter and by-laws of the organization can be ascertained and deducted, where the charter provides for withdrawal by notice and "paying all dues and liabilities." *Id.*

3. Smoked meats taken from a smokehouse to a storage-room as fast as they are cured are contents of the smokehouse within the meaning of a policy in separate sums upon a butcher-shop and its contents, and the smokehouse and its contents, where it was the understanding of the parties that the smoked meats taken out of the smokehouse for storage were properly insured as contents of the smokehouse; and recovery may be had therefor when burned with the butcher-shop, although the smokehouse is not burned. *Graybill* v. *Penn Twp. Mut. F. Ins. Asso.* (Pa.) 55

4. A policy of insurance on a building and various articles of personal property therein, separately valued, is not forfeited as to the personal property by virtue of a lack of title to the land, under a provision that the entire policy shall be void if the "subject of insurance be a building on ground not owned by the insured in fee simple," since the building is not alone the subject of insurance. *Bills* v. *Hibernia Ins. Co.* (Tex.) 706

NOTES AND BRIEFS.

Insurance; by foreign corporation. 712

Construction of policy. 55

INTEREST.

1. The allowance of interest upon the value of property destroyed by negligence must be left to the discretion of the jury under Cal. Civ. Code, § 3288. *King* v. *Southern P. Co.* (Cal.) 755

2. A provision for the payment semi-annu-

ally of interest on municipal bonds at a certain per cent is unlawful, where the notice of election which the law requires to state the rate of interest names such per cent payable annually. *Skinner* v. *Santa Rosa* (Cal.) 512

8. The rate of compound interest paid by an executor on funds retained in his hands, which is more than banks would pay for a part of the time, and which has made double the income that could have been obtained by investing the money as directed by the will, will not be increased to the maximum rates at which there is evidence that money could have been loaned, with no allowance for expenses, delays, and failures,—especially where the executor has disbursed more than $50,000 during a long term of years and his accounts for the whole estate have been found correct in every item and there is no delinquency or suspicion of fraud on his part. *Re Ricker's Estate* (Mont.) 622

NOTES AND BRIEFS.

Interest; lawfulness of taking in advance:—(I.) in discounts: (*a*) in general; (*b*) by persons other than banks; (*c*) on instruments other than bills and notes; (II.) in periodical payments; (III.) for what length of time allowed. 761

Liability of executors, trustees, etc., for compound interest: (I.) origin, growth, and general statement of the doctrine; (II.) principle of the allowance; (III.) option to take interest or profits; (IV.) grounds for allowance: (*a*) generally; (*b*) misconduct or gross delinquency generally; (*c*) use and admixture of trust fund; (*d*) failure or refusal to account; (*e*) neglect to invest; (*f*) improper investment; (*g*) unnecessarily calling in investment; (*h*) neglect in winding up or paying over; (*i*) nonperformance of trusts for accumulation; (*j*) neglect or violation of duty imposed by statute; (*k*) interest or profits made; (*l*) interest or profits which might have been made; (V.) who are chargeable; (VI.) jurisdiction to allow; (VII.) how computed: (*a*) method of computing generally; (*b*) upon what computed; (*c*) when allowance should commence; (*d*) rate per cent and length of rests; (*e*) termination of allowance; (VIII.) what sufficient to release from accountability; (IX.) effect of allowance on compensation; (X.) effect of allowance on costs. 622

INTOXICATING LIQUORS. See MORTGAGE, 6, 7.

IRRIGATION. See EMINENT DOMAIN, 1–8.

JUDGMENT. See also APPEAL AND ERROR; CONSTITUTIONAL LAW, 20; MORTGAGE, 6, 7, 11; SET-OFF, ETC.

1. A judgment payable in United States gold coin is not within the rule that debt will not lie on any obligation except for the payment of a sum specifically certain, as calling for the payment of an unliquidated amount to be determined by the fluctuations of the gold market, but is an obligation to pay in money, or an agreement to deliver a certain weight of standard gold ascertainable by count of coins made legal tender by statute. *Belford* v. *Woodward* (Ill.) 593

2. A default judgment ordering payment of the amount adjudged in gold coin is void as to such provision, where the complaint showed no promise to pay in coin, but is not invalid as a whole. *Id.*

3. A judgment of another state adjudicating a matter not presented by the pleadings or within the issues may be held invalid as to such adjudication, but valid as to other matter which the judgment record shows upon its face to be easily and naturally separable and within the issues. *Id.*

4. A judgment of revival in scire facias to revive a judgment, based upon notice by mail as well as by publication to a resident of the state, is prima facie valid in a collateral proceeding. *Bickerdike* v. *Allen* (Ill.) 783

5. An affidavit in which the affiant "on oath states," but which the certificate of the notary merely states, to have been "subscribed," without saying that it was sworn to before him, on which a scire facias to revive a judgment is based, is not so defective as to defeat the judgment of revival in a collateral proceeding, where this recites that it was made on due proof. *Id.*

6. A judgment for a special assessment against a lot to pay for an improvement is not conclusive against the owner of the lot, who did not appear or defend in the proceeding for such judgment, so as to preclude an action by him for damages to the lot caused by removing the lateral support, and illegally cutting down the grade of the street in front of it in making the improvement for which the assessment was made. *Farrell* v. *St. Paul* (Minn.) 778

7. A judgment against a railroad company becomes a lien on its real property owned at the time of its recovery in the county where it was rendered, including lands acquired for roadway, right of way, depots, and other railroad purposes. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

NOTES AND BRIEFS.

Judgment; form of judgment and procedure in case of liability to make payment in coin:—(I.) form of judgment: (*a*) on contract to pay coin; (*b*) on contracts for coin or equivalent; (*c*) for coin converted or misapplied; (*d*) for damages in other cases; (*e*) for obligations created by law; (*f*) for costs; (II.) pleadings and procedure. 593

Conclusiveness of. 779

Enforcement in other states. 165

JUDICIAL NOTICE. See EVIDENCE.

JUDICIAL SALE.

1. The sale of the freight house and a portion of the right of way and tracks of a railroad, although at its terminus, cannot be sustained as a mode of collecting an assessment for local improvements. *Lake Shore & M. S. R. Co.* v. *Grand Rapids* (Mich.) 195

2. A judgment creditor may cause the sale of all the property of a railroad company to satisfy his lien, in a proceeding in equity to which all persons interested are made parties

and in which the proceeds may be properly applied, although he cannot have a sale on execution of the property to which the lien attaches, if that is part only of the corporate property and necessary in connection with the balance of the property to enable the company to discharge its public duties, or when the sale would materially impair the uses and value of the balance of the property. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

3. An intent to devest a tax lien is not shown by a decree for the sale of property free from mechanics', laborers', materialmen's, and other liens or encumbrances of any kind whatsoever. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

4. A tax lien cannot be devested by a judicial sale of property free from liens by order of the court in an action to which the state is not a party, so as to compel the state to look to the proceeds of the sale rather than the property itself for payment of the taxes. *Id.*

JURISDICTION. See APPEAL AND ERROR; COURTS.

JURY. See EMINENT DOMAIN, 4; EVIDENCE, 5.

LABEL. See INDICTMENT, ETC., 3; TRADE-MARK, 1, 2, NOTES AND BRIEFS.

LABOR UNION. See CONSTITUTIONAL LAW, 16, 19, 26, 27; INDICTMENT, ETC., 3; TRADE-MARK, 1–3.

LANDLORD AND TENANT.

1. A covenant in a lease of railroad property used for warehouse purposes, relieving the company from liability for loss by fire, does not bind an agent of the lessee in charge of the property, a stranger to the lease, who stores his own property in the warehouse. *King* v. *Southern P. Co.* (Cal.) 755

2. The occupancy of a part of a schoolhouse as a residence by a teacher for the purpose of enabling him the better to perform his contract to teach does not make him a tenant of the school district employing him, but his occupation is that of the district. *Alpine Twp. School Dist. No. 11* v. *Batsche* (Mich.) 576

3. A person lawfully in possession of land, who holds over without right, becomes a tenant at sufferance if the owner permits him to remain a sufficient length of time to imply an intentional acquiescence in the occupancy, although his previous holding was not that of a tenant; and a consent to the occupancy, either express or presumed from lapse of time, is not essential to create that relation. *Id.*

NOTES AND BRIEFS.

Landlord and tenant; negligence of, in respect to gas. 858

Estoppel of tenant as to title. 576

Use and occupation; school district as landlord. 577

LEASE. See CONTRACTS, 8.

LEAVE. See QUO WARRANTO, 1.

LEGISLATURE. See OFFICERS, 2.

LEVY AND SEIZURE. See EXECUTION; INJUNCTION, 9; MORTGAGE, 18.

LIBEL. See also INJUNCTION, 1; PLEADING, 18.

1. Falsely to publish of a person that he "would be an anarchist if he thought it would pay" is libelous. *Lewis* v. *Daily News Co.* (Md.) 59

2. Where it appears from a complaint in an action for libel based on an allegation in a pleading in another action, that the defamatory allegation was wholly gratuitous, irrelevant, and immaterial, that it was well known by defendant to be false and untrue, and that it was published without cause or justification and with express malice,—it is not privileged. *Sherwood* v. *Powell* (Minn.) 153

NOTES AND BRIEFS.

Libel; what constitutes. 59

By pleading. 153

LIBRARY. See COLLEGES.

LICENSE. See also BROKERS, 2; COMMERCE, 2, 3; CONSTITUTIONAL LAW, 25; MUNICIPAL CORPORATIONS, 6, 7; PATENTS; PEDDLERS; STATUTES, 16.

1. An ordinance for the licensing of transient merchants is not to be regarded as discriminating against nonresidents merely because there may not be any resident merchants who are compelled to pay the license. *Ottumwa* v. *Zekind* (Iowa) 734

2. A license fee of $250 per month, or $25 per day for shorter periods, exacted from transient merchants by an ordinance, is excessive and invalid, amounting to an exercise of the taxing power rather than a police measure. *Id.*

3. A privilege tax on a street-car company is not within Colo. Const. art. 10, § 3, requiring "all taxes" to be uniform on the same class of subjects. *Denver City R. Co.* v. *Denver* (Colo.) 608

NOTES AND BRIEFS.

See also COMMERCE.

License; for business in a city; as a tax. 609

Use of funds received from. 799

Reasonableness of fee. 734

LIENS. See JUDGMENT, 7; TAXES, 17–19; VENDOR AND PURCHASER, 8.

LIGHT. See EASEMENTS, 2; INJUNCTION, 11.

LIMITATION OF ACTIONS.

1. A foreign contract between nonresidents may constitute a cause of action within the meaning of a statute providing that if any person liable to an action shall be absent from the state when it accrues he shall have no benefit of the statute of limitations while such absence continues. *Mason* v. *Union Mills Paper Mfg. Co.* (Md.) 278

2. A nonresident of the state whose obligation is sought to be enforced by another nonresident through garnishment of funds in the hands of a resident is within the provisions of a statute that any person liable to an action who is absent from the state when it accrues shall have no benefit of the statute of limitations while the absence continues. *Mason* v. *Union Mills Paper Mfg. Co.* (Md.) 273

NOTES AND BRIEFS.

Running of statute against commonwealth. 170

As to nonresidents. 273

LIS PENDENS.

1. Actions and judgments in the courts of the United States are not affected by Ohio Rev. Stat. § 5056, providing that a certified copy of a judgment must be recorded in the county in which property is situated before third persons in that county will be charged with notice of an action or judgment in another county affecting the property. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 438

2. A suit in a federal court to foreclose a railroad mortgage is constructive notice throughout the district, so that the decree will bind all persons acquiring an interest in or lien on any part of the property during the pendency of the suit. *Id.*

LOBSTERS. See CARRIERS, 10.

MANDAMUS.

1. Mandamus to compel officers to turn over funds can be granted only to the extent of the funds that are in the treasury, although they may have improperly disposed of a part of the funds which they should have turned over. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

2. Mandamus may issue to county commissioners to turn over road funds in the county treasury by issuing a warrant for that purpose, when the law makes it their duty to turn over the funds, and the money can only be drawn on a warrant issued pursuant to their order. *Id.*

3. An order directing a railroad company to restore and operate a passenger train as before is not final or conclusive under the Kansas statute, and cannot be specifically enforced in the courts by mandamus. *State, Kellogg,* v. *Missouri P. R. Co.* (Kan.) 444

NOTES AND BRIEFS.

Mandamus; to compel acts by corporations. 444

MANDATORY INJUNCTION. See INJUNCTION, 2–4.

MARKET. See TAXES, 8.

MARSHALING.

NOTES AND BRIEFS.

Marshaling; of assets as affecting priority of state or United States. 238

MASTER AND SERVANT. See also CARRIERS; CONSTITUTIONAL LAW, 10, 12, 15, 16, 18, 19, 24, 27; PROXIMATE CAUSE, 1; STATUTES, 8.

1. A statute providing that no female shall be employed in any factory or workshop more than eight hours in any one day, or forty-eight hours in any one week, prohibits both the employer and the employé from entering into a contract of employment for a greater time and restricts their right to contract with each other with reference to the hours of labor. *Ritchie* v. *People* (Ill.) 79

2. A railroad employé is not bound to report to the company facts which it already knows. *Pennsylvania Co.* v. *McCaffrey* (Ind.) 104

3. A railroad company which requires a train crew to be on duty nineteen hours each day, without time for rest or food, is liable for an injury to a track hand, caused by the attempt of some of the crew to operate the train while others have temporarily left it to procure food. *Id.*

4. It is not negligence for a conductor and engineer of a train to leave it to procure food after thirteen hours of consecutive service, with no provision made by the company for a food supply. *Id.*

5. A railroad company is liable for injuries to a track hand, which are caused by its attempt to operate a train with only a fireman and a brakeman. *Id.*

6. A section boss, knowing the custom of a portion of a train's crew to leave it at a certain time for food, is not charged with the duty of ascertaining that they have not left it before attempting to put his car on a track which the train has passed, for fear the train may back on him without warning. *Id.*

7. The effort of a section boss to save a hand car in his charge from injury by a train backing towards it is not negligence as matter of law, although in trying to get away after ascertaining that the car cannot be saved he falls under it and is injured, if he acts naturally, and not recklessly, although by acting differently he might have escaped. *Id.*

8. A section man is not a fellow servant of a fireman or one employed to load tenders with coal. *Union P. R. Co.* v. *Erickson* (Neb.) 137

9. Consociation in the same department of duty or line of employment is necessary to make fellow servants. *Id.*

10. Minn. Gen. Laws 1887, chap. 13, making railroad companies liable for injuries sustained by the negligence of fellow servants, is not applicable to street railways, although operated by cable. *Funk* v. *St. Paul City R. Co.* (Minn.) 208

11. The boss or foreman of a gang of men unloading and leveling dirt on a railroad, who is under the immediate control of a railroad official who is often present, sometimes daily, directing the work, is a fellow servant of a member of the gang who is injured by the foreman's failure to give notice that the train is about to move, whether he had authority to hire and discharge the men under him, or not. *Schroeder* v. *Flint & P. M. R. Co.* (Mich.) 321

12. One engaged in repairing a house is not

relieved from liability for injury thereto by fire through the negligence of his workmen, because he furnished proper appliances and competent workmen. *Shafer* v. *Lacock* (Pa.) 254

13. A mine foreman is personally liable for his negligence causing injury to a workman in the mine, either under Pa. Act of 1891 permitting only certified foremen to be employed and regulating their duties, or without regard to such statute. *Durkin* v. *Kingston Coal Co.* (Pa.) 808

NOTES AND BRIEFS.

See also BAILMENT.

Who are fellow servants. 188

Foreman as fellow servant. 321

Negligence of fellow servant causing explosion. 858

Assumption of risks in service. 105

MAXIMS.

1. A grantor cannot be allowed to derogate from his own grant. *Robinson* v. *Clapp* (Conn.) 582

2. A grantor is presumed to convey, so far as it is in his possession, whatever is necessary for the reasonable enjoyment of the thing conveyed. *Id.*

3. Res ipsa loquitur. *Hart* v. *Washington Park Club* (Ill.) 492; *Judson* v. *Giant Powder Co.* (Cal.) 718

4. Sic utere tuo ut alienum non lædas. *Brim* v. *Jones* (Utah) 97

5. Stare decisis. *Denver City R. Co.* v. *Denver* (Colo.) 608

6. Volenti non fit injuria. *Judson* v. *Giant Powder Co.* (Cal.) 718

NOTES AND BRIEFS.

Loss between innocent parties. 607

MINES. See MASTER AND SERVANT, 13.

MONEY. See BONDS, 5; CONTRACTS, NOTES AND BRIEFS; JUDGMENT, 1, 2, NOTES AND BRIEFS.

MORTGAGE. See also BONDS, 4; COSTS AND FEES, 3; PLEADING, 10, 11; REAL PROPERTY; SUBROGATION; TAXES, 17, 19.

1. The transfer of a note secured by a mortgage carries with it the mortgage also. *Parke* v. *Randolph* (S. D.) 83

2. Bona fide purchasers for value before maturity of genuine notes accompanied by a forged copy of a recorded mortgage securing them, which the purchasers took on the faith of the records, are entitled to the security of the mortgage as against persons to whom the assignor had previously sold forged copies of the notes accompanied by an assignment and delivery of the genuine mortgage. *Kernohan* v. *Manss* (Ohio) 317

3. That commissioners appointed to make partition of a decedent's estate refused to recognize any value in second-mortgage bonds taken for property sold to a corporation will have no bearing upon the question whether or not such bonds shall be given priority over the first-mortgage bonds, which were issued to promoters, because of their fraud in procuring their preference. *Hooper* v. *Central Trust Co.* (Md.) 262

4. A stipulation in second-mortgage bonds of a corporation that they shall not be enforced against the individual estate of stockholders, will not prevent equity from refusing to enforce a first mortgage held by such stockholders until they have paid for their stock. *Id.*

5. First mortgagees will not be permitted by equity to assert their lien against the property in preference to a grantor's lien for unpaid purchase money, a waiver of which they procured by a fraudulent device so as to let in their mortgage as a first lien, although the grantors agreed to take a second mortgage as security, which on its face declares that it is subject to the lien of the first. *Id.*

6. The interest of a prior mortgagee cannot be displaced by the lien of a judgment for damages in consequence of the sale of intoxicating liquors, under the Illinois Dramshop Act, § 10, providing that if any person shall rent or lease to another any building to be used for the sale of such liquors, or knowingly permit it to be so used or occupied, it may be sold to pay any such judgment against any occupant. *Bell* v. *Cassem* (Ill.) 571

7. The provision of the Illinois Dramshop Act, § 10, making the building and premises where intoxicating liquors are sold with permission of the owner liable to sale under a judgment against the occupant for damages from the sale of such liquors, applies only to owners or those having a rentable interest in the property, and not to a contingent interest, such as that of a mortgagee. *Id.*

8. A grantee of mortgaged property is personally liable to the owner of the mortgage under his assumption of the payment of the mortgage debt as part of the consideration of the conveyance to him, without reference to whether his immediate grantor is liable or not. *Hare* v. *Murphy* (Neb.) 851

9. The purchaser of a mortgage obtains no rights as against a prior mortgagee by the wrongful act of his own agent in discharging the prior mortgage, which remained in his possession after the transfer of a note which was secured by it. *Parker* v. *Randolph* (S. D.) 83

10. A purchaser of railroad property on foreclosure takes it discharged from all liens and interests acquired pending the suit by persons charged with constructive notice thereof, although they were not made parties to the suit, and the latter must seek satisfaction from the proceeds of the sale. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 433

11. A judgment recovered in a state court against a railroad company before commencement of a foreclosure suit, by a creditor who was not made a party on foreclosure, is unaffected by the decree and sale. *Id.*

12. The proceeds of a resale of railroad property on behalf of a judgment creditor, after sale in a foreclosure suit to which he was not made a party, must first be applied to the satisfaction of encumbrances superior to his

lien, if there be any, including those set up in the foreclosure suit. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 488

18. The lien of a chattel mortgage upon property exempt from execution is not waived by obtaining judgment upon the notes secured by the mortgage and levying upon the mortgaged property under execution thereon, although the exempt property is set off to the debtor as such; but such lien may be enforced under the terms of the mortgage in a jurisdiction where the mortgage creates only a lien and does not transfer the legal title, as there is no such inconsistency between remedies as there would be where the levy asserted title in the mortgagor while the enforcement of the mortgage claimed title in the mortgagee. *Barchard* v. *Kohn* (Ill.) 808

NOTES AND BRIEFS.

Mortgage; as incident to note secured by it. 818
Priority as to judgment. 572
Assumption of, by grantee. 851
Chattel, how enforced. 804

MUNICIPAL CORPORATIONS. See also BONDS, 5, 6; CONSTITUTIONAL LAW, 1; CONTRACTS, 6, 7; COUNTIES, 1; ESTOPPEL, 1, 2; GAS, 4; INSOLVENCY, 1; LICENSE, 1; SALE, 1–3; STATUTES, 16; TELEGRAPHS; WATERS, 5.

1. The right of a municipal corporation to exercise the authority, powers, and functions of an incorporated city, can be questioned only in a direct proceeding prosecuted by the proper public officers, and not by private action for an injunction against taxes. *Kuhn* v. *Port Townsend* (Wash.) 445

2. Mere irregularities and informalities not affecting jurisdiction afford no ground for collateral attack on proceedings to annex territory to a city. *Id.*

3. The mayor cannot adjourn either of the two branches of the general council alone, under authority of a charter providing that if they cannot agree on an adjournment he "shall adjourn them to a day not beyond the regular time of meeting." *Tillman* v. *Otter* (Ky.) 110

4. The mayor of a city has no power to adjourn the general council to a time beyond that at which it is directed by statute to elect a certain city official, for the purpose of depriving it of power to make such election and permitting it to be done by the alternative electing body provided by the statute in case of the council's failure to elect. *Id.*

5. The majority of one branch of the general council of a city cannot, by refusing to consent to fix a time for the election of a city official whom a statute requires the council to elect, and by remaining away from the meeting, prevent the remaining members of the general council, who constitute a majority of both branches, from making a valid election. *Id.*

6. A city whose charter provides therefor may collect a license imposed by it on street cars by enforcing a penalty for failure to pay for the license. *Denver City R. Co.* v. *Denver* (Colo.) 608

7. A city has power to pass an ordinance requiring a license to hawk and peddle therein, under Burns's (Ind.) Rev. Stat. 1894, § 8541, empowering cities to "restrain" hawking and peddling. *South Bend* v. *Martin* (Ind.) 531

8. A corporation composed of private individuals, not restrained by law from conducting its business for private benefit, which does not report to and is not inspected by any state official, which elects its own managers without the state's approval, and by law owes the state no duty,—is a private corporation within the provisions of the Illinois Constitution prohibiting municipalities from making donations to private corporations. *Washingtonian Home* v. *Chicago* (Ill.) 798

9. A city having the power to pave streets and pay therefor from its treasury is liable for the cost of paving under a contract providing that assessments shall be accepted by the contractor in payment, and that the city shall not be otherwise liable under the contract, whether the assessments are collectible or not, where the statute under which they are made is held invalid and the assessments are therefore without authority, as the contract contemplates valid charges on the property, and failure to make the required assessments renders the city in default upon the contract. *Barber Asphalt Pav. Co.* v. *Harrisburg* (C. C. App. 3d C.) 401

NOTES AND BRIEFS.

Municipal corporations; validity of annexation to. 446
Legislative control over funds of. 799
Power to regulate gas business and prices. 398
Contracts by officer personally interested. 463
Liability to contractor for public improvement. 401
Liability for acts of officers. 803

NAME. See TRADE-MARK, 6.

NATURAL GAS. See GAS.

NAVIGATION. See DAMAGES, 8; NUISANCES, 3, 4.

NEGLIGENCE. See also AGRICULTURAL SOCIETIES; CONTRACTS, 8; EVIDENCE, 13–17; EXPLOSION, 2; GAS, 1–3; HORSE RACING; LANDLORD AND TENANT, 1; MASTER AND SERVANT; PLEADING, 5–9; TRIAL, 4–9.

1. A child nine years of age is not guilty of negligence if he exercises that degree of care which under like circumstances would reasonably be expected from one of his years and intelligence. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

2. A railroad company is not liable for injuries to a licensee by the sliding of a bank along the top of which was a footpath which he was using, in consequence of the removal of a boulder to prevent its falling on the tracks, unless the person doing the work knew that such removal left the path unsafe, and failed to use reasonable precautions to avoid injury

to persons likely to use it, or to notify them of the danger. *Norfolk & W. R. Co.* v. *Wheeler* (Va.) 825

NOTES AND BRIEFS.

See also CONTRACTS; EXPLOSION; GAS.

Of infants. 757
What constitutes. 188
Injury to licensees. 825

NITRO-GLYCERINE. See EVIDENCE, 16; EXPLOSION, NOTES AND BRIEFS.

NONRESIDENT. See ATTACHMENT, 1; CONFLICT OF LAWS, 1; LICENSE, 1; LIMITATION OF ACTIONS.

NOTICE. See also TAXES, 16.

1. The principal is not chargeable with the knowledge of the agent in relation to a fraud which he perpetrates in collusion with the other party. *Hickman* v. *Green* (Mo.) 89

2. Notice to a special agent employed to make a certain exchange of property, without any authority to pass upon the title, of matters connected with the title to the property obtained in the exchange, is not imputed to the principal,—especially when the agent was acting for the other party also, and his concealment of the facts was a fraud on his principal. *Id.*

3. Possession of premises by a woman who furnishes to her vendee as evidence of her title a quitclaim deed to herself, with an abstract showing a perfect record title in her grantor, does not charge her vendee with notice of a prior unrecorded warranty deed from the same grantor to her and the heirs of her body. *Id.*

NUISANCES. See also EVIDENCE, 12; HEALTH.

1. Property which is itself a nuisance endangering the public health or safety may be destroyed by the municipal authorities without compensation to the owner, under a provision of the charter conferring the power to abate such nuisances, where it is first condemned as a nuisance by appropriate proceedings, or its destruction is really necessary to the public health or safety, and an emergency exists. *Savannah* v. *Mulligan* (Ga.) 803

2. A private action for a public nuisance may be maintained by one who is not the sole or even a peculiar sufferer, if his grievance is not common to the whole public, but is a common misfortune of a number or even a class of persons. *Farmers Co-Op. Mfg. Co.* v. *Albemarle & R. R. Co.* (N. C.) 700

3. The fact that a boat was doing business as a common carrier, as well as for the manufacturers who owned it, does not preclude a private right of action by the owner for obstruction of navigation. *Id.*

4. The owner of a boat, whether licensed or not, and whether other individuals own boats similarly engaged in navigating a river or not, may have a private action for an obstruction to a navigable river, where his boat was engaged in transporting material for manufacturing purposes from a point below the obstruction to a point above it. *Id.*

NOTES AND BRIEFS.

Nuisance; private right of action for. 700
Abatement by destroying property. 803
Provision by board of health. 574

OATH. See JUDGMENT, 5; REAL PROPERTY, 3.

OBSCENITY. See INDICTMENT, ETC., 1.

OFFICERS. See also APPROPRIATIONS, 1; CONSTITUTIONAL LAW, 4; CONTRACTS, 6, 7; EVIDENCE, 7; MANDAMUS, 1, 2; STATUTES, 10.

1. A certificate of qualification from a judge, obtained after election as county court clerk, but before the term of office began, is sufficient in this respect under Ky. Const. § 100, providing that no person shall be "eligible to the office" unless he has procured such certificate, while it expressly makes the eligibility for certain offices, so far as age and residence are concerned, depend on the time of the election. *Kirkpatrick* v. *Brownfield* (Ky.) 703

2. The general assembly may appoint to all offices existing and not otherwise provided for at the time of the adoption of the Indiana constitution, by virtue of art. 15, § 1, authorizing their choice "in such manner as now is or hereafter may be prescribed by law," and other clauses of the constitution referring to offices "the appointment to which is vested in the general assembly." *French* v. *State, Harley* (Ind.) 118

NOTES AND BRIEFS.

Officers; qualifications for. 703
Appointment of; nature of power. 118

PARENT AND CHILD. See INFANTS.

PARLIAMENTARY LAW. See also MUNICIPAL CORPORATIONS, 3–5.

NOTES AND BRIEFS.

Adjournment of body; quorum. 110

PARTIES. See ACTION OR SUIT.

PARTITION.

In dividing the proceeds of property which was unsusceptible of partition, a coparcener who has made repairs and permanent improvements upon the property, for which he could not compel contribution, may be allowed from such proceeds to the amount by which the property at the date of the sale remains enhanced in value from the improvements, but not for their original cost. *Ward* v. *Ward* (W. Va.) 449

PARTNERSHIP. See also ATTACHMENT, 8; ATTORNEYS, 1; TAXES, 18, 20.

1. Members of a company which fails in an attempt to acquire corporate existence must be given the advantages as well as the liabilities of a partnership. *Jones* v. *Aspen Hardware Co.* (Colo.) 148

2. The giving of firm paper for individual debts of the partners for money borrowed and contributed by them individually to the firm capital cannot be declared fraudulent merely because the firm was at the time insolvent, or was made so by the act of making the notes. *Re Edwards & W.'s Estate* (Mo.) 681

3. Individual debts of partners may, in the absence of fraud, be converted into firm debts which will share equally with other firm debts in case of dissolution, by an agreement between the partners to that effect and the execution of firm paper for them. *Id.*

NOTES AND BRIEFS.

Partnership; assumption by a partnership of individual debts of the partners:—(I.) the general rule; (II.) the question of insolvency; (III.) the question of fraud; (IV.) assumption held sufficient; (V.) insufficient assumption; (VI.) by mortgage of firm property; (VII.) by new firm of debts of old firm; (VIII.) assumption of debt originally incurred for firm benefit. 681

PATENTS.

A state statute requiring a license for the sale of patent-rights is in violation of the rights of the patentee under federal law. *Com.* v. *Petty* (Ky.) 786

NOTES AND BRIEFS.

Patents; power of state to restrict and regulate the sale or enjoyment of patent rights:—(I.) as to sales: (*a*) sales of patent rights; (*b*) sales of patented articles; (II.) police regulations of other business in which patents are used; (III.) restricting right of action for infringement; (IV.) taxation of patent rights. 786

PEDDLERS. See also COMMERCE, 8; MUNICIPAL CORPORATIONS, 7.

One engaged in going personally from house to house, and selling chairs and delivering them at the time of the sale, is a peddler within an ordinance requiring peddlers to obtain a license. *South Bend* v. *Martin* (Ind.) 531

PENALTY. See also FERRIES, 5; MUNICIPAL CORPORATIONS, 6.

NOTES AND BRIEFS.

Penalties; compulsory evidence against one's self in case of. 818

PIGPEN. See HEALTH.

PLEADING. See also EVIDENCE, 17; LIBEL, 2.

1. An objection that a suit should have been brought at law, instead of in equity, cannot be taken by demurrer. *Bibbins* v. *Clark* (Iowa) 278

2. That a purchaser was not able to fulfill his contract so as entitle the broker to commissions on the sale is not shown by an allegation that an extension of time for payment after the first draft was due was requested because the purchaser was not able to pay it "at that time." *Fairly* v. *Wappoo Mills* (S. C.) 215

3. A prayer of a complaint for damages for breach of a contract, and one for specific performance of the same, based upon the same facts, do not render the complaint obnoxious to the objection that it joins several causes of action without separately stating them. *San Diego Water Co.* v. *San Diego Flume Co.* (Cal.) 839

4. Averments that notice of dishonor was received in due time by the acceptor and at once delivered to the drawer and indorser by him are mere conclusions of the pleader and do not sufficiently state due diligence. *Sebree Deposit Bank* v. *Moreland* (Ky.) 305

5. A declaration does not sufficiently allege negligence of the person conducting a public exhibition of horse racing by stating an invitation to the public and that a spectator, while in the place set apart for such persons and without fault on his part, was struck and injured by a runaway horse, without further allegations as to the place of the injury or defendant's control over the immediate cause of it. *Hart* v. *Washington Park Club* (Ill.) 492

6. A complaint charging a gas company with negligence in failing to cut off the supply of gas from a building in which there was a defective pipe, and denying that plaintiff was guilty of contributory negligence, is insufficient to show that the negligence of such company was the efficient cause of an injury to plaintiff from an explosion, as this would be impossible without some agency acting upon the leaking gas. *McGahan* v. *Indianapolis Natural Gas Co.* (Ind.) 355

7. Striking from the complaint in an action to recover damages for negligent injuries the allegation that defendant was a common carrier of passengers is not error, unless other allegations show that the relation of carrier and passenger existed between plaintiff and defendant. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

8. A cause of action is stated by a complaint which alleges that the railroad company moved a train without signals or guards, or any one except a fireman in charge of it, back upon and injured a track hand free from fault. *Pennsylvania Co.* v. *McCaffrey* (Ind.) 104

9. Allegations of negligence of a railroad company in unlawfully stopping a freight train more than five minutes across a public highway, and wrongfully and negligently backing it while a person was attempting to cross between the cars, are not separable in the sense that only one would be the proximate cause of the injury, but together constitute a sufficient allegation of negligence as against a general demurrer. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

10. A prayer for payment of stock subscriptions cannot properly be inserted in a crossbill filed by second mortgagees on corporate property in a suit to foreclose a first mortgage held by stockholders of the corporation, the priority of which over the second mortgage is attacked on the ground of fraud. *Hooper* v. *Central Trust Co.* (Md.) 263

11. A crossbill by second mortgagees is not so far foreign to a bill filed to foreclose the first mortgage as to be improper, where the matter alleged is the same as set out in the answer, and

attacks the priority of the first mortgage, seeking to establish that of the second, and the question of priority cannot be adjusted without the aid of the crossbill. *Id.*

12. A plea in a proceeding in the nature of quo warranto for the dissolution of a corporation, alleging that respondent has fully performed all its duties arising out of its charter by providing a system of waterworks of sufficient capacity and power to furnish the city an abundant supply of water, does not deny an allegation in the petition that respondent failed to supply the city and its inhabitants with such water. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

13. Defining alleged libelous terms in a paraphrastic way, and pointing out that they were intended to apply to the plaintiff, is strictly within the office of an innuendo. *Lewis* v. *Daily News Co.* (Md.) 59

NOTES AND BRIEFS.

Pleading; averment as to particulars of personal injury. 287
Allegation of libel. 59
Use of crossbill. 263

POLICE POWER. See CONSTITUTIONAL LAW, 13–16.

POLL TAX. See also HIGHWAYS, 6.

NOTES AND BRIEFS.

Poll taxes:—(I.) what are poll taxes; (II.) power to impose; (III.) restrictions and limitations; (IV.) the restriction and equation of the North Carolina constitution; (V.) upon what imposed; (VI.) place of taxation; (VII.) the levy and collection; (VIII.) disposition; (IX.) payment of poll taxes as a qualification of electors. 404

PRESUMPTIONS. See EVIDENCE.

PRINCIPAL AND AGENT. See BROKERS; CONTRACTS, 7; MORTGAGE, 9; NOTICE, 1, 2; SALE, 1.

PRIVATE ACTIONS. See MUNICIPAL CORPORATIONS, 1; NUISANCES, 2, 8.

PROFANITY. See CARRIERS, 2, 8.

PROMOTERS. See CORPORATIONS, 3–6; RECEIVERS, 4.

PROXIES. See CORPORATIONS, 10, NOTES AND BRIEFS.

PROXIMATE CAUSE.

1. Requiring a train crew to be on duty nineteen hours each day, without time for food, is the proximate cause of an injury to a track hand by the train's backing on him without warning while the fireman is the only member of the crew on board, the brakeman being off to operate a switch and the others in search of food. *Pennsylvania Co.* v. *McCaffrey* (Ind.) 104

2. The negligence of a bandman in walking close to an electric-railway track while playing his instrument cannot, as a matter of law, be said to be the proximate cause of his injury by a car overtaking him, where the evidence would justify a finding that the motorman was guilty of reckless and wanton conduct as to the speed with which he approached the band. *Montgomery* v. *Lansing City Elec. R. Co.* (Mich.) 287

PUBLIC IMPROVEMENTS. See also JUDGMENT, 6; JUDICIAL SALE, 1; MUNICIPAL CORPORATIONS, 9.

A tax on a railroad "in lieu of all other taxes" does not exempt it from assessments for local improvements. *Lake Shore & M. S. R. Co.* v. *Grand Rapids* (Mich.) 195

NOTES AND BRIEFS.

Public improvements; exemption from assessments for; charge on railroad property. 196

PUBLIC MONEYS. See BANKS, 5.

QUITCLAIM. See DEEDS; NOTICE, 3; REAL PROPERTY, NOTES AND BRIEFS; VENDOR AND PURCHASER, 1, 2.

QUO WARRANTO. See also CORPORATIONS, 1; COSTS AND FEES, 1, 2; PLEADING, 12.

1. The relator in a proceeding in the nature of quo warranto for the dissolution of a corporation need not obtain leave or an order of court to institute and prosecute such proceedings. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

2. A proceeding in the nature of quo warranto for the dissolution of a corporation need not be commenced by summons and complaint under Ala. Code, §§ 2651, 2652, requiring all "civil actions," except as otherwise provided, to be so commenced. *Id.*

3. An action in the nature of quo warranto may be maintained in the name of the state by the attorney-general to oust the Board of Regents of the University of Kansas from the exercise of corporate powers in excess of those conferred on it by law. *State, Little,* v. *Regents of University* (Kan.) 378

4. The assumption by the Board of Regents of the State University of the power to collect fees from students for use of the library, and to exclude students from the library for nonpayment thereof, is an unwarranted assumption of corporate powers from the exercise of which they will be ousted by suit brought in the name of the state by the attorney-general. *Id.*

NOTES AND BRIEFS.

Quo warranto; against corporation. 743

RAILROADS. See also CARRIERS, 6, 11; COMMERCE, 2; CONTRACTS, 4, 8; COSTS AND FEES, 8; EMINENT DOMAIN, 12, 14; EVIDENCE, 11; EXECUTION; FERRIES, 1, 6; HIGHWAYS, 5; INJUNCTION, 6, 9; JUDGMENT, 7; JUDICIAL SALE, 2; LANDLORD AND TENANT, 1; MANDAMUS, 3; MASTER AND SERVANT; MORTGAGE, 10; NEGLIGENCE, 2; PLEADING, 7–9; PROXIMATE CAUSE, 1; STATUTES, 14; TAXES, 7, 13, 14; TRIAL, 4–7.

1. The fact that a railroad is not fenced, in the absence of a statutory requirement, does

not make a railroad company liable for injuries to a person who was driving along a highway parallel to the track. *Reynolds* v. *Great Northern R. Co.* (C. C. App. 8th C.) 695

2. Compensation to a railroad company for the inconvenience to it is not a necessary condition to the crossing of its tracks at grade by an electric street railway under legislative authority. *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 867

See also EMINENT DOMAIN, 9–14.

3. The duty to give warning signals of the approach of a train at a crossing, imposed by Dak. Comp. Laws 1887, § 3016, does not extend to a person driving along a highway parallel to the railroad, who has not lately used and does not intend to use any crossing, although he expects a signal to be given at a private crossing near by. *Reynolds* v. *Great Northern R. Co.* (C. C. App. 8th C.) 695

4. The term "any other road," in Dak. Comp. Stat. 1887, § 3016, providing for railroad signals at crossings of other roads, refers only to public highways, and not to a private crossing. *Id.*

5. A person driving along a highway 10 or 12 feet distant from and parallel to a railroad track, with a buffalo coat turned up against his ears, while the wind is blowing so that he does not hear a train coming behind him, but who does not look behind him to see the train, or drive with tight reins so as to prevent his horse, which is gentle, from drawing him against the train as it passes, is guilty of such negligence as will prevent recovery for injuries thereby received. *Id.*

NOTES AND BRIEFS.

See also EMINENT DOMAIN.

Railroads; signals at crossings. 695

Rights as to grade crossings. 868

Negligence causing injury at crossings. 757

REAL PROPERTY. See also DEEDS; NOTICE, 3; VENDOR AND PURCHASER, 1, 2.

1. Failure of the officer to index a mortgage is not fatal to its validity, in the absence of any statute making the indexing a part of the recording. *Armstrong* v. *Austin* (S. C.) 772

2. A mortgage covering both real and personal property was properly recorded in a lien and mortgage book, under S. C. Rev. Stat. 1872, p. 422, chap. 82, § 2, requiring a real-estate mortgage to be recorded in the register's office, without specifying in what book the record should be made. *Id.*

3. Failure of a subscribing witness to a mortgage to sign an affidavit made by him does not invalidate the affidavit so as to prevent the record of the mortgage in the absence of a statute or rule of court requiring such signing. *Id.*

NOTES AND BRIEFS.

Real property; the effect of a quitclaim deed in an otherwise perfect record title:—as to latent equities; purchaser with notice; other rulings; distinction between conveyance of land and of mere interest; doctrine of United States Supreme Court; where not protected; where entitled to protection; the Iowa doctrine; necessity of care; remote quitclaim in chain of title. 33

RECEIPT. See EVIDENCE, 20, NOTES AND BRIEFS.

RECEIVERS. See also ATTORNEYS, 2; BANKS, 4; BUILDING AND LOAN ASSOCIATIONS, 9, 11; TRUSTS, 2.

1. A receiver appointed by the courts of one state cannot sue in another state to recover property belonging to the estate, which has never been in his possession. *Commercial Nat. Bank* v. *Motherwell Iron & S. Co.* (Tenn.) 164

2. The receiver in insolvency of a building association is the proper person to ascertain the amount of losses of the association, and make an assessment on the members to meet the same. *Eversmann* v. *Schmitt* (Ohio) 184

3. Vested liens upon the property of individuals and private corporations cannot be displaced by means of receivers' certificates. *Hooper* v. *Central Trust Co.* (Md.) 262

4. Receivers' certificates issued to a promoter of a corporation for money advanced to pay for improvements put on the corporate property will not be given priority over the rights of the seller of the property, who waived his lien upon the fraudulent guaranty by another promoter at the time of the sale that money was in his possession which would be applied to pay for such improvements. *Id.*

NOTES AND BRIEFS.

Receivers; extraterritorial powers. 164

RECITAL. See EVIDENCE, 19.

RECORDS. See REAL PROPERTY, NOTES AND BRIEFS; VENDOR AND PURCHASER, 2.

REFERENCE.

1. An exception to the report of a commissioner, which is not made within ten days, is not sufficient under W. Va. Code, chap. 129, § 7, to permit any new evidence which would reopen the report, but is effectual only to support a motion for a recommital of the report, or a claim for a rehearing. *Ward* v. *Ward* (W. Va.) 449

2. A point as to variance in the clerk's signature to the certificate of record and to the affidavit attached to a mortgage, not raised before a master or passed upon by him, or raised by any exception to his report, cannot be considered by the court in passing upon such report, for the purpose of invalidating the mortgage. *Armstrong* v. *Austin* (S. C.) 772

RELIGIOUS SOCIETIES.

1. The administrative duties of the supreme body of a religious organization may be delegated. *Krecker* v. *Shirey* (Pa.) 476

2. The duty to fix a time and place for holding the general conference of a religious organization is administrative when the laws of the organization provide for the holding of such

conferences at regular intervals, and name the bodies which shall fix the day and place at which they shall be held. *Id.*

8. The appointment of the place of meeting of the next general conference of a religious organization, and giving notice thereof to the annual conferences in time for them to select delegates to represent them in the general conference, by a standing board of the general conference, to which the duty was delegated by the conference, is a fixing of such place according to laws of the organization which place the duty upon the general conference, so as to prevent action by the oldest annual conference, upon which the duty is devolved in case the general conference fails to act. *Id.*

4. The laws of an ecclesiastical body will be recognized and enforced by the civil courts when not in conflict with the constitution and laws of the state. *Id.*

5. An exposition by the supreme judicial tribunal of a religious association, of a provision of the discipline to the effect that under it a second trial after one acquittal upon substantially the same charges is illegal, is binding upon the members of the association and must be respected by the civil courts. *Id.*

6. Decisions of ecclesiastical courts which plainly violate the law they profess to administer, or are in conflict with the laws of the land, will not be followed by the civil courts. *Id.*

7. The question of the regularity and legal effect of the organization of an annual conference of a religious organization, after forcibly intercepting the entrance of the bishop appointed to preside over it because of his alleged suspension from his office under the discipline of the organization, raises an ecclesiastical question upon which the decision of the highest tribunal of the order is binding on the civil courts. *Id.*

8. Appointments of preachers by an annual conference of a religious organization, which has been pronounced by the highest tribunal of the order to have been illegally organized, confer no rights and impose no duties in respect to members or congregations still holding their allegiance to the old organization. *Id.*

9. An annual conference of the Evangelical Association, organized by a bishop with less than a quorum of those entitled to sit as members in the conference, is, under the discipline of that denomination, irregular and illegal; and its appointment of preachers will confer no authority and impose no duty on the churches. *Id.*

10. Congregations or parts of congregations of a religious body which has adopted as part of its polity the itinerant plan for pastoral supply of the churches, who refuse to accept the supply sent by authority of the regular ecclesiastical agencies acting in accord with the general conference,—cease to adhere to the organization. *Id*

11. Adherents to a general conference of a religious organization, held at a time and place designated by an annual conference without authority after another time and place had been regularly designated under the laws of the organization, place themselves outside of the organization, and, although in the majority, have no title to the property of the organization as against persons claiming under the regularly appointed general conference. *Id.*

12. Ecclesiastical standing, and not numbers, determines the title to and the right of control over property held for the use of a religious denomination. *Id.*

13. The minority members of the annual conference of a religious denomination, when confronted with a revolt from the association of a majority of the members of the conference, for which condition the discipline makes no provision, may provide temporarily for the religious care of those adhering to the minority, which action may subsequently be ratified by the highest tribunal of the denomination; but neither alone nor both combined can give the action of the minority regularity which will make it binding upon the revolting members. *Id.*

NOTES AND BRIEFS.

Religious societies; constitutional law of; secession by majority of. 477

RESUME.

For résumé of contents of book, see p. 865

RIVERS. See BOUNDARIES.

SALE. See also ESTOPPEL, 3.

1. A city upon discovering that its agent was paid a commission upon a sale to it may either repudiate or ratify and affirm the contract, as it elects. *Findlay* v. *Pertz* (C. C. App. 6th C.) 188

2. The right of a city to rescind a sale to it because a commission was paid to its officer through whom it was made is not affected by the fact that the seller did not know that the city was ignorant of the double relation of such officer and supposed that he would give the city credit for the commission. *Id.*

3. Ratification of a sale to a city notwithstanding a commission paid to its agent by the seller confirms it subject to the warranties made; and the city may, when sued for the purchase price, recoup to the extent of any damage sustained by the breach of any warranty. *Id.*

4. Fraud in the purchase of goods is waived by the seller's entering into a compromise agreement with the purchaser, by which the latter returns a portion of the goods and agrees to pay for the balance on terms satisfactory to the seller. *Munzer* v. *Stern* (Mich.) 859

5. Sellers of goods to one who purchased with intent to defraud, who have been induced to leave a portion in possession of the buyer under a compromise agreement entered into by the latter with the intent to defraud, may rescind the agreement and retake the goods. *Id.*

6. A tender back of what he obtained by the compromise is not necessary to justify its rescission, where one from whom goods were fraudulently purchased regained a portion of them under a compromise agreement which left the remainder in the buyer's possession,

but which was entered into by the buyer with intent to defraud the seller of the property. *Munzer* v. *Stern* (Mich.) 859

NOTES AND BRIEFS.

Sale; bona fide purchaser. 607

SCHOOLS. See also LANDLORD AND TENANT, 2; TAXES, 4.

1. A statute authorizing school authorities to make vaccination a condition of the privilege of attending public schools is essentially a police regulation, and does not violate the constitutional guaranties of due process of law or equal protection of the law. *Bissell* v. *Davison* (Conn.) 251

2. The existence of smallpox in a town, or an indication that an epidemic of that disease is likely to present itself, is not necessary to permit school committees to require vaccination of pupils before attending public schools, under Conn. Gen. Stat. §§ 2187, 2197. *Id.*

NOTES AND BRIEFS.

Schools; regulation as to attendance. 252

SCIRE FACIAS. See CONSTITUTIONAL LAW, 20; JUDGMENT, 4.

SEARCH. See also EXECUTORS AND ADMINISTRATORS, 3.

NOTES AND BRIEFS.

Searches; to compel one to furnish evidence against himself. 818

SEIZURE.

NOTES AND BRIEFS.

To obtain evidence. 818

SERVITUDE. See EASEMENTS.

SET-OFF AND COUNTERCLAIM.

The right to set off independent judgments rendered in different suits growing out of different causes of action is subject to attorneys' liens or claims for services. *Roberts* v. *Mitchell* (Tenn.) 705

SHIPPING. See COMMERCE, 1; DAMAGES, 8; FIRES.

SLANDER OF TITLE. See INJUNCTION, 1.

SLEEPING CAR. See CARRIERS, 9.

SPECIFIC PERFORMANCE. See FERRIES, 2.

STATE. See also BOUNDARIES, 1; INSOLVENCY, 1; PATENTS.

NOTES AND BRIEFS.

See also PATENTS.

State; priority in respect to payment from assets of debtor. 226

STATE INSTITUTION. See also AGRICULTURAL SOCIETIES; COLLEGES; CORPORATIONS, 1; QUO WARRANTO, 3, 4.

NOTES AND BRIEFS.

Nature of incorporated institutions belonging to the state:—(I.) in general: (*a*) banks; (*b*) educational institutions; (*c*) other state institutions; (II.) liabilities of such institutions; (III.) directors, trustees, and officers: (*a*) in general; (*b.*) personal liability. 378

Public nature of. 708

STATUTES. See also APPROPRIATIONS; CONSTITUTIONAL LAW, 26; CONTRACTS, 10.

Title.

1. So long as the generality of the subject expressed in the title of a statute is not employed as a guise to conceal the real object of the law, or some provision therein, it will not be objectionable. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

2. Surreptitious legislation, and not comprehensive titles, is prohibited by Neb. Const. art. 3, § 11, providing that no bill shall contain more than one subject, which shall be clearly expressed in the title. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 853

3. A provision for the acquirement, by irrigation companies, of the right of way for canals and ditches, is within the title of Neb. Act March 27, 1889, entitled "An act to provide for water rights and irrigation and to regulate the use of water for agricultural and manufacturing purposes." *Id.*

4. A provision in a statute for the application of part of a county road tax to streets in cities and towns is within the general subject of the title of the act when that is the laying out and maintaining of public roads of the counties. *Duval County Comrs.* v. *Jacksonville* (Fla.) 416

5. A provision for recovery of damages occasioned by neglect to provide fire screens for vessels as required by statute is sufficiently expressed in the title, "An act to compel steam vessels . . . to provide fire screens, . . . and to provide a penalty for its violation." *Burrows* v. *Delta Transp. Co.* (Mich.) 468

6. The mere omission of the word "steam" before the word "vessel," in a section of an act requiring fire screens, the title of which relates to steam vessels, does not render the act repugnant in its terms, as the provisions apply only to steam vessels. *Id.*

7. A statute containing two distinct subjects, both of which are expressed in the title, is wholly void under Ill. Const. art. 4, § 13, declaring that no act shall embrace more than one subject and that shall be expressed in the title; but if any subject be embraced which is not expressed in the title, the act is void only as to so much thereof as shall not be expressed. *Ritchie* v. *People* (Ill.) 79

8. A statute entitled "An act to regulate the manufacture of clothing, wearing apparel, and other articles," etc., and providing in its body that no female shall be employed in any factory or workshop more than eight hours a

day, will embrace only employment in the manufacture of articles of the same kind as those expressly enumerated. *Id.*

9. The title of Ill. Act June 17, 1893, entitled "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same, and to make an appropriation therefor," does not express two subjects because the appropriation for salaries of the factory inspectors provided for is a separate subject, as the words "appropriation therefor" do not necessarily imply that the appropriation is for such salaries, but may be for the payment of their expenses. *Id.*

10. The appropriation in Ill. Act June 17, 1893, § 10, for the salaries of factory inspectors, is a subject not expressed in the title, "An act to regulate the manufacture of clothing, wearing apparel, and other articles in this state, and to provide for the appointment of state inspectors to enforce the same, and to make an appropriation therefor," and is void under Ill. Const. art. 4, § 13, declaring that if a subject shall be embraced in an act which is not expressed in the title the act shall be void as to so much thereof as is not expressed. *Id.*

Construction.

11. A word occurring in a statute, which is evidently an interpolation, and has no relation to the body of the statute, and is without sensible meaning, will be disregarded in giving effect to its provisions. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 853

12. Great deference and respect should be paid by the court to the long-prevailing construction of a statute made by the executive department of the state government. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

13. The meaning judicially given to words in a statute will be taken as that intended when used in a subsequent similar statute. *Anderson* v. *Bell* (Ind.) 541

Repeal.

14. A special act permitting a grade crossing by an electric railway over the track of a steam railroad, which is made subject to general laws "except as otherwise herein expressly provided," is not affected by a general law previously passed, but which does not take effect until subsequently, which prohibits such grade crossings "except upon approval by the railroad commissioners." *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* (Conn.) 367

15. The Dakota Compiled Laws relating to the assessment of damages in laying out town roads are not repealed by S. D. Act 1891, chap. 94, providing for the assessment of damages for property taken by municipal or other corporations, as the corporations contemplated are those referred to in S. D. Const. art. 17, § 18, and do not include townships organized under the laws of the state. *Dell Rapids* v. *Irving* (S. D.) 861

16. A statute requiring a county and city to pay a percentage of liquor license fees to a certain home is repealed, but not retrospectively repealed, by a constitutional provision prohibiting municipalities from making donations to a private corporation. *Washingtonian Home* v. *Chicago* (Ill.) 798

Notes and Briefs.

Statutes; expressing purposes in title. 80
Implied repeal of. 868
Construction of. 273

STOCKHOLDERS. See Corporations.

STREET RAILWAYS. See also Carriers, 1–3; Eminent Domain, 11–14; Injunction, 5, 6; License, 3; Master and Servant, 10; Municipal Corporations, 6; Proximate Cause, 2; Railroads, 2; Statutes, 14; Trial, 8, 9.

Notes and Briefs.

See also Eminent Domain.
Street railway; as a railroad. 209

SUBROGATION.

The purchaser on foreclosure may be subrogated to the rights of the mortgagee, in a proceeding for that purpose, if necessary for his protection, to the extent of the purchase money paid. *Stewart* v. *Wheeling & L. E. R. Co.* (Ohio) 488

Notes and Briefs.

Subrogation; of sureties as affected by priority of United States or of state. 240, 248
Of person paying tax. 282

SUSPENSION OF SENTENCE. See Criminal Law.

TAXES. See also Appeal and Error, 8; Constitutional Law, 21; Counties, 2; Highways, 6; Judicial Sale, 3, 4; Public Improvements.

1. The exemption of property from taxation is beyond the power of a town in the absence of constitutional legislative authority. *Mc Twiggan* v. *Hunter* (R. I.) 526

2. Land covered by water held back by a dam for furnishing power is assessable for taxation at its enhanced value, in the town in which it lies, under a statute making real estate taxable where situated, although the power is used in another town. *Amoskeag Mfg. Co.* v. *Concord* (N. H.) 57

3. The constitutional exemption from taxation of public property used exclusively for any public purpose does not extend to real property owned and leased by a private party, although it is by contract with public authorities used as a public market house or place with an agreement that it shall be exempt from taxation. *State, Realty Co.* v. *Cooley* (Minn.) 777

4. A school is not a purely public charity so that the property used for it is exempt from taxation, when conducted by a master as a business enterprise under a contract by which he pays one eighth of the gross receipts from tuition to the corporation owning the property, and receives tuition for all pupils, although the

corporation, which was organized to conduct a school for the rich at reasonable rates and for the poor gratuitously, itself pays the tuition of a small part of the pupils out of income received from endowments and legacies. *Philadelphia* v. *Overseers of Public Schools* (Pa.) 600

5. Stock which a corporation issues in payment for property is not a debt incurred by it which can be deducted in determining the amount invested in such property, for the purpose of taxation. *People, Hecker-Jones-Jewell Mill. Co.* v. *Barker* (N. Y.) 393

6. The sum invested in the state, on which a foreign corporation can be taxed under N. Y. Laws 1855, chap. 37, when it has purchased property in the state and paid for it only in part, is the sum paid, and cannot include the indebtedness for the unpaid part of the purchase money. *Id.*

7. A bridge owned by a bridge company but used exclusively for railroad purposes and leased forever to a railroad company, subject to termination of the lease for default of the lessee to perform its terms and conditions, is not railroad property which can be assessed as such with the railroad track by the Illinois state board of equalization, instead of the local assessor. *Chicago & A. R. Co.* v. *People, Windmiller* (Ill.) 69

8. The value of a franchise for the purpose of taxation is the benefit derived from its possession. *Com.* v. *Henderson Bridge Co.* (Ky.) 78

9. Debts of a corporation cannot be deducted in finding the value of its franchise as the difference between the values of its capital stock and tangible property, where the constitution requires the property of corporations to be taxed like that of individuals, and debts of the latter are not deducted from their property for taxation. *Id.*

10. The "capital stock" of a corporation, within the meaning of Ky. Stat. § 4079, from which the value of its tangible property is to be deducted in order to find the value of its corporate franchise for the purpose of taxation, means the entire property, real and personal, tangible and intangible, including assets and franchise. *Id.*

11. The right of the state to tax the franchise of a bridge corporation created by it is not defeated by the fact that the company had obtained from another state the privilege of extending its bridge from the boundary of that state at low-water mark of the river to the high lands, and had acquired from congress the privilege of maintaining the bridge across a navigable river and the designation of the bridge as a post road. *Id.*

12. Interstate business is not taxed by taxing the franchise of a bridge company which maintains a toll bridge between states. *Id.*

13. The special exemption of a railroad from taxation by its charter does not extend to lines which it operates under a lease and which were organized under the general laws of the state. *Lake Shore & M. S. R. Co.* v. *Grand Rapids* (Mich.) 195

14. A street railroad is a "railroad" within the meaning of Fla. Acts 1893, chap. 4115, §§ 48, 49, providing for the taxation of railroad property and the sale thereof as an entirety for delinquent taxes thereon. *Bloxham* v. *Consumers' E. L. & Street R. Co.* (Fla.) 507

15. The omission by assessors to include property in an assessment, solely by reason of their mistake as to the binding effect of an agreement for an exemption, and not by any intentional disregard of law or other wrongful or fraudulent purpose,—will not make their assessment void. *McTwiggan* v. *Hunter* (R. I.) 526

16. The only notice to taxpayers of an assessment required by R. I. Pub. Stat. chap. 43, is that required by § 6 in respect to the time and place of meeting, at which each taxable person is directed to bring in an account; and no subsequent notice of a time to hear objections is required. *Id.*

17. A statute simply making personal property taxes a lien on the real estate of the owner does not give them priority over mortgage liens existing at the time they attach. *Bibbins* v. *Clark* (Iowa) 278

18. Individual real estate of a partner is subject to the lien of a tax assessment upon the personal property of the partnership under a statute making taxes due from any person a lien upon any property owned by him. *Id.*

19. A mortgagor who permits his personal property taxes to become a lien on the mortgaged land can be compelled to reimburse the mortgagee who is compelled to pay them to protect his own interests. *Id.*

20. Members of a partnership the personal taxes of which have been levied on the real estate of their copartner cannot be compelled to reimburse a mortgagee of such real estate, who, to protect his own interests, has been compelled to pay the taxes. *Id.*

NOTES AND BRIEFS.

See also POLL TAXES.

Jurisdiction as to taxation of bridge over river forming boundary of a state or its divisions:—general rule; statutory rule; effect on commerce; capital stock. 69

On land under dam. 57

Priority of claims for taxes against the assets of a debtor:—(I.) scope of note; (II.) upon what based; (III.) constitutionality and construction of provisions for; (IV.) what is included in the right: (*a*) taxes generally; (*b*) claims against collectors; (V.) nature and extent of priority; (VI.) subrogation of person paying the tax; (VII.) what amounts to a devestiture of the right; (VIII.) enforcement of the right. 278

On corporate investments in state. 394

Exemption of. 526, 777

Notice to taxpayer. 526

TELEGRAPHS.

A city ordinance exacting a specified sum as rent from a telegraph company for the entry upon and occupation of the streets with its poles is void under Miss. Laws 1886, p. 93, § 1, authorizing companies to operate telegraph lines on and along all streets, without provid-

ing for compensation to the cities. *Hodges* v. *Western U. Teleg. Co.* (Miss.) 770

TENDER. See SALE, 6.

TICKET. See CARRIERS, 4.

TOWN. See STATUTES, 15; TAXES, 1.

TRADE-MARK. See also CONSTITUTIONAL LAW, 26.

1. A labor union may be protected by appropriate state legislation in the use of a label for the designation of articles manufactured by its members, and use of the label prohibited to persons other than members of the union or persons who employ such members. *State* v. *Bishop* (Mo.) 200

2. Labels, symbols, or advertisements adopted by any association or union of workingmen as a trade-mark to distinguish articles manufactured by their members from those manufactured by other persons, are protected by Mo. Laws 1893, p. 260, when they are adopted in accordance with its provisions. *Id.*

3. Proof of guilty knowledge is necessary to sustain a conviction under Mo. Act 1893, p. 260, making it a misdemeanor to have for sale goods bearing counterfeit labels representing that they were made by a certain person, association, or union of workingmen. *Id.*

4. No exclusive right can be acquired to the use of the words "scientific dentistry at moderate prices." *Cady* v. *Schultz* (R. I.) 524

5. There can be no property right in the shape, size, color, or arrangement of signs without regard to the letters which they bear. *Id.*

6. Names which are not trade-marks strictly speaking may be protected as property if they are taken by others with fraudulent intention and are so used as to be likely to effect such intention. *Id.*

NOTES AND BRIEFS.

Protection of trade-union labels or trade-marks:—(I.) in general; (II.) contents of label; (III.) effect of statutes. 200

TRADE-NAME. See also INJUNCTION, 8.

NOTES AND BRIEFS.

Trade-name; protection of. 524

TRADE UNIONS. See TRADE-MARKS, NOTES AND BRIEFS.

TREES.

A land owner may cut from a tree, the trunk of which stands on the boundary line, all the roots and branches on his side up to the trunk. *Robinson* v. *Clapp* (Conn.) 582

NOTES AND BRIEFS.

Trees; on boundary; rights in. 583

TRESPASS.

NOTES AND BRIEFS.

Liability for killing or injuring trespassers by means of spring guns, traps, and other dangerous instruments:—(I.) the general doctrine of liability; (II.) liable as for homicide; (III.) when considered as a nuisance; (IV.) the property owner's or the trespasser's act; (V.) the question of notice; (VI.) the act held legal; (VII.) English cases. 154

TRIAL. See also EMINENT DOMAIN, 4; HOMICIDE; INTEREST, 1; PROXIMATE CAUSE, 2.

1. The testimony of a witness, admitted without objection, cannot be excluded because the other party to the transaction was dead. *Hickman* v. *Green* (Mo.) 89

2. The use by a city of gas separators sold to it, for two months after discovering that its agent was paid a commission upon the sale, is not so conclusive of ratification of the sale as to take that question from the jury. *Findlay* v. *Pertz* (C. C. App. 6th C.) 188

3. It is for the jury to determine which of various screens described by witnesses would comply with the requirements of a statute; and therefore an instruction that there could be no liability for a fire alleged to have been caused by want of a screen, if one of the screens described in the testimony would not have prevented the fire, is erroneous. *Burrows* v. *Delta Transp. Co.* (Mich.) 468

4. Negligence of a child nine years old in attempting to pass between cars at a railroad crossing when the train had stood longer than the law allowed is a question for the jury. *Lake Erie & W. R. Co.* v. *Mackey* (Ohio) 757

5. Whether or not a child nine years of age is a trespasser in attempting to cross a railroad track by climbing over a car coupling is a question for the jury. *Id.*

6. Negligence in moving a train after it has stood longer than the statutory period of five minutes across a public street, without giving timely warning of an intention to do so, is a question for the jury. *Id.*

7. Negligence of a railroad company in loading a tender with coal so that a large piece fell off and injured a section man is a question for the jury. *Union P. R. Co.* v. *Erickson* (Neb.) 1.7

8. Negligence of a street-railway company in not avoiding the deflection of a car from the main track to a branch track so as to strike a person waiting to take it is a question for the jury. *Donovan* v. *Hartford Street R. Co.* (Conn.) 297

9. Whether or not a motorman used due care is a question for the jury, where, with his lever in next to the fastest notch until within a few feet of it, he overtook a band playing while parading the streets, knowing that some of the men were in close proximity to the track. *Montgomery* v. *Lansing City Elec. R. Co.* (Mich.) 287

NOTES AND BRIEFS.

Trial; right to jury as affected by compulsory evidence as against one's self. 819

Duty to instruct peremptorily. 105

Question for jury as to negligence. 757

TRUSTS. See also ACTION OR SUIT; BANKS, 5, 6; EVIDENCE, 9.

1. A trust in land bought by an executor for himself is not established in favor of the heirs by the fact that part of the purchase price was paid from funds of the estate, where he has long since accounted for such funds, with interest, and his accounts have been annually approved; and the fact of such payment cannot be overcome by a claim that a higher rate of interest ought to have been charged against him, which would make him still indebted to the estate. *Re Ricker's Estate* (Mont.) 622

2. Consignors cannot impress funds of the consignees in the hands of a receiver with a trust lien for the proceeds of goods sold, if the consignees dissipated such proceeds in paying current expenses of their business, although the claims against the funds in the receiver's hands were thereby diminished. *Ferchen* v. *Arndt* (Or.) 664

NOTES AND BRIEFS.

Liability of trustees for compound interest. 622

Trust; tracing into proceeds. 664

TURNPIKES. See BICYCLES, 2, 3.

UNITED STATES.

NOTES AND BRIEFS.

Priority in respect to payment from assets of debtor. 226

UNIVERSITY. See COLLEGES; CORPORATIONS, 1; QUO WARRANTO, 3, 4.

USURY. See also CONSTITUTIONAL LAW, 3.

1. Usury forming part of the face of a renewal note discounted in the regular course of business, at the legal rate, without notice and before maturity, is not an available defense under a statute changing the law making usurious contracts "void" so that they shall "be deemed to be for an illegal consideration" as to the interest. *Lynchburg Nat. Bank* v. *Scott* (Va.) 827

2. Taking interest in advance on a negotiable note at the highest rate allowed by the constitution is not usury. *Bank of Newport* v. *Cook* (Ark.) 761

3. The fact that a note is payable twelve months after its date does not take it out of the rule which permits the highest rate of lawful interest to be taken in advance. *Id.*

NOTES AND BRIEFS.

Usury; effect on bona fide holders of notes. 827

VACCINATION. See SCHOOLS.

VARIANCE. See APPEAL AND ERROR, 15.

VENDOR AND PURCHASER. See also DEEDS; NOTICE, 3; MORTGAGE, 8.

1. A grantee in a quitclaim deed cannot be a bona fide purchaser,—at least where the grantor, who had full knowledge of the equities affecting the title, was the agent of the grantee in the purchase of a note and mortgage for the surrender of which the deed was given. *Parker* v. *Randolph* (S. D.) 38
But see next case.

2. A quitclaim deed to a vendor who is in possession of the premises, from one who has the record title, is sufficient to give the vendee the right to claim the protection of the recording laws against a prior unrecorded deed by which such grantee was given a life estate only. *Hickman* v. *Green* (Mo.) 39

3. Equity will relieve against the waiver of a vendor's lien, procured by a fraudulent guaranty on the part of the vendee. *Hooper* v. *Central Trust Co.* (Md.) 262

VIADUCT. See HIGHWAYS, 3.

VOTE. See CORPORATIONS, 10.

VOTERS AND ELECTIONS. See also EVIDENCE, 8.

1. A statute requiring the use of an official ballot may properly be deemed necessary by the legislature in order to secure to the voters a full and fair election and an accurate and honest count, and does not impair the constitutional rights of the voters. *Cole* v. *Tucker* (Mass.) 668

2. A statute making an official ballot compulsory in the election of city officers, but optional in the election of town officers, is not void as partial and unequal in its operation upon the rights of voters. *Id.*

3. Ballots will not be vitiated, in the absence of fraud, by the fact that the official stamp required by statute to be placed on them was not so placed until they were returned by the electors to be placed in the box, having gone into the possession of the electors unstamped. *Moyer* v. *Van de Vanter* (Wash.) 670

4. A law forbidding the counting of ballots upon which the election officers have not placed their initials cannot be sustained where the constitution provides that persons possessing certain qualifications "shall be entitled to vote at all elections." *Id.*

5. Failure of election officers to provide booths which comply with the law is a mere irregularity which will not render void the votes cast in that precinct. *Id.*

6. The opening of the polls an hour later than the time prescribed by statute, and the removal of the ballot box from the polls in violation of Cal. Pol. Code, §§ 1160, 1162, invalidates the election in the precinct, although the misconduct is prompted merely by ignorance and lack of appreciation by the election officers of the responsibility of their positions. *Tebbe* v. *Smith* (Cal.) 673

7. An initial in a space left in a ballot for the insertion of the name of a candidate, although made with the intention of writing a name, which was abandoned, is a distinguishing mark making the ballot void. *Id.*

8. A cross in the marginal space at the right of the name of a candidate and outside of the square is not a distinguishing mark within Cal. Pol. Code, § 1215, as the Code does not expressly require the mark to be placed within such square, although it requires the clerk in printing the ticket to place upon it the

words, "To vote for a person, stamp a cross (×) in the square at the right of the name." *Id.*

9. The ballots cast at a precinct will be excluded from the count where all of them bear in the same writing the name of a person followed by the name of a party, and there was but one person in the precinct lawfully assisted in the marking of his ballot as provided by Cal. Pol. Code, § 1208, where it does not appear who did the writing or whether it was upon the tickets when they were put into the voters' hands, under § 1211, providing that any ballot which is not made as provided in the act shall be void, and shall not be counted. *Id.*

10. A blurred spot plainly made on a ballot, which might have been made for identification, or a cross not opposite the name of any candidate, or a number of crosses in a bunch, or a mark which is not a cross, or the use of a blue lead pencil,—is ground for rejecting the ballot under the Nevada Ballot Law, §§ 20, 26, providing that the ballot shall be marked with a cross after the names of the persons for whom the elector votes, in black pencil, and that any marks except as provided in the act shall invalidate the ballot. *Dennis* v. *Caughlin* (Nev.) 731

11. A slightly blurred spot or erasure on a ballot, made to correct a mistake, and not indicating an intention to identify the ballot, or a slight pencil mark made by mistake, or a tobacco stain, will not avoid the ballot under the Nevada Ballot Law, § 26, providing that any ballot on which appear marks written or printed, except as provided, shall not be counted. *Id.*

12. A ballot law which permits the name of a candidate to appear on the official ballot but once, although he may be nominated by different parties, is not unconstitutional although some voters may be unable to vote, as voters of other parties can, for all the candidates of their party without marking the ballot more than once, or to have all the candidates of their party appear on the party ballot. *Todd* v. *Board of Election Comrs.* (Mich.) 880

13. A statute requiring a person nominated for the same office by different parties at the same election to notify the election commissioners, within a limited time, upon the column of which party his name shall appear, and forbidding its appearance in more than one place, will not apply to cases in which the specified time has elapsed before the act takes effect. *Id.*

NOTES AND BRIEFS.

Voters and elections; payment of poll taxes as a qualification of electors. 414

Construction of ballot law. 670

Validity of ballot law. 880, 668

Distinguishing marks on ballots. 674

WATERS. See also BOUNDARIES; CORPORATIONS, 15, 16; EMINENT DOMAIN, 1, 2; INJUNCTION, 7; NUISANCES, 3, 4.

1. The low-water mark, which in Vermont defines the limit of private ownership of land abutting upon a navigable lake, is the ordinary low-water mark, and not the point to which the water recedes in an exceptionally dry season. *McBurney* v. *Young* (Vt.) 589

2. One irrigating company has no right to connect with the ditches of another or take water therefrom without the latter's consent, under the Nebraska Irrigation Law of 1889. *Paxton & H. Irrig. C. & L. Co.* v. *Farmers' & M. Irrig. & L. Co.* (Neb.) 858

3. A provision in the contract of a waterworks company, that if any "unforeseen or inevitable accident" shall happen to any part of its system of works the company shall have a reasonable time to repair injuries resulting from the accident, and that such accident shall not be construed to be a breach of the contract, does not apply to an insufficiency of water during a drought, caused by the failure of the company to bore wells necessary to an adequate supply in such seasons. *Capital City Water Co.* v. *State, Macdonald* (Ala.) 743

4. A waterworks company whose charter makes it its absolute duty to supply pure, wholesome deep-well water, is not justified in failing to supply such water by the fact that extra expense would be required in digging the necessary deeper wells, for which the city would not have to pay if it should ever elect to purchase such works, which it has the right to do. *Id.*

5. A city which has undertaken to furnish its inhabitants with water cannot, after accepting the rates and furnishing water to a consumer for a period beyond that for which a disputed unpaid claim against him exists, shut off the supply for the purpose of coercing payment of such claim. *Wood* v. *Auburn* (Me.) 876

6. The question of the validity of an old claim against a water consumer will not be investigated in an injunction proceeding by him against the city to prevent its shutting off his supply after it has accepted the rates and furnished water for periods subsequent to that covered by the disputed claim. *Id.*

NOTES AND BRIEFS.

Water; cutting off supply to enforce payment of rates. 876

WELL. See also INJUNCTION, 10.

NOTES AND BRIEFS.

Well; as appurtenant. 584

WITNESSES. See also EXECUTORS AND ADMINISTRATORS, 8.

A witness may be properly asked on cross-examination how a private crossing came to be put in over a railroad, where he has testified in chief that he knew who put it in and when it was put in. *Reynolds* v. *Great Northern R. Co.* (C. C. App. 8th C.) 695

WOMEN. See also CONSTITUTIONAL LAW, 10, 15, '24; MASTER AND SERVANT, 1; STATUTES, 8.

WRIT AND PROCESS.

The objection that an affidavit for substituted service was in the disjunctive in stating that defendant was concealed within the state, or had gone out of the state so that process could not be served upon him, is not well taken where the material fact of the impossibility of finding his whereabouts is alleged. *Bickerdike* v. *Allen* (Ill.) 782

L. R. A. CASES AS AUTHORITIES

SHOWING WHERE THE CASES IN THIS VOLUME HAVE BEEN APPLIED, DEVELOPED, STRENGTHENED, LIMITED, OR IN ANY WAY AFFECTED BY LATER DECISIONS THAT HAVE CITED THESE CASES AS PRECEDENTS, WITH HOLDINGS OF CITING CASES; ALSO REFERENCES TO LATER ANNOTATIONS CITING CASES OR NOTES

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L. R. A. CASES AS AUTHORITIES.

CASES IN 29 L. R. A.

29 L. R. A. 33, PARKER v. RANDOLPH, 5 S. D. 549, 59 N. W. 722.

Notice of prior lien or conveyance affecting title.

Cited in Hill v. Alliance Bldg. Co. 6 S. D. 178, 55 Am. St. Rep. 819, 60 N. W. 752, denying that failure to file verified statement of lien is available to one taking quitclaim deed with notice of lien.

Cited in footnote to Wilhelm v. Wilken, 32 L. R. A. 370, which allows holder of recorded quitclaim deed, rights of bona fide purchaser.

Criticized in Schott v. Dosh, 49 Neb. 192, 59 Am. St. Rep. 531, 68 N. W. 346, holding that grantee under quitclaim deed purchasing without notice of prior unrecorded conveyance takes superior title.

Priority of title.

Distinguished in Citizens' Bank v. Shaw, 14 S. D. 203, 84 N. W. 779, holding rights of assignee of discharged mortgage inferior to rights of grantees under warranty deed from one taking deed with special warranty.

Validity of second chattel mortgage.

Cited in Rosenbaum v. Foss, 7 S. D. 93, 63 N. W. 538 (dissenting opinion), majority upholding second chattel mortgage, which covers mortgagor's right title, and interest to same property, given to different mortgagee.

29 L. R. A. 39, HICKMAN v. GREEN, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440.

Objection to incompetent evidence.

Cited in Boggs v. Pacific Steam Laundry Co. 86 Mo. App. 624, and State v. Crab, 121 Mo. 564, 26 S. W. 548, holding objection as to competency of witness, made on motion for new trial, too late; Nichols v. Nichols, 147 Mo. 403, 48 S. W. 947; Hume v. Hopkins, 140 Mo. 76, 41 S. W. 784, holding that cross-examination as to new matter waives incompetency of evidence; State v. Marcks, 140 Mo. 669, 41 S. W. 973, holding motion to exclude incompetent matter, delayed until close of evidence, properly denied; State v. Foley, 144 Mo. 618, 46 S. W. 733, denying that omission to object to question apparently competent bars exclusion when answered; State v. Lehman, 175 Mo. 625, 75 S. W. 139, holding that after witness has testified for state and has been cross-examined, it is too late to object as to competency on ground that communications were privileged.

Necessity of showing purport of evidence.

Cited in State v. Martin, 124 Mo. 524, 28 S. W. 12, holding mere refusal to

admit answer when purport not shown, no error; Lowman v. Maney, 65 Mo. App. 623, and St. Louis Nat. Bank v. Flanagan, 129 Mo. 201, 31 S. W. 773, holding exclusion of evidence for failure to show its purport, no error; Kischman v. Scott, 166 Mo. 226, 65 S. W. 1031, holding that failure to show purpose of swearing wife as witness in action to which husband party justifies exclusion of evidence: Caskey v. La Belle, 101 Mo. App. 598, 74 S. W. 113, holding that appellate court will not review action of trial court in excluding stenographic notes of absent witnesses' testimony, where party failed to show purport of such evidence.

Power of husband to bind wife's estate.

Cited in McCollum v. Boughton, 132 Mo. 623, 35 L. R. A. 488, 34 S. W. 480, denying husband's authority to stipulate with sureties on his note that wife's deed of trust of her separate estate will be used to exonerate sureties.

Imputing agent's knowledge or acts to principal.

Cited in Butler v. Montgomery Grain Co. 85 Mo. App. 56, denying that agent's knowledge of independent transactions is imputable to principal; Kenneth Investment Co. v. National Bank, 96 Mo. App. 143, 70 S. W. 173, denying that agent's knowledge of forgery is imputed to principal, when part of scheme to defraud employee; Traber v. Hicks, 131 Mo. 192, 32 S. W. 1145, denying that principal is chargeable with notice of fraud perpetrated by agent in collusion with other party; Stanford v. Coram, 26 Mont. 297, 67 Pac. 1005, denying that principal is bound by cashier's misappropriation of proceeds of collateral note in transaction antagonistic to principal; Alpha Mills v. Watertown Steam Engine Co. 116 N. C. 802, 21 S. E. 917, holding principal bound by act of agent in substituting inferior engine for one purchased; Richardson v. Penny, 6 Okla. 342, 50 Pac. 231, holding service of notice to quit, upon agent of tenant, sufficient.

Cited in footnote to Henry v. Allen, 36 L. R. A. 658, which holds notice of agreement by bank with person depositing another's money, that cashier's checks given shall be returned without delivery, not imputable to principal.

Distinguished in Smith v. Farrell, 66 Mo. App. 12, holding that knowledge of dual agency binds both principals so far as affecting either.

Effect of subsequent deed on prior unrecorded deed.

Cited in Elliott v. Buffington, 149 Mo. 676, 51 S. W. 408, holding that grantee under quitclaim deed without notice acquires title superior to grantee under prior unrecorded warranty deed.

Criticized in Morrison v. Juden, 145 Mo. 301, 46 S. W. 994, holding that grantee of unrecorded deed holds title inferior to grantee of deed subsequently executed and recorded.

What establishes relation of attorney and client.

Cited in West v. Freeman, 69 Mo. App. 688, holding that attorney's acceptance of client's offer establishes relation of attorney and client.

Privileged communications.

Cited in State v. Faulkner, 175 Mo. 595, 75 S. W. 116, holding that statute relating to privileged communications does not make attorney incompetent to testify as to communications relating to conspiracy to bribe councilmen.

29 L. R. A. 52, LAKE SHORE & M. S. R. CO. v. PLATT, 53 Ohio St 254, 41 N. E. 243.

Grant of land situated upon stream.

Cited in Head v. Chesbrough, 13 Ohio C. C. 357, Affirming 4 Ohio N. P. 75, holding that conveyance of platted lots on bank of stream, no part of bed being platted, includes grantor's rights to center of stream.

29 L. R. A. 55, GRAYBILL v. PENN TWP. MUT. F. INS. ASSO. 170 Pa. 75, 50 Am. St. Rep. 747, 32 Atl. 632.

Location of movable property as affecting policy.

Cited in McKeesport Mach. Co. v. Ben Franklin Ins. Co. 173 Pa. 57, 34 Atl. 16, construing policy to include patterns burned while in use, though not located in building described in policy.

Cited in footnotes to British America Assur. Co. v. Miller, 39 L. R. A. 545, which holds that insurance on personal property while contained in certain building does not cover property while in other place where family are temporarily staying, in accordance with known habit; L'Anse v. Fire Asso. 43 L. R. A. 838, which holds that insurance on fire engine, etc., while in engine-house does not cover property while being used in extinguishing fire; Ohio Farmers' Ins. Co. v. Burget, 55 L. R. A. 825, which authorizes recovery of insured chattels destroyed at place to which removed with insurer's consent, notwithstanding previous removal without consent.

29 L. R. A. 57, AMOSKEAG MFG. CO. v. CONCORD, 66 N. H. 562, 34 Atl. 241.

29 L. R. A. 59, LEWIS v. DAILY NEWS CO. 81 Md. 466, 32 Atl. 246.

Defamatory words and their justification.

Cited in Coffin v. Brown, 94 Md. 193, 55 L. R. A. 734, 89 Am. St. Rep. 422, 50 Atl. 567, holding charge of willingness "to perpetrate any crime in politics that would pay" not justified by proof of attempt to bribe voter subsequent to libel; Kilgour v. Evening Star Newspaper Co. 96 Md. 23, 53 Atl. 716, holding publication that state's attorney wilfully prevented proper inquiry as to cause of death of infant not actionable *per se;* Shepherd v. Baer, 96 Md. 154, 53 Atl. 790, holding that charge criticizing management of schools justifies publication of letter alleging that critic had formerly praised board, but had changed because he had failed to receive appointment, and that he lacked mental rectitude.

Cited in footnote to Hollenbeck v. Hall, 39 L. R. A. 734, which holds publication that trader was dishonest in pleading statute of limitations not libelous.

29 L. R. A. 61, COM. v. McCANCE, 164 Mass. 162, 41 N. E. 133.

Sufficiency of indictment.

Cited in Rosen v. United States, 161 U. S. 37, 40 L. ed. 608, 16 Sup. Ct. Rep. 434, holding indictment omitting indecent matter charged, yet described with reasonable definiteness, sufficient.

29 L. R. A. 63, ST. JOHNS MFG. CO. v. MUNGER, 106 Mich. 90, 58 Am. St. Rep. 468, 64 N. W. 3.

Corporation's ratification of promoter's acts.

Followed in Rapid Hook & Eye Co. v. DeRuyter, 117 Mich. 549, 76 N. W. 76,

holding that promoter's testimony that corporation ratified his acts in securing subscribers is not evidence of ratification.

Liability of contributors to corporation about to be formed.

Cited in Esper v. Miller, 131 Mich. 339, 91 N. W. 613, holding persons contributing funds to corporation about to be organized, for purchase of land, not personally liable, after formation of corporation, on contract between corporation and real estate agent.

Rescission of subscription contract for fraud.

Cited in note (33 L. R. A. 725) on rescission for fraud or misrepresentation in procuring subscription to stock.

29 L. R. A. 66, REYES v. MIDDLETON, 36 Fla. 99, 51 Am. St. Rep. 17, 17 So. 937.

Adverse possession affecting validity of deed.

Cited in footnote to Ft. Jefferson Improv. Co. v. Dupoyster, 48 L. R. A. 537, which holds adverse possession of land conveyed no ground for complaint to subsequent purchaser after outstanding title has been bought in.

29 L. R. A. 69, CHICAGO & A. R. CO. v. PEOPLE, 153 Ill. 409, 38 N. E. 1075.

Taxation of railroad and bridge companies.

Cited in footnotes to Com. v. Henderson Bridge Co. 29 L. R. A. 73, which sustains city's power to tax franchise for bridge over interstate river; State v. Virginia & T. R. Co. 35 L. R. A. 759, which holds earning capacity of railroad the main consideration in determining taxable value.

Distinguished in Chicago, M. & St. P. R. Co. v. Grant, 167 Ill. 496, 47 N. E. 750, holding that right of way may be assessed as "railroad track," although not actually owned by company.

Taxation of corporate franchise.

Cited in note (57 L. R. A. 48) on taxation of corporate franchise in United States.

29 L. R. A. 73, COM. v. HENDERSON BRIDGE CO. 99 Ky. 623, 31 S. W. 486.

Corporate taxation.

Followed in Louisville & J. Ferry Co. v. Com. 104 Ky. 735, 47 S. W. 877, sustaining act requiring bridge and ferry companies to file statement of property to aid assessment of taxes.

Cited in Louisville Tobacco Warehouse Co. v. Com. 106 Ky. 168, 57 L. R. A. 36, 49 S. W. 1069, holding private trading corporations not required to report for franchise taxes; South Covington & C. Street R. Co. v. Bellevue, 105 Ky. 292, 57 L. R. A. 60, 49 S. W. 23, holding ad valorem tax upon franchise of street railroad company required by Constitution; Western U. Teleg. Co. v. Norman, 77 Fed. 26, holding taxation on intangible property of corporation valid; First Nat. Bank v. Stone, 88 Fed. 411, sustaining act taxing national banks on basis of value of shares of capital stock; Bank of Kentucky v. Stone, 88 Fed. 395, holding that judgment that statute exempts certain banks from taxation prevents direct tax on bank's property; Ridpath v. Spokane County, 23 Wash. 439, 63 Pac. 261, holding shares of stock of domestic corporation not assessable against shareholders person-

ally; Southern R. Co. v. Coulter, 113 Ky. 668, 68 S. W. 873, and Paducah Street R. Co. v. McCracken County, 105 Ky. 476, 49 S. W. 178, sustaining act providing for taxation of corporate franchises.

Cited in notes (57 L. R. A. 54, 56, 79, 80, 94, 103, 104) on taxation of corporate franchise in United States; (58 L. R. A. 514, 529, 558, 559, 577) on taxation of capital stock of corporations in United States; (60 L. R. A. 351) on constitutional equality in United States in relation to corporate taxation; (60 L. R. A. 675) on corporate taxation and the commerce clause.

— Deduction of debts and value of other franchise.

Cited in State v. Duluth Gas & Water Co. 76 Minn. 105, 57 L. R. A. 71, 78 N. W. 1032, and State *ex rel.* Shriver v. Karr, 64 Neb. 529, 90 N. W. 298, declaring unconstitutional, provision for deducting indebtedness of corporation from value of stock for purposes of assessment; Louisville & J. Ferry Co. v. Com. 108 Ky. 723, 57 S. W. 624, holding that value of additional franchise granted in another state need not be deducted in assessing value of franchise in state where corporation domiciled and where latter franchise was granted.

Action for taxes as res judicata.

Cited in First Nat. Bank v. Covington, 129 Fed. 800, holding judgment in action for taxes for one year not bar to subsequent suit between same parties under same law for another year's tax.

Right and duties of toll bridge proprietors.

Cited in note (58 L. R. A. 168) on rights and duties of toll bridge proprietors.

29 L. R. A. 79, RITCHIE v. PEOPLE, 155 Ill. 98, 46 Am. St. Rep. 315, 40 N. E. 454.

Validity of statute or ordinance interfering with contract, business, or immunities.

Cited in Carrollton v. Bazette, 159 Ill. 294, 31 L. R. A. 526, 42 N. E. 837, holding license fee of $10 per day, imposed upon itinerant merchants, unreasonable; Eden v. People, 161 Ill. 305, 32 L. R. A. 663, 52 Am. St. Rep. 365, 43 N. E. 1108, declaring void, statute prohibiting barbers from doing business on Sunday; State v. Sopher, 25 Utah, 324, 60 L. R. A. 471, 95 Am. St. Rep. 845, 71 Pac. 482, sustaining statute forbidding barber to exercise his trade on Sunday; *Re* Day, 181 Ill. 80, 50 L. R. A. 522, 54 N. E. 646, holding void, statute discriminating with respect to admission of attorneys who began study of law prior to certain date; Dixon v. People, 168 Ill. 190, 39 L. R. A. 123, 48 N. E. 108, denying that property of expert witness is taken without compensation by requiring opinion upon payment of ordinary fees; Ruhstrat v. People, 185 Ill. 142, 49 L. R. A. 186, 76 Am. St. Rep. 30, 57 N. E. 41, declaring unconstitutional, law forbidding use of likeness of national flag on trademark or label; Booth v. People, 186 Ill. 48, 50 L. R. A. 763, 78 Am. St. Rep. 229, 57 N. E. 798, sustaining law prohibiting grain-option contracts under penalty; Bailey v. People, 190 Ill. 33, 54 L. R. A. 840, footnote p. 839, 83 Am. St. Rep. 116, 60 N. E. 98, holding void, restriction on number which lodging-house keepers may permit to occupy one room; Price v. People, 193 Ill. 118, 55 L. R. A. 590, 86 Am. St. Rep. 306, 61 N. E. 844, sustaining act taxing private employment agencies; Bessette v. People, 193 Ill. 345, 56 L. R. A. 562, footnote p. 558, 62 N. E. 215, holding void, requirement that horseshoers practise for four years, submit to examina-

tion, and pay license fee; Chicago Union Traction Co. v. Chicago, 199 Ill. 520, 59 L. R. A. 644, 65 N. E. 451, upholding city's power to regulate street car fares and transfers; State v. Gerhardt, 145 Ind. 452, 33 L. R. A. 319, 44 N. E. 469, sustaining act regulating sale of intoxicating liquors; Mathews v. People, 202 Ill. 401, 63 L. R. A. 78, 95 Am. St. Rep. 241, 67 N. E. 28, holding statute establishing free employment agencies to be maintained at public expense, and forbidding information to be given to persons whose employees are on strike, void, as interfering with freedom of contract; State *ex rel.* Zillmer v. Kreutzberg, 114 Wis. 535, 58 L. R. A. 751, 91 Am. St. Rep. 934, 90 N. W. 1098, and Gillespie v. People, 188 Ill. 183, 52 L. R. A. 286, 80 Am. St. Rep. 176, 58 N. E. 1007, declaring void, statute forbidding, under penalty, employers to discharge employees for connection with unions; State v. Julow (Omitted from official report in 129 Mo. 163), 29 L. R. A. 259, upholding statute restricting right to discharge laborers for membership in unions; Fiske v. People, 188 Ill. 210, 52 L. R. A. 292, 58 N. E. 985, declaring unconstitutional, ordinance requiring employment of union labor only, upon public buildings; Harbison v. Knoxville Iron Co. 103 Tenn. 447, 56 L. R. A. 322, 76 Am. St. Rep. 682, 53 S. W. 955, sustaining act requiring employers to pay money at face value of orders issued for wages; State v. Haun, 61 Kan. 160, 47 L. R. A. 374, 59 Pac. 340, holding invalid, act forbidding payment of wages except in money, check, or draft; State v. Foster, 22 R. I. 175, 50 L. R. A. 344, 46 Atl. 833, sustaining act requiring itinerant merchants to procure license and leave special deposit; Opinion of Justices, 163 Mass. 591, 40 N. E. 713, discussing validity and effect of statutes regulating time of payment of wages; Vogel v. Pekoc, 157 Ill. 347, 30 L. R. A. 494, 42 N. E. 386 (dissenting opinion), majority sustaining restriction to designated class of right to recover attorney's fees in suits for wages; State v. Smiley, 65 Kan. 285, 69 Pac. 199 (dissenting opinion), majority sustaining statute prohibiting making of anti-competitive trade agreements.

Cited in footnotes to Harding v. People, 32 L. R. A. 445, which holds act requiring weighing of coal hoisted from mines whose product is shipped by rail or water, invalid; *Re* Preston, 52 L. R. A. 523, which holds void, statute against screening coal before weighing and crediting to miner; State v. Wilson, 47 L. R. A. 71, which sustains statute against screening coal mined at quantity rates, before weighing and crediting to employees.

Cited in note (28 L. R. A. 344) on validity and effect of statutes regulating time of payment of wages.

— As to hours of employment.

Cited in State v. Buchanan, 29 Wash. 606, 59 L. R. A. 344, footnote p. 342, 92 Am. St. Rep. 930, 70 Pac. 52, sustaining prohibition against employment of women more than ten hours daily in certain establishments; State v. Holden, 14 Utah, 92, 37 L. R. A. 107, footnote p. 103, 46 Pac. 756, and State v. Cantwell, 179 Mo. 263, 78 S. W. 569, sustaining act prohibiting employment in mines more than eight hours daily; *Re* Morgan, 26 Colo. 444, 47 L. R. A. 64, footnote p. 52, 77 Am. St. Rep. 269, 58 Pac. 1071, declaring void, eight-hour law applying to smelters; Com. v. Beatty, 15 Pa. Super. Ct. 19, sustaining act regulating hours of employment of minors and women in certain establishments; *Re* Ten-Hour Law, 24 R. I. 611, 61 L. R. A. 615, footnote p. 612, 54 Atl. 602, which sustains limitation to ten hours a day of work of street railway employees.

Cited in footnotes to State v. McNally, 36 L. R. A. 533, which denies power

of city council to make violation of ordinance fixing hours of labor on public works a misdemeanor; Short v. Bullion, B. & C. Min. Co. 45 L. R. A. 603, which sustains eight-hour law for miners, smelters, and refiners; *Re* Dalton, 47 L. R. A. 380, which sustains eight-hour law applicable only to employees of state, municipality, or subdivision of state; Fiske v. People, 52 L. R. A. 291, which holds void, restriction of hours of labor on city contracts to eight hours per day; Wenham v. State, 58 L. R. A. 825, which sustains statute limiting hours of work of women in certain employments; Cleveland v. Clements Bros. Constr. Co. 59 L. R. A. 775, which holds void, act limiting work of laborers on public contract to eight hours a day.

Stipulation for employment of union men only.

Cited in Adams v. Brenan, 177 Ill. 200, 42 L. R. A. 720, 69 Am. St. Rep. 222, 52 N. E. 314, holding stipulation in contract for construction of school building by union men only, illegal.

Restrictions as to hours of labor as preventing bidding.

Cited in Glover v. People, 201 Ill. 548, 66 N. E. 820, holding objection, on application for sale, that specifications for local improvement restricted employment of labor to eight hours a day, or forfeit contract, thereby restricting bidding, prima facie sufficient to defeat application.

Injunction against interference by strikers.

Cited in Temple Iron Co. v. Carmanoskie, 10 Kulp, 39, 7 Northampton Co. Rep. 260, sustaining injunction restraining strikers from intimidating employees; Vegelahn v. Guntner, 167 Mass. 98, 35 L. R. A. 723, 57 Am. St. Rep. 443, 44 N. E. 1077, sustaining injunction against patrol of strikers in front of factory.

Title of act as affecting its constitutionality.

Cited in Hudnall v. Ham, 172 Ill. 83, 49 N. E. 985, holding provision that testator's marriage revokes will properly embraced in title "Act in Regard to Descent of Property;" Bobel v. People, 173 Ill. 25, 64 Am. St. Rep. 64, 50 N. E. 322, holding "slot machine" act not unconstitutional on ground that subject not expressed in title; Boehm v. Hertz, 182 Ill. 156, 48 L. R. A. 577, 54 N. E. 973, holding act entitled "Act to Make Appropriations for Expenses of Normal College and Equipment of Gymnasium" not void as expressing more than one subject in title; Cook v. Marshall County, 119 Iowa, 399, 93 N. W. 372, holding provision for assessment of tax against one dealing in cigarettes, and on real property whereon they are sold, expressed in title "An Act to Revise and Amend Statutes in Relation to Crimes and Their Punishment."

Priority of mechanic's lien over mortgage.

Cited in Vilas v. McDonough Mfg. Co. 91 Wis. 618, 30 L. R. A. 782, 51 Am. St. Rep. 925, 65 N. W. 488 (dissenting opinion), majority holding mechanic's lien for machinery superior to prior mortgage.

29 L. R. A. 88, WILLAMETTE IRON WORKS v. OREGON R. & NAV. CO. 26 Or. 224, 46 Am. St. Rep. 620, 37 Pac. 1016.

Additional servitudes.

Cited in Huddleston v. Eugene, 34 Or. 353, 43 L. R. A. 447, footnote p. 444, 55 Pac. 868, denying that change of county road to city street is additional servitude; Brand v. Multnomah County, 38 Or. 92, 50 L. R. A. 393, footnote p.

389, 84 Am. St. Rep. 772, 60 Pac. 390, holding bridge approach elevating surface of street to established grade not increased burden; Chicago & N. W. R. Co. v. Milwaukee, R. & K. Electric R. Co. 95 Wis. 573, 37 L. R. A. 862, 60 Am. St. Rep. 136, 70 N. W. 678, holding that construction upon public street of electric railroad imposes additional servitude.

Cited in footnote to Boston & A. R. Co. v. Worcester, 55 L. R. A. 623, which holds use of part of railroad location outside of tracks for approach of highway bridge over tracks to abolish grade crossing not new easement on right of way.

Injunction against injury to easement in street.

Cited in footnote to First Nat. Bank v. Tyson, 59 L. R. A. 399, which sustains right of injunction against erection of pillars in street in front of adjoining lot, obstructing light and air from street.

Validity of assessment, regardless of benefits.

Cited in Lathrop v. Racine, 119 Wis. 473, 97 N. W. 192, holding provision empowering council to compel riparian owners to build docks along navigable harbor, and, in case of their failure, to award contracts and assess cost upon abutting property, regardless of benefits, void, as taking property without compensation.

29 L. R. A. 92, TAYLOR v. DOWNEY, 104 Mich. 532, 53 Am. St. Rep. 472, 62 N. W. 716.

Innkeeper's lien and liability.

Approved in Elliott v. Martin, 105 Mich. 507, 55 Am. St. Rep. 461, 63 N. W. 525, holding no innkeeper's lien acquired for board of horse under express agreement with one not a guest.

Cited in footnotes to Cunningham v. Buckey, 35 L. R. A. 850, which holds innkeeper liable for theft of servants from guests while asleep; Bradley Livery Co. v. Snook, 55 L. R. A. 208, which denies innkeeper's liability for team tied under shed without his attention being called to fact.

Care in keeping special deposit.

Cited in note (32 L. R. A. 776) on care required of bank in keeping special deposit.

29 L. R. A. 97, BRIM v. JONES, 11 Utah, 200, 39 Pac. 825.

Affirmed in 165 U. S. 180, 41 L. ed. 677, 17 Sup. Ct. Rep. 282.

Reconsideration of question on second appeal refused in 13 Utah, 442, 45 Pac. 46.

29 L. R. A. 100, EATON v. ROBINSON, 19 R. I. 146, 31 Atl. 1058, 32 Atl. 339.

Corporate officers' right to compensation.

Cited in footnotes to Huffaker v. Germania Safety Vault & T. Co. 46 L. R. A. 384, which holds directors entitled to compensation for extraordinary services performed without contract, by which company was saved from bankruptcy: Bassett v. Fairchild, 52 L. R. A. 611, which sustains director's right, without direct contract, to compensation for services not connected with office.

Right of action for misappropriation of corporate funds.

Cited in Schoening v. Schwenk, 112 Iowa, 735, 84 N. W. 916, upholding stock

holder's right to maintain suit against officers and directors for misappropriation of corporate funds.

29 L. R. A. 103, AMERICAN NAT. BANK v. AMERICAN WOOD PAPER CO. 19 R. I. 149, 61 Am. St. Rep. 746, 32 Atl. 305.

29 L. R. A. 104, PENNSYLVANIA CO. v. McCAFFREY, 139 Ind. 430, 38 N. E. 67.

Duty of master as to care and employment of servant.

Cited in Cleveland, C. C. & St. L. R. Co. v. Martin, 13 Ind. App. 494, 41 N. E. 1051, holding proof of invitation a condition to recovery for injuries to employee while going to another part of premises to eat dinner; Dillon v. Iowa C. R. Co. 118 Iowa, 651, 92 N. W. 855, holding railroad company not liable to engineer who left engine to urinate, and was injured while between cars; Republic Iron & Steel Co. v. Ohler, 161 Ind. 406, 68 N. E. 901, holding evidence that servant had been required to perform heavy work continuously for forty eight hours competent in action for personal injuries.

Cited in note (48 L. R. A. 393) on duty of master as to employment of servants.

Impulsive act as contributory negligence.

Cited in Indiana R. Co. v. Maurer, 160 Ind. 28, 66 N. E. 156, holding infirm person not guilty of contributory negligence in impulsively grabbing hold of running board of car, to prevent fall due to premature starting of car.

29 L. R. A. 110, TILLMAN v. OTTER, 93 Ky. 600, 20 S. W. 1036.

Validity of acts of less than majority.

Cited in *Re* Schuylkill Haven Nominations, 20 Pa. Co. Ct. 420, denying power of two members of committee of twelve to change place of meeting.

Compelling attendance of absent trustee.

Cited in footnote to Wampler v. State, 38 L. R. A. 829, which authorizes mandamus to compel township trustee to meet with others in order to obtain quorum.

29 L. R. A. 113, FRENCH v. STATE, 141 Ind. 618, 41 N. E. 2.

Constitutional power of appointment.

Cited in footnote to Johonson v. State, 38 L. R. A. 373, which holds statute depriving governor of power to appoint judges of inferior court by changing its name, void.

Long acquiescence as affecting construction of statute or Constitution.

Cited in State v. Gerhardt, 145 Ind. 458, 33 L. R. A. 321, 44 N. E. 469, holding that practice of legislature, unquestioned for forty years, will control construction of constitutional provision applicable to amendments of statutes; Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 186, 37 L. R. A. 194, 46 N. E. 77, holding that acquiescence for forty years in legislative construction of Constitution becomes conclusive; Indianapolis v. Navin, 151 Ind. 147, 41 L. R. A. 341, 47 N. E. 525, and Smith v. Indianapolis Street R. Co. 158 Ind. 435, 63 N. E. 849, holding acquiescence for forty-five years in legislature's power to regulate corporations, influential in determining constitutional provision as to creating

corporations by special acts; Wilcoxon v. Bluffton, 153 Ind. 279, 54 N. E. 110, holding town officials' acquiescence in judiciary's treatment of school bonds as town debts may be entitled to great weight in construing statute.

Judicial exercise of legislative powers.

Cited in Terre Haute v. Evansville & T. H. R. Co. 149 Ind. 184, 37 L. R. A. 194, 46 N. E. 77, sustaining act conferring upon circuit court judges power to appoint city commissioners.

Cited in footnotes to Norwalk Street R. Co.'s Appeal, 39 L. R. A. 794, which holds approval and adoption or modification of plan for street railway not judicial power; Zanesville v. Zanesville Teleg. & Teleph. Co. 52 L. R. A. 150, which sustains statute empowering probate court to direct mode of constructing telegraph or telephone line in street; *Re* Davies, 56 L. R. A. 855, which holds that supreme court justice may be empowered to appoint referee to take testimony to aid in suppressing monopoly.

Member of school board as ministerial officer.

Cited in State v. Loechner, 65 Neb. 825, 59 L. R. A. 919, 91 N. W. 874, holding member of board of education in city, ministerial officer.

Duty of one denying validity of statute.

Cited in Overshiner v. State, 156 Ind. 188, 51 L. R. A. 749, 83 Am. St. Rep. 187, 59 N. E. 468, holding that one assailing validity of act must specify particular constitutional provision violated.

29 L. R. A. 120, SOUTHERN BLDG. & L. ASSO. v. ANNISTON LOAN & T. CO. 101 Ala. 582, 46 Am. St. Rep. 138, 15 So. 123.

Application of payments on loan association contracts.

Cited in Gwin v. National Bldg. & L. Asso. 121 Ala. 574, 25 So. 843, holding one executing mortgage to loan association as security not entitled to credit for payments before maturity; Capital City Ins. Co. v. Jones, 128 Ala. 364, 86 Am. St. Rep. 152, 30 So. 674, upholding modification of original agreement by application of payments to mortgage debt, instead of on stock subscription; Hayes v. Southern Home Bldg. & L. Asso. 124 Ala. 670, 82 Am. St. Rep. 216, 26 So. 527, holding payments made on stock retransferred to loan association as security for loan not credits on loan; Caston v. Stafford, 92 Mo. App. 191, denying that monthly dues on stock in loan association constitute payments on loan; Coltrane v. Blake, 51 C. C. A. 463, 113 Fed. 796, holding borrowing stockholder in loan association entitled to *pro rata* share in distribution of assets, without credit on loan for payments on stock; Phelps v. American Sav. & L. Asso. 121 Mich. 355, 80 N. W. 120, holding payments on unmatured stock not applicable to mortgage debt, on insolvency of association; Pioneer Sav. & L. Co. v. Cannon, 96 Tenn. 605, 33 L. R. A. 114, footnote p. 112, 54 Am. St. Rep. 858, 36 S. W. 386, denying right to credit for forfeited payments on lapsed shares of loan association: Hale v. Gullick, 13 S. D. 647, 84 N. W. 196 (dissenting opinion), majority holding credit of dues on stock or loan immaterial in winding up affairs of insolvent association; Wilson v. Martinez, 47 C. C. A. 593, 108 Fed. 707; Manorita v. Fidelity Trust & Loan Co. 101 Fed. 10, denying loan association's right to hold mortgage as security for further instalments after mortgage debt extinguished.

Cited in footnotes to Strauss v. Carolina Interstate Bldg. & Loan Asso. 30 L. R. A. 693, which holds all money paid by borrowing members of loan associa-

tion to be credits on amounts borrowed; Post v. Mechanics' Bldg. & L. Asso. 34 L. R. A. 201, which denies right to credit, on usurious loans, payment of dues on loan association stock; Hale v. Cairns, 44 L. R. A. 261, which denies right to apply dues, paid on stock, on mortgage to insolvent loan association; People's Bldg. & L. Asso. v. McPhillamy, 59 L. R. A. 743, which holds that when insolvent loan association goes into voluntary liquidation prematurely, borrowing member cannot be credited with full amount of dues paid on stock.

Distinguished in Pioneer Sav. & Loan Co. v. Nonnemacher, 127 Ala. 548, 30 So. 79, holding borrower entitled to have withdrawal value of stock, retransferred to loan association as collateral security, indorsed on mortgage debt at time of forfeiture.

Criticized in Randall v. National Bldg. Loan & Protective Union, 43 Neb. 878, 29 L. R. A. 137, 62 N. W. 252, refusing to enforce agreement as to forfeiture of stock in loan association, pledged as collateral security, without allowing credit on loan.

Relation between loan association and subscriber.

Cited in Pioneer Sav. & L. Co. v. Nonnemacher, 127 Ala. 545, 30 So. 79, holding that one subscribing to stock of loan association, and retransferring it as collateral security for loan, occupies relation of shareholder and borrower.

Amount recoverable on loan association mortgage.

Cited in footnote to Roberts v. American Bldg. & L. Asso. 33 L. R. A. 744, which holds amount recoverable on loan association mortgage is amount of interest, dues, and fines, and present value of anticipated payment.

Liability of member of loan association for assessments.

Cited in note (29 L. R. A. 177) on liability of advanced member of building and loan association to assessment for losses.

Usury as to building and loan association contracts.

Cited in Johnson v. National Bldg. & L. Asso. 125 Ala. 481, 82 Am. St. Rep. 257, 28 So. 2, holding building and loan association contracts not within statute applicable to usury; Sheldon v. Birmingham Bldg. & L. Asso. 121 Ala. 283, 25 So. 820; Interstate Bldg. & L. Asso. v. Brown, 128 Ala. 469, 29 So. 656; Farmers Sav. & Bldg. & L. Asso. v. Kent, 131 Ala. 255, 30 So. 874,—holding charge of premium and interest on loan is not usury; Barrett v. Central Bldg. & L. Asso. 130 Ala. 298, 30 So. 347, holding bill alleging intention of parties to make loan usurious, demurrable; Southern Bldg. & L. Asso. v. Casa Grande Stable Co. 128 Ala. 629, 29 So. 654, raising, without deciding, question of usury as to building and loan association contracts.

29 L. R. A. 127, BUIST v. BRYAN, 44 S. C. 121, 51 Am. St. Rep. 787, 21 S. E. 537.

Effect of dissolution or insolvency on contracts of loan associations.

Approved in Sumter Bldg. & L. Asso. v. Winn, 45 S. C. 386, 23 S. E. 29, holding that premature dissolution of loan association forfeits right to foreclose mortgage against defaulting borrower; Clarke v. Olson, 9 N. D. 373, 83 N. W. 519, and Meares v. Finlayson, 63 S. C. 540, 41 S. E. 779, holding that appointment of receiver terminates borrower's contract and entitles him to credit payments on loan.

Cited in Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 311, and Interstate

Bldg. & L. Asso. v. Edgefield Hotel Co. 120 Fed. 427, holding stockholder chargeable with loan and interest and entitled to credit for premiums when association insolvent; Armstrong v. United States Bldg. & L. Asso. 15 App. D. C. 18, holding borrowing member entitled to release upon dissolution of association by payment of present value of aggregate instalments unpaid; Leahy v. National Bldg. & L. Asso. 100 Wis. 568, 69 Am. St. Rep. 945, 76 N. W. 625, and Curtis v. Granite State Provident Asso. 69 Conn. 11, 61 Am. St. Rep. 17, 36 Atl. 1023, holding that mortgage debts become due upon dissolution of loan association; Manorita v. Fidelity Trust & Loan Co. 101 Fed. 12, holding borrowing stockholder required to contribute *pro rata* share to association's losses.

Application of payments on loan association contracts.

Cited in People's Bldg. & L. Asso. v. McPhilamy, 81 Miss. 79, 59 L. R. A. 744, 95 Am. St. Rep. 693, 32 So. 1001, holding that borrowing member cannot be credited with full amount of dues paid on stock when insolvent loan association goes into voluntary liquidation prematurely; Carpenter v. Lewis, 65 S. C. 405, 43 S. E. 881, denying right of receiver of loan association to collect costs or interest on usurious contract, but all dues and interest paid by borrower must be credited on loan; Pollock v. Carolina Interstate Bldg. & L. Asso. 51 S. C. 424, 64 Am. St. Rep. 683, 29 S. E. 77, holding that all money paid on stock in loan association must be credited on debt; Hale v. Thomas, 20 Utah, 432, 59 Pac. 241; Hale v. Stenger, 22 Wash. 520, 61 Pac. 156; Hale v. Barker, 129 Cal. 425, 62 Pac. 168,— applying on mortgage, given to secure loan, monthly payments made on stock, when association insolvent; Hale v. Cairns, 8 N. D. 150, 44 L. R. A. 262, 73 Am. St. Rep. 746, 77 N. W. 1010, denying right of defaulting borrower to apply on mortgage debt, premiums paid on stock assigned as security.

Cited in footnote to Post v. Mechanics' Bldg. & L. Asso. 34 L. R. A. 201, which denies right to credit on usurious loans, payment of dues on loan association stock.

Disapproved in Price v. Kendall, 14 Tex. Civ. App. 31, 36 S. W. 810, and Curtis v. Granite State Provident Asso. 69 Conn. 14, 61 Am. St. Rep. 17, 36 Atl. 1023, holding that dues paid by borrowing member on stock should not be credited on debt.

Usury as affecting contracts of loan association.

Cited in Turner v. Interstate Bldg. & L. Asso. 47 S. C. 404, 25 S. E. 278, holding stipulation that amount received by association shall not exceed loan and interest not usurious; Carpenter v. Lewis, 60 S. C. 40, 38 S. E. 244, applying remedy in force in forum for collection of usurious interest by nonresident on contract executed in another state; Guarantee Sav. Loan & Invest. Co. v. Alexander, 96 Fed. 872, holding that usury laws of District of Columbia govern loan association contract made there, affecting property in South Carolina.

Excessive collection by loan association.

Cited in Pollock v. Carolina Interstate Bldg. & L. Asso. 48 S. C. 78, 59 Am. St. Rep. 695, 25 S. E. 977, holding excessive collection shown by complaint in action against loan association, stating that after certain payments had been made on bond, the property was burned and insurance money deposited in bank, from which association drew more than sufficient to pay balance due on bond.

Relation between loan association and borrower.

Cited in Meares v. Finlayson, 55 S. C. 117, 32 S. E. 986, holding that assign-

ment of stock to association as security for loan established relation of lender and borrower.

Borrower's liability for payments.

Distinguished in Buist v. Fitzsimmons, 44 S. C. 141, 21 S. E. 610, holding borrower from loan association who gave bond requiring monthly payments until assets should pay $200 per share not relieved from liability because required sum has been paid, but wasted by directors, and because of action to appoint receiver.

When rehearing will be denied.

Followed in Buist v. Salvo, 44 S. C. 145, 21 S. E. 615, dismissing petition for rehearing when no material fact overlooked.

29 L. R. A. 133, RANDALL v. NATIONAL BLDG. LOAN & PROTECTIVE UNION, 42 Neb. 809, 60 N. W. 1019.

Rehearing denied in 43 Neb. 877, 62 N. W. 252.

Application of payments on loan association contracts.

Followed, without discussion, in Stearns v. National Bldg. Loan & Protective Union, 42 Neb. 817, 60 N. W. 1022.

Cited in People's Bldg. Loan & Sav. Asso. v. Gilmore, 1 Herdman (Neb.) 183, 90 N. W. 108, upholding right of defaulting borrower from loan association to have credit for present value of his stock applied on mortgage debt; Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 311, holding stockholder chargeable with loan and interest and credited with payments and interest when association insolvent; Sawtelle v. North American Sav. L. & Bldg. Co. 14 Utah, 449, 48 Pac. 211, decreeing that sum paid as dues on stock in loan association must be applied in reduction of loan; Western Sav. Co. v. Houston, 38 Or. 381, 65 Pac. 611; People's Bldg. L. & Sav. Asso. v. Fowble, 17 Utah, 129, 53 Pac. 999; Hale v. Stenger, 22 Wash. 520, 61 Pac. 156,— holding that all sums paid to association must be credited on mortgage debt; Armstrong v. United States Bldg. & L. Asso. 15 App. D. C. 18, holding borrowing member entitled to release upon dissolution of association by payment of present money value of aggregate instalments unpaid; Buist v. Bryan, 44 S. C. 129, 29 L. R. A. 133, 51 Am. St. Rep. 787, 21 S. E. 597, holding that monthly payments on stock should be credited on mortgage when association is in hands of receiver.

Cited in footnote to Post v. Mechanics' Bldg. & L. Asso. 34 L. R. A. 201, which denies right to credit, on usurious loans, payment of dues on loan association stock.

Distinguished in Hale v. Cairns, 8 N. D. 150, 44 L. R. A. 262, 73 Am. St. Rep. 746, 77 N. W. 1010, denying right of defaulting borrower to apply on debt, premiums paid on stock assigned as security; Anselme v. American Sav. & L. Asso. 63 Neb. 529, 88 N. W. 665, denying borrower's right to credit upon loan for money paid as dues when association insolvent.

Usury in loan association contract.

Cited in National Mut. Bldg. & L. Asso. v. Keeney, 57 Neb. 98, 77 N. W. 442, denying right of loan association to recover interest on principal, where contract provided for payments in such manner as to allow association to collect more than legal rate.

Relation between loan association and member.

Cited in Livingston Loan & Bldg. Asso. v. Drummond, 49 Neb. 206, 68 N. W. 375, holding that advancement of funds upon assignment of stock to loan association as security establishes relation of lender and borrower.

Surrender of stock as affecting liability for dues.

Cited in Kear v. Eastern Bldg. & L. Asso. 2 Herdman (Neb.) 899, 90 N. W. 643, holding borrower who assigned his stock to loan association as collateral security for advancement not liable for payment of dues on such stock, since he has no interest in its accumulations.

29 L. R. A. 137, UNION P. R. CO. v. ERICKSON, 41 Neb. 1, 59 N. W. 347.

Liability for injury by things thrown from train.

Cited in Cleveland, C. C. & St. L. R. Co. v. Berry, 152 Ind. 619, 46 L. R. A. 57, 53 N. E. 415, denying that injury to trackwalker from collision with iron pin thrown from passing engine proves negligence on part of railroad company.

Cited in footnote to Pennsylvania R. Co. v. Martin, 55 L. R. A. 361, which denies duty of railroad company to use care to prevent piece of broken brake shoe flying from car and injuring one using track for his own affairs.

Duty of railroad company to give signals.

Cited in Chicago, B. & Q. R. Co. v. Metcalf, 44 Neb. 860, 28 L. R. A. 827, 63 N. W. 51, holding one transferring coal from car to wagon to be within protection of statute requiring sounding of signal by approaching train.

Who are fellow servants.

Followed in Omaha & R. Valley R. Co. v. Krayenbuhl, 48 Neb. 555, 67 N. W. 447, holding foreman of section crew and engineer in charge of train not connected with former's work not fellow servants.

Cited in Union P. R. Co. v. Doyle, 50 Neb. 557, 70 N. W. 43, holding sectionman working under boss not fellow servant of foreman of gravel train; Chicago, B. & Q. R. Co. v. Kellogg, 54 Neb. 131, 74 N. W. 454, holding station agent charged with duty of setting brakes on cars sidetracked not fellow servant of car inspector; Missouri P. R. Co. v. Lyons, 54 Neb. 641, 75 N. W. 13, holding members of two switching crews, engaged in same yard and under same yard master, fellow servants; St. Louis & S. F. R. Co. v. Furry, 52 C. C. A. 523, 114 Fed. 903, holding fireman injured through failure of operator to deliver orders not fellow servant of latter.

Cited in note (50 L. R. A. 446, 447, 458) on what servants are deemed to be in same common employment apart from statutes, where no question as to vice principalship arises.

Vice principalship as determined by act causing injury.

Cited in note (54 L. R. A. 47) on vice principalship as determined with reference to character of act which caused injury.

Contributory negligence as question for jury.

Cited in footnote to Neeley v. Southwestern Cotton Seed Oil Co. 64 L. R. A. 146, which holds contributory negligence of employee in using defective ladder to adjust belt, after complaining to manager and being told that it was all right, question for jury.

29 L. R. A. 143, JONES v. ASPEN HARDWARE CO. 21 Colo. 263, 52 Am. St. Rep. 220, 40 Pac. 457.

Creation, powers, and liabilities of de facto and de jure corporations.

Cited in Miller v. Williams, 27 Colo. 38. 59 Pac. 740, holding that foreign corporation may take under trust deed executed before, and delivered after, filing certificate; Maryland Tube & Iron Works v. West End Improv. Co. 87 Md. 217, 39 L. R. A. 814, 39 Atl. 620, holding failure to pay bonus tax, good defense to action by corporation for specific performance of contract; Card v. Moore, 68 App. Div. 335, 74 N. Y. Supp. 18, holding filing of certificate in office of town clerk only insufficient to complete organization; Gilkey v. How, 105 Wis. 46, 49 L. R. A. 485, 81 N. W. 120, holding that defective organization of town under valid law creates *de facto* town; Gastonia Cotton Mfg. Co. v. Wells Co. 128 Fed. 375, 63 C. C. A. 117, holding corporation not created with power to bring action in Federal court, where no capital stock was paid in or certificates issued.

Cited in footnote to Slocum v. Head, 50 L. R. A. 324, which holds persons attempting to incorporate by filing original articles, instead of copies, entitled to all rights of corporation as to persons dealing with them as such.

Title of act.

Cited in Cardillo v. People, 26 Colo. 361, 58 Pac. 678, holding provision imposing penalty for opening bars on Sunday germane to title of act "To Regulate Saloons, and Imposing Penalties for Violations."

29 L. R. A. 145, CARPENTER'S APPEAL, 170 Pa. 203, 50 Am. St. Rep. 765, 32 Atl. 637.

Right to take or administer property as affected by murder.

Cited in *Re* Fleming, 16 Misc. 444, 38 N. Y. Supp. 611, holding that indictment of remainderman for murder of life tenant prevents distribution until charge disposed of; Schmidt v. Northern Life Asso. 112 Iowa, 45, 51 L. R. A. 144, 84 Am. St. Rep. 323, 83 N. W. 800, holding that murder of assured by beneficiary forfeits rights under certificate; Lanier v. Box (Tenn.) 64 L. R. A. 463, footnote p. 458, 79 S. W. 1042, which sustains right of wife's distributees to proceeds of policy on husband's life, payable to wife if she survived husband, although latter murdered her and afterwards took his own life.

Cited in footnotes to Holdom v. Ancient Order, U. W. 31 L. R. A. 67, which holds policy not forfeited by killing of insured by insane beneficiary; New York L. Ins. Co. v. Davis, 44 L. R. A. 305, which holds only assignee's interest in policy forfeited by his murder of insured.

— By pendency of divorce proceedings.

Cited in Topham's Estate, 28 Pa. Co. Ct. 376, holding wife's right to administer husband's estate not forfeited by pendency of divorce proceedings at time of his death.

— By detention under commitment proceedings.

Cited in Reilly's Estate, 28 Pa. Co. Ct. 544, holding widow not deprived of her exemptions at husband's death, because absent against her will under commitment proceedings instituted by husband.

Statutes and public policy.

Cited in Com. *ex rel.* Luden v. Kutz, 6 Pa. Dist. R. 574, holding statute requir-

ing auctioneer to procure license not contrary to public policy; Reinhold v. Reinhold, 7 Pa. Dist. R. 566, denying wife's right, under statute, to sue husband for her separate property during continuance of family relation; Northern C. R. Co. v. Walworth, 193 Pa. 215, 44 Atl. 253, upholding contract of purchase, under statute, of stock of one railroad company by another, when roads not competing lines.

29 L. R. A. 150, PRICE v. PRICE, 91 Iowa, 693, 51 Am. St. Rep. 360, 60 N. W. 202.

Offer to provide home as defense to suit for alienation of affections.

Cited in Bailey v. Bailey, 94 Iowa, 604, 63 N. W. 341, holding father's offer to provide home for son and wife admissible in wife's suit against him for alienation of husband's affections.

Wife's right of action for alienation of husband's affections.

Cited in footnote to Betser v. Betser, 52 L. R. A. 630, which sustains wife's right of action for alienation of husband's affections.

— By another woman.

Cited in Wolf v. Frank, 92 Md. 143, 52 L. R. A. 105, footnote p. 102, 48 Atl. 132, and Humphrey v. Pope, 122 Cal. 258, 54 Pac. 847, affirming wife's right to sue in her own name for alienation of husband's affections by another woman.

Cited in footnotes to Houghton v. Rice, 47 L. R. A. 310, which denies right of action against other woman for alienating husband's affections, when unaccompanied by adultery; Dietzman v. Mullin, 50 L. R. A. 808, which sustains wife's right of action for alienating husband's affections.

Distinguished in Kroessin v. Keller, 60 Minn. 375, 27 L. R. A. 686, 51 Am. St. Rep. 533, 62 N. W. 438, denying wife's right to maintain action against another woman in nature of criminal conversation.

— By parents.

Cited in Gernerd v. Gernerd, 185 Pa. 236, 40 L. R. A. 550, 42 W. N. C. 51, 64 Am. St. Rep. 646, 39 Atl. 884, and Lockwood v. Lockwood, 67 Minn. 484, 70 N. W. 784, sustaining wife's right to recover for alienation of husband's affections by his parents; Lonstorf v. Lonstorf, 118 Wis. 167, 95 N. W. 961 (dissenting opinion), majority denying wife's right to maintain action against mother-in-law for alienation of husband's affections, under statute giving her right of action for "injury to her person or character."

Cited in footnotes to Hodgkinson v. Hodgkinson, 27 L. R. A. 120, which sustains action by wife against husband's parents inducing abandonment, for damages from his desertion; Tucker v. Tucker, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; Brown v. Brown, 38 L. R. A. 242, which sustains right of action in own name by abandoned wife against husband's father who caused abandonment.

29 L. R. A. 153, SHERWOOD v. POWELL, 61 Minn. 479, 52 Am. St. Rep. 614, 63 N. W. 1103.

Defamatory words in legal proceedings or in record.

Cited in Union Mut. L. Ins. Co. v. Thomas, 28 C. C. A. 97, 48 U. S. App. 575, 83 Fed. 804, holding answer of insurance company averring that plaintiff alleged

insured's death to defraud company, libelous; McGehee v. Insurance Co. of N. A. 50 C. C. A. 551, 112 Fed. 854, holding allegation in answer of insurance company imputing charge of arson, privileged.

Cited in footnotes to Shinglemeyer v. Wright, 50 L. R. A. 129, which holds information given to detectives as to larceny, with reason for suspecting certain person as thief, privileged; Jones v. Brownlee, 53 L. R. A. 445, which holds naming person with whom adultery committed, in cross-bill for divorce, absolutely privileged; Grant v. Hayne, 54 L. R. A. 930, which holds libelous words in pleading not privileged when foreign to issues; Kubricht v. State, 58 L. R. A. 959, which holds clergyman entering on baptismal record, as reputed father of bastard child, name of person known to have been acquitted, guilty of libel; Cooley v. Galyon, 60 L. R. A. 139, which holds words maliciously spoken by witness in judicial proceeding of stranger, absolutely privileged, if pertinent and responsive; Crockett v. McLanahan, 61 L. R. A. 914, which holds defamatory matter as to stranger in pleading, absolutely privileged, if pertinent and relative to issue.

29 L. R. A. 154, STATE v. BARR, 11 Wash. 481, 48 Am. St. Rep. 890, 39 Pac. 1080.

Liability for negligently injuring trespasser.

Cited in Grant v. Hass, 31 Tex. Civ. App. 691, 75 S. W. 342, sustaining innocent trespasser's right to recover for injuries inflicted by spring gun set to protect melon patch.

Cited in footnote to Magar v. Hammond, 59 L. R. A. 315, which denies right of one fishing unlawfully, to recover for wound unintentionally inflicted by gun negligently fired by watchman.

Variance between pleading and proof.

Cited in State v. Williams, 122 Iowa, 124, 97 N. W. 992, holding there was no variance between allegations (which were not stated) and proof in murder case.

Weight given evidence of good character.

Cited in footnote to Daniels v. State, 54 L. R. A. 286, which requires evidence of good character to be weighed by jury according to weight of testimony by which supported.

29 L. R. A. 164, COMMERCIAL NAT. BANK v. MATHERWELL IRON & STEEL CO. 95 Tenn. 172, 31 S. W. 1002.

Extraterritorial effect of insolvency laws.

Cited in Toof v. Miller, 73 Miss. 771, 19 So. 577, upholding sale in one state of insolvent's personal property in other state; Zacher v. Fidelity Trust & Safety Vault Co. 45 C. C. A. 483, 106 Fed. 595, denying receiver's right to recover corporate property in another state as against attaching creditor.

Cited in footnotes to Castleman v. Templeman, 41 L. R. A. 367, which denies receiver's power to consent to decree in other state for payment of assessments by stockholders to creditors; Linville v. Hadden, 43 L. R. A. 222, which holds nonresident creditor of foreign corporation in hands of receiver entitled to same protection as resident creditors against receiver's claim to property; Ward v. Connecticut Pipe Mfg. Co. 42 L. R. A. 706, which requires attachment creditor to account for fair value of goods at time of attachment, before sharing in benefit of receivership in other state; Segnitz v. Garden City Bkg. & T. Co. 50

L. R. A. 327, which holds money on deposit in bank of other state applicable to notes of assignor for creditors held by bank after their maturity.

29 L. R. A. 169, BROWNELL v. OLD COLONY R. CO. 164 Mass. 29, 49 Am. St. Rep. 442, 41 N. E. 107.

Regulation of elevated railroad and ferry companies.

Cited in People *ex rel.* Linton v. Brooklyn Heights R. Co. 69 App. Div. 558, 75 N. Y. Supp. 202, denying mandamus to compel elevated railroad company to run trains in designated manner.

Cited in footnote to Nixon v. Reid, 32 L. R. A. 315, which sustains right to grant exclusive ferry license.

Cited in note (59 L. R. A. 546) on establishment, regulation, and protection of ferries.

Action for penalty in name of state.

Cited in State v. Messner, 9 N. D. 188, 82 N. W. 757, holding action for penalty for failure to destroy noxious weeds not maintainable in name of state.

29 L. R. A. 173, ELLSWORTH v. CHICAGO, B. & Q. R. CO. 95 Iowa, 98, 63 N. W. 584.

Liability for ejection of passenger.

Cited in footnote to Atkinson v. Southern R. Co. 55 L. R. A. 223, which holds carrier liable for ejection of passenger because train does not stop at his station, as ticket seller had incorrectly told him it would.

— For defective ticket or transfer.

Cited in O'Rourke v. Citizens' Street R. Co. 103 Tenn. 132, 46 L. R. A. 616, 76 Am. St. Rep. 639, 52 S. W. 872, holding company liable for ejecting passenger offering transfer incorrectly punched by another conductor; Indianapolis Street R. Co. v. Wilson, 161 Ind. 159, 100 Am. St. Rep. 261, 66 N. E. 950, holding company liable for conductor's ejecting passenger who tendered alleged defective transfer, explaining that he had asked for proper one.

Cited in footnotes to Northern P. R. Co. v. Pauson, 30 L. R. A. 730, which holds carrier liable for ejection of one tendering return coupon of round-trip ticket, improperly stamped; Southern R. Co. v. Wood, 55 L. R. A. 536, which holds carrier liable for ejection of passenger whose round-trip ticket was unstamped from inability to find agent; Illinois C. R. Co. v. Harper, 64 L. R. A. 283, which denies right to eject passenger presenting ticket not specifying route to place of destination, because of regulations requiring her to take another route.

Distinguished in Trezona v. Chicago G. W. R. Co. 107 Iowa, 25, 43 L. R. A. 138, 77 N. W. 486, denying right to passage on limited ticket used year after date of sale; Hanlon v. Illinois C. R. Co. 109 Iowa, 141, 80 N. W. 223, and Rolfs v. Atchison, T. & S. F. R. Co. 66 Kan. 282, 71 Pac. 526, denying that company is bound by representation of agent on day following sale of ticket, that ticket would be honored after expiration of first day, so as to render it liable for ejection of passenger.

Duty to pay fare wrongfully demanded.

Cited in note (43 L. R. A. 706) on duty of passenger to pay fare wrongfully demanded, in order to avoid expulsion and lessen damages.

29 L. R. A. 177, WOHLFORD v. CITIZENS' BLDG. L. & SAV. ASSO. 140 Ind. 662, 40 N. E. 694.

Sustaining demurrer to one paragraph of answer.

Cited in Kniss v. Holbrook, 16 Ind. App. 237, 44 N. E. 563, and Germania F. Ins. Co. v. Stewart, 13 Ind. App. 637, 42 N. E. 286, holding it no error to sustain demurrer to one paragraph of answer when defense provable under another.

Application of payments, securities, and stock dues on loan association contracts.

Followed, without discussion, in Willis v. Citizens' Bldg. L. & Sav. Asso. 140 Ind. 699, 40 N. E. 698; Wagner v. Citizens' Bldg. L. & Sav. Asso. 140 Ind. 700, 40 N. E. 698; Kenower v. Citizens' Bldg. L. & Sav. Asso. 141 Ind. 704, 40 N. E. 698; Lee v. Citizens' Bldg. L. & Sav. Asso. 141 Ind. 705, 40 N. E. 749.

Cited in Huter v. Union Trust Co. 153 Ind. 212, 54 N. E. 755, holding borrowing member not entitled to credit dues on loan, but to share in residuum; People's Bldg. & L. Asso. v. McPhilamy, 81 Miss. 88, 59 L. R. A. 748, 95 Am. St. Rep. 693, 32 So. 1001, holding borrowing member of insolvent association entitled to credit on loan, balance of stock payments after payment of losses; Young v. Improvement L. & Bldg. Asso. 48 W. Va. 524, 38 S. E. 670, holding borrowing member not entitled to distributive share of dues paid on stock before winding up of association; Phelps v. American Sav. & L. Asso. 121 Mich. 355, 80 N. W. 120, holding sums paid on unmatured stock not applicable to mortgage debt upon insolvency of association; Hale v. Cairns, 8 N. D. 151, 44 L. R. A. 263, 73 Am. St. Rep. 746, 77 N. W. 1010, holding borrowing member of insolvent loan association not entitled to credit dues paid on stock in reduction of loan; Hale v. Phillips, 68 Ark. 390, 59 S. W. 35, holding present value of stock not offset in foreclosure action by association; Cummings v. Citizens' Bldg. L. & Sav. Asso. 142 Ind. 603, 42 N. E. 213, raising, without deciding, question as to right to recover principal and interest upon proper complaint; Hale v. Gullick, 13 S. D. 647, 84 N. W. 196 (dissenting opinion), majority holding borrowing member chargeable with loan and credited with all payments upon dissolution of association.

Cited in note (29 L. R. A. 120) on right to apply payments made on stock in building and loan association on mortgage given for loan by same member.

Distinguished in International Bldg. & L. Asso. v. Bratton, 24 Ind. App. 661, 56 N. E. 105, holding that payment of stipulated number of instalments extinguishes debt, although sum less than loan.

Relation between association and member.

Cited in Security Sav. & L. Asso. v. Elbert, 153 Ind. 202, 54 N. E. 753, holding that contracts between building and loan associations and members create relation of lender and borrower.

Rights of withdrawing member.

Cited in Hawley v. North Side Bldg. & L. Asso. 11 Colo. App. 99, 52 Pac. 408, holding that rights of withdrawing member of association date as of time of acceptance of resignation.

Member's liability for shortages.

Cited in footnote to Eversmann v. Schmitt, 29 L. R. A. 184, which holds assessments for shortages in assets after receiver appointed, covered by mortgage to loan association.

29 L. R. A. 184, EVERSMANN v. SCHMITT, 53 Ohio St. 174, 53 Am. St. Rep. 632, 41 N. E. 139.

Liability of members of loan association for losses.

Cited in Richter v. Main Street Bldg. & Loan Co. 4 Ohio N. P. 99, directing assessment by receiver upon mortgage members to cover losses of association: Hale v. Phillips, 68 Ark. 388, 59 S. W. 35, holding members bound in proportion to amount of stock for payment of losses of association; Lealy v. National Bldg. & L. Asso. 100 Wis. 569, 69 Am. St. Rep. 945, 76 N. W. 625, denying that assignment of stock to association severs membership and relieves from liability to bear share of losses.

Credit for payments by borrowing member of loan association.

Cited in Home Bldg. Asso. Co. v. Tenney, 7 Ohio N. P. 131, holding borrowing member entitled to release when payments credited equal par value of stock: Wilcoxen v. Smith, 107 Iowa, 562, 70 Am. St. Rep. 220, 78 N. W. 217, holding members of insolvent association entitled to credit for actual value of shares: Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 311, holding stockholders chargeable with loan and interest and entitled to credit for premiums when association insolvent; People's Bldg. & L. Asso. v. McPhilamy, 81 Miss. 88, 59 L. R. A. 748, 95 Am. St. Rep. 693, 32 So. 1001, holding borrowing member of insolvent association entitled to credit on loan, balance of stock payments after payment of losses; Phelps v. American Sav. & L. Asso. 121 Mich. 355, 80 N. W. 120, holding sums paid on unmatured stock not applicable to mortgage debt upon insolvency of association; Young v. Improvement Loan & Bldg. Asso. 48 W. Va. 524, 38 S. E. 670, holding borrowing member not entitled to credit for distributive share of stock payments before winding up of association; Hale v. Cairns, 8 N. D. 151, 44 L. R. A. 263, 73 Am. St. Rep. 746, 77 N. W. 1010, holding borrowing member of insolvent loan association not entitled to credit stock payments in reduction of loan; Hale v. Gullick, 13 S. D. 647, 84 N. W. 196 (dissenting opinion), majority holding borrowing member chargeable with loan and credited with all payments upon insolvency of association.

Distinguished in Hale v. Barker, 129 Cal. 425, 62 Pac. 168, holding that stock payments should be credited upon mortgage debt upon insolvency of association.

Liability to continue payments till maturity of stock.

Cited in Columbia Bldg. & L. Asso. v. Junquist, 111 Fed. 647, holding that borrowing member must continue payments till maturity of stock, although contract limits number of payments.

Validity of contract for maturity of stock at definite time.

Cited in Columbia Bldg. & L. Asso. v. Lyttle, 16 Colo. App. 428, 66 Pac. 247, denying association's power to contract with member for maturity of stock at definite time.

Rights of withdrawing members.

Cited in Cook v. Emmet Perpetual & Mut. Bldg. Asso. 90 Md. 289, 44 Atl. 1022, holding withdrawing members not entitled to share with general creditors in distribution of assets of insolvent association; Hawley v. North Side Bldg. & L. Asso. 11 Colo. App. 99, 52 Pac. 408, holding that rights of withdrawing member date as of time of acceptance of resignation from association.

Who are stockholders of loan association.

Cited in Coltrane v. Baltimore Bldg. & L. Asso. 110 Fed. 284, holding owners

of full-paid stock in loan association, stockholders, not creditors; Ottawa Mut. Loan & Sav. Asso. v. Merriman, 67 Kan. 785, 74 Pac. 256, holding one investing money in loan association, and receiving two certificates, one of deposit, another that he is a member owning stock, stockholder and not mere creditor.

Validity of mortgage of property held by entirety for husband's dues.

Cited in Harrison Bldg. & Deposit Co. v. Lackey, 149 Ind. 14, 48 N. E. 254, holding mortgage by husband and wife as tenants by entirety, to secure payments of husband's dues as member of association, void as to wife.

29 L. R. A. 188, FINDLAY v. PERTZ, 13 C. C. A. 559, 31 U. S. App. 340, 66 Fed. 427.

Validity of contracts involving conflict of interests.

Cited in Hayward v. Nordberg Mfg. Co. 29 C. C. A. 446, 54 U. S. App. 639, 85 Fed. 11, holding private solicitation of members of council in procuring contract for pumping engine, against public policy; Alger v. Keith, 44 C. C. A. 377, 105 Fed. 111, and Alger v. Anderson, 78 Fed. 738, holding that bribery of vendee's agent by real estate dealers entitles vendee to rescind sale; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co. 86 Fed. 945, holding agreement between promoter and president of company to divide profits of former's contract to reorganize, void; Union Cent. L. Ins. Co. v. Berlin, 33 C. C. A. 276, 62 U. S. App. 223, 90 Fed. 781, holding agent's agreement to extend premium note on condition that policy holder pay personal debt to agent, illegal; Smythe v. Evans, 209 Ill. 383, 70 N. E. 906, Reversing 108 Ill. App. 150, holding contract for erection of gas plant, effected through agent of both parties, void.

Cited in footnotes to Berka v. Woodward, 45 L. R. A. 420, which denies recovery to officer on implied contract with city for materials furnished it; Sylvester v. Webb, 52 L. R. A. 518, which sustains contract to erect school building by member of building committee and selectmen of town.

City's liability to councilman for defect in street.

Cited in footnote to Danville v. Robinson, 55 L. R. A. 162, which sustains right of member of city council to recover for injuries by defect in street.

Effect of ratification on fraudulent contract.

Cited in Findlay v. Pertz, 20 C. C. A. 663, 43 U. S. App. 383, 74 Fed. 682, holding that use of machines by city after discovery of fraud of agent in secretly acting for seller renders city liable for purchase price; State v. Engle, 111 Iowa, 250, 82 N. W. 763, holding that principal's acceptance of sale by agent of land to himself for grossly inadequate consideration, prevents prosecution of agent for embezzlement in retaining proceeds of resale.

29 L. R. A. 195, LAKE SHORE & M. S. R. CO. v. GRAND RAPIDS, 102 Mich. 374, 60 N. W. 767.

Liability and assessment for local improvements.

Cited in footnote to Cincinnati, L. &. N. R. Co. v. Cincinnati, 49 L. R. A. 566, which denies right to assess entire cost of land taken for highway, on remaining land of same owner.

Cited in note (35 L. R. A. 40) on liability to local assessments for benefits of property exempt from general taxation.

— Of railroad company.

Followed in Detroit, G. H. & M. R. Co. v. Grand Rapids, 106 Mich. 14, 28 L. R. A. 794, 58 Am. St. Rep. 466, 63 N. W. 1007, holding that roadbed of railroad cannot be sold to pay assessment for municipal improvement.

Cited in Chicago & N. W. R. Co. v. Ellson, 113 Mich. 33, 71 N. W. 324, holding coal stored in railroad shed subject to sale under tax warrant; Grand Rapids v. Lake Shore & M. S. R. Co. 130 Mich. 239, 97 Am. St. Rep. 473, 89 N. W. 932, holding void, statute requiring railroad companies personally to pay paving tax previously levied.

Cited in footnotes to Storrie v. Houston City Street R. Co. 44 L. R. A. 716, which holds street railway company required to pave between rails and 6 inches each side; Chicago, R. I. & P. R. Co. v. Ottumwa, 51 L. R. A. 763, which denies liability of railroad running alongside of street for street paving assessment.

Railroad company's right to exemption from tax.

Cited in Manistee & G. R. Co. v. Auditor General, 115 Mich. 294, 73 N. W. 240, denying right of railroad company to exemption from tax, where railroad was only two thirds finished at passage of exemption act.

Corporate taxation.

Cited in note (60 L. R. A. 76, 78) on corporate taxation in United States as affected by contract clause in Federal Constitution.

Right to sell section of railroad separate from franchise.

Cited in footnote to Connor v. Tennessee C. R. Co. 54 L. R. A. 687, which denies power to sell section of railroad separate from franchise to enforce contractor's lien.

29 L. R. A. 200, STATE v. BISHOP, 128 Mo. 373, 49 Am. St. Rep. 569, 31 S. W. 9.

Protection of trade labels.

Distinguished in Oakes v. St. Louis Candy Co. 146 Mo. 399, 48 S. W. 467, denying that mere designation of new confection as "what is it?" gives manufacturer exclusive use of term.

— Of unions.

Cited in Tracy v. Banker, 170 Mass. 270, 39 L. R. A. 509, footnote p. 508, 49 N. E. 308, denying that fraudulent use of trade-union label before passage of act imposing penalty exempts wrongdoer.

Cited in footnotes to Hetterman Bros. v. Powers, 39 L. R. A. 211, which holds voluntary unincorporated labor organizations entitled to protection of labels adopted by them; Perkins v. Heert, 43 L. R. A. 858, which sustains statute authorizing labor union to adopt distinguishing label; Schmalz v. Woolley, 43 L. R. A. 86, which sustains right of labor unions to trade-mark used on goods not owned by them.

Sufficiency of pleading.

Cited in Parker v. Western U. Teleg. Co. 87 Mo. App. 559, holding averment "that company neglected to transmit or deliver message promptly," sufficient.

Distinguished in State v. Thierauf, 167 Mo. 442, 67 S. W. 292, holding allegation of imitation of label, stated in general terms of statute, insufficient.

29 L. R. A. 208, FUNK v. ST. PAUL CITY R. CO. 61 Minn. 435, 52 Am. St. Rep. 608, 63 N. W. 1099.

Street railways as "railroads" or common carriers.

Cited in Lundquist v. Duluth Street R. Co. 65 Minn. 389, 67 N. W. 1006, holding that statute authorizing recovery for injury by fellow servant on railroads has no application to injury to one repairing street car track, through motorman's negligence; State v. Duluth Gas & Water Co. 76 Minn. 107, 57 L. R. A. 74, 78 N. W. 1032, holding street railway company not railroad company within tax statute; Stillwater v. Lowry, 83 Minn. 278, 86 N. W. 103, denying that statute authorizing villages to contract with railroad companies confers power to authorize construction of street railways; Fidelity Loan & T. Co. v. Douglas, 104 Iowa, 536, 73 N. W. 1039, and Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 54, 59 U. S. App. 403, 88 Fed. 596, denying that statute making judgment against "any railway corporation" for personal injuries, lien prior to mortgage, includes street railroads; Railroad Comrs. v. Market Street R. Co. 132 Cal. 683, 64 Pac. 1065, holding street railway not transportation company; Lincoln Street R. Co. v. McClellan, 54 Neb. 676, 69 Am. St. Rep. 736, 74 N. W. 1074, holding that street railways are common carriers liable to passengers for injuries resulting from negligence; Hannah v. Metropolitan Street R. Co. 81 Mo. App. 82, holding electric railway operated between cities, within statute making "railroad corporations" liable for injury to stock resulting from neglect to maintain fences; Savannah, T. & I. of H. R. Co. v. Williams, 117 Ga. 417, 61 L. R. A. 250, footnote p. 249, 43 S. E. 751, which holds chartered street railroad a railroad company within statute as to liability for negligence of fellow servant; Sams v. St. Louis & M. River R. Co. 174 Mo. 74, 61 L. R. A. 480, 73 S. W. 686, holding that street railroad company is not within statute making corporations operating railroads liable for injuries by fellow servant.

Cited in footnotes to Vail v. Broadway R. Co. 30 L. R. A. 626, which holds passenger on street-car platform not passenger on "any railroad," so as to assume risk of injury; Diebold v. Kentucky Traction Co. 63 L. R. A. 637, which holds electric railway operated between two cities in different states, a trunk railway within prohibition against granting franchise except to highest bidder.

Private logging railway as a "railroad."

Cited in Schus v. Powers-Simpson Co. 85 Minn. 452, 89 N. W. 68, holding that private logging railway company is railroad company, liable to servant for injury through negligence of coservant.

Right to use street for street railroad.

Cited in Rische v. Texas Transp. Co. 27 Tex. Civ. App. 37, 66 S. W. 324, sustaining right of electric street railway company to use street for transportation of freight, after payment of compensation to abutters.

When new trial required.

Cited in Grover v. Bach, 82 Minn. 301, 84 N. W. 909, holding that error in submitting question to jury requires new trial; Schmitt v. Murray, 87 Minn. 253, 91 N. W. 1116, denying new trial when verdict sustained by evidence.

29 L. R. A. 212, CENTRAL TRUST CO. v. MORAN, 56 Minn. 188, 57 N. W. 471.

Right to injunction.

Cited in footnote to Bass v. Metropolitan West Side Elev. R. Co. 39 L. R. A.

711, which authorizes injunction to compel restoration by railroad company of part of building removed without making compensation.

Cited in note (30 L. R. A. 104, 135) on injunction against execution sales or other proceedings under final process.

29 L. R. A. 215, FAIRLY v. WAPPOO MILLS, 44 S. C. 227, 22 S. E. 108.

Custom; admissibility of evidence of.

Cited in Turpin v. Sudduth, 53 S. C. 306, 31 S. E. 245, holding evidence of master's custom to date conveyances on day of sale inadmissible.

— Reasonableness of.

Cited in Pennsylvania R. Co. v. Naive (Tenn.) 64 L. R. A. 447, footnote p. 443, 79 S. W. 124, which upholds custom of carrier not to deliver perishable freight on July 4th.

— As affecting contract.

Cited in footnote to Harris v. Sharples, 58 L. R. A. 214, which denies right under contract to add lithographer's name for advertising purposes to lithographed cover design, although it is customary to do so.

Burden of proof.

Cited in Davis v. Morgan, 96 Ga. 520, 23 S. E. 417, holding that proof by broker of principal's acceptance of purchaser imposes burden upon principal of showing vendee's inability to perform.

Cited in footnote to Tucker v. State, 46 L. R. A. 181, which holds that person wrongfully killing another with deadly weapon has burden of proving justification or legal excuse in action for damages.

Attachment of liquors.

Cited in Lanahan v. Bailey, 53 S. C. 494, 42 L. R. A. 299, 69 Am. St. Rep. 884, 31 S. E. 332, holding attachment of intoxicating liquors shipped into state for unlawful purpose invalid under dispensary law, making any sale of such liquors unlawful.

Violation of rule or failure to procure license, as affecting contract or recovery for services.

Cited in Hanesley v. Monroe, 103 Ga. 280, 29 S. E. 928, holding admission of proof of rule against commissions, in action by agent for services in procuring loan from insurance company, error.

Cited in footnotes to Vermont Loan & T. Co. v. Hoffman, 37 L. R. A. 509, which holds loan of money without license valid, though misdemeanor under statute; Randall v. Tuell, 38 L. R. A. 143, which denies right of unlicensed innholder to recover for board and lodging; Smith v. Robertson, 45 L. R. A. 510, which denies right of recovery on contract for services of unlicensed stallion: Denning v. Yount, 50 L. R. A. 103, which denies right of unlicensed brokers to recover commissions; Black v. Security Mut. Life Asso. 54 L. R. A. 939, which denies right to commissions of one securing applications for insurance before license, which is granted before policies issued; Citizens' State Bank v. Nore, 60 L. R. A. 737, which authorizes recovery by bona fide purchaser of note for medical services by unlicensed practitioner.

Validity of mortgage.

Cited in Brown v. Newell, 64 S. C. 74, 41 S. E. 835 (distinguished in dissent-

ing opinion), majority holding execution of note and mortgage in favor of one who assigned them before delivery and without consideration, and which purported to be executed on same day as prior mortgage, but in fact year later, consideration of second being satisfaction of first, valid and enforceable in equity.

29 L. R. A. 226, STATE v. FOSTER, 5 Wyo. 199, 38 Pac. 926.

Attachment of assigned property.

Cited in Swofford Bros. Dry-Goods Co. v. Mills, 86 Fed. 558, denying motion to dissolve attachment levied on property of insolvent partnership in hands of assignee.

Priority of tax claims.

Cited in note (29 L. R. A. 278) on priority of claims for taxes against assets of debtor.

Liability for loss of public funds.

Cited in State v. Gramm, 7 Wyo. 377, 40 L. R. A. 696, 52 Pac. 533, denying sureties' liability on bond of treasurer for loss of public funds by failure of bank.

Cited in footnote to Maloy v. Bernalillo County, 52 L. R. A. 126, which denies defaulting county treasurer's liability to county for interest paid to him by bank, in which public money was deposited, after he had paid county.

Right to follow trust funds.

Cited in Independent District v. Beard, 83 Fed. 12, holding special trust established by proof showing augmentation of estate by trust fund; Hanna v. McLaughlin, 158 Ind. 296, 63 N. E. 475, holding that partner's use of partnership funds to pay mortgage debt against land owned by himself and wife subjects such land to trust in favor of copartner; State v. Bank of Commerce, 54 Neb. 729, 75 N. W. 28, holding county entitled to funds left in insolvent bank, which had used public funds to pay depositors.

Cited in footnotes to Marquette v. Wilkinson, 43 L. R. A. 840, which holds that city funds redeposited in other bank under arrangement for sharing deposits are held in trust for city as against original banker's assignee for creditors; Central Stock & Grain Exchange v. Bendinger, 56 L. R. A. 875, which holds broker liable to refund to principal, money illegally taken from agent as margin on gambling transaction.

29 L. R. A. 251, BISSELL v. DAVISON, 65 Conn. 183, 32 Atl. 348.

Exercise of police power.

Cited in State v. Main, 69 Conn. 137, 36 L. R. A. 628, 61 Am. St. Rep. 30, 37 Atl. 80, holding statute requiring destruction of peach trees attacked by "yellows" within police power; New York v. Chelsea Jute Mills, 43 Misc. 273, 88 N. Y. Supp. 1085, sustaining statute forbidding employment of child under fourteen years of age during time when schools of his district are in session; Board of Education v. Purse, 101 Ga. 439, 41 L. R. A. 606, 65 Am. St. Rep. 312, 28 S. E. 896, holding that board of education may suspend children of parent who enters school room and insults teacher in presence of scholars.

— Compulsory vaccination.

Approved in Gerhard v. Packer Twp. School District, 24 Pa. Co. Ct. 341, 9 Pa. Dist. R. 721, denying mandamus to require board of education to admit pupil who fails to furnish certificate of vaccination.

Cited in Morris v. Columbus, 102 Ga. 800, 42 L. R. A. 180, footnote p. 175, 66 Am. St. Rep. 243, 30 S. E. 850, sustaining compulsory vaccination within city limits, where smallpox is prevalent; State *ex rel.* Cox v. Board of Education, 21 Utah, 416, 60 Pac. 1013, upholding rule of board of education excluding unvaccinated pupils during prevalence of smallpox; Blue v. Beach, 155 Ind. 137, 50 L. R. A. 71, footnote p. 64, 80 Am. St. Rep. 195, 56 N. E. 89, holding exclusion of unvaccinated pupils from public schools during smallpox epidemic justified only as public emergency; Com. v. Pear, 183 Mass. 246, 66 N. E. 719, sustaining statute empowering board of health of city or town to require vaccination of inhabitants, and imposing fine for violations; Osborn v. Russell, 64 Kan. 509, 68 Pac. 60, holding that statute forbidding pupils infected with contagious disease to attend school does not authorize board of education to require vaccination when disease not prevalent; French v. Davidson, 143 Cal. 661, 77 Pac. 663, and Viemeister v. White, 88 App. Div. 51, 84 N. Y. Supp. 712, holding statute prohibiting children from attending public schools unless they have been vaccinated valid.

Cited in footnotes to Mathews v. Board of Education, 54 L. R. A. 736, which denies power to make vaccination condition of admission to schools, in absence of epidemic; State *ex rel.* Freeman v. Zimmerman, 58 L. R. A. 78, which sustains regulation, in cases of emergency, for vaccination as condition of admission to school.

Distinguished in State *ex rel.* Adams v. Burdge, 95 Wis. 402, 37 L. R. A. 161, footnote p. 157, 60 Am. St. Rep. 123, 70 N. W. 347, holding void, rule of board of education excluding unvaccinated children from school when smallpox epidemic not probable; Potts v. Breen, 167 Ill. 78, 39 L. R. A. 156, footnote p. 152, 59 Am. St. Rep. 262, 47 N. E. 81, denying power to compel students to be vaccinated as condition of attending school.

Injunction against construction of electric railway.

Cited in Canastota Knife Co. v. Newington Tramway Co. 69 Conn. 152, 36 Atl. 1107, upholding abutter's right to enjoin construction of electric railway over route deviating from prescribed line.

29 L. R. A. 254, SHAFER v. LACOCK, 168 Pa. 497, 32 Atl. 44.

Admissibility of declarations as part of res gestæ.

Cited in Sample v. Consolidated Light & R. Co. 50 W. Va. 479, 57 L. R. A. 190, 40 S. E. 597, holding declaration by motorman while car on child that "I saw child; thought I could pass it," admissible as part of *res gestæ;* Pierce v. Van Dusen, 24 C. C. A. 293, 47 U. S. App. 339, 78 Fed. 707, holding conductor's statement as to cause of injury, made immediately afterwards, admissible as part of *res gestæ;* Hupfer v. National Distilling Co. 119 Wis. 422, 96 N. W. 809, holding declaration of employee whose duty it was to sell slops from distillery vat, that he knew hoops on vat were defective, admissible as part of *res gestæ* in action for personal injuries resulting from bursting of vat.

Presumption of negligence.

Cited in Fisher v. Ruch, 12 Pa. Super. Ct. 247, holding that implication of negligence arises from use of explosives in blasting; Matthews v. Pittsburg & L. E. R. Co. 18 Pa. Super. Ct. 17, holding absence of spark arrester prima facie evidence of negligence in action for loss by fire; Alexander v. Pennsylvania Water Co. 201 Pa. 257, 50 Atl. 991, denying that infliction of injury resulting

from defective condition of pump creates presumption of negligence; Snyder v. Wheeling Electrical Co. 43 W. Va. 668, 39 L. R. A. 502, 64 Am. St. Rep. 922, 28 S. E. 733, holding existence of broken electric wire in street prima facie evidence of negligence.

Cited in footnote to Esberg-Gunst Cigar Co. v. Portland, 43 L. R. A. 435, which holds bursting of water main three times under ordinary pressure, evidence of negligence.

Distinguished in Kepner v. Harrisburg Traction Co. 183 Pa. 31, 38 Atl. 416, holding that fright of horse, due to breaking of trolley wire, creates presumption of negligence; Zahniser v. Pennsylvania Torpedo Co. 190 Pa. 353, 42 Atl. 707, Affirming 7 Pa. Super. Ct. 623, holding that explosion of torpedo 200 feet above bottom of well raises no presumption of negligence in shooting.

29 L. R. A. 257, STATE v. JULOW, 129 Mo. 163, 50 Am. St. Rep. 443, 31 S. W. 781.

Freedom of contract and press.

Cited in Watson Seminary v. County Court, 149 Mo. 73, 45 L. R. A. 681, 50 S. W. 880, holding that statute giving seminary fines collected by county may be repealed by subsequent act; *Re* Flukes, 157 Mo. 131, 51 L. R. A. 178, 80 Am. St. Rep. 619, 57 S. W. 545, holding statute prohibiting creditors sending chose in action out of state for collection against wages of resident, void; State *ex rel.* Star Pub. Co. v. Associated Press, 159 Mo. 456, 51 L. R. A. 166, 81 Am. St. Rep. 368, 60 S. W. 91, holding courts without power to compel associated press to admit newspaper company as member; Marx & H. Jeans Clothing Co. v. Watson, 168 Mo. 146, 56 L. R. A. 957, 90 Am. St. Rep. 440, 67 S. W. 391, refusing to enjoin publication of circular letter urging merchants not to deal with boycotted firm; State *ex rel.* Zillmer v. Kreutzberg, 114 Wis. 534, 58 L. R. A. 751, footnote p. 748, 91 Am. St. Rep. 934, 90 N. W. 1098, declaring unconstitutional, statute prohibiting discharge of employee for membership in union; Gillespie v. People, 188 Ill. 183, 52 L. R. A. 286, footnote p. 283, 58 N. E. 1007, declaring unconstitutional, act making it criminal offense to discharge employee for membership in union; *Re* Morgan, 26 Colo. 449, 47 L. R. A. 66, 77 Am. St. Rep. 269, 58 Pac. 1071, holding unlawful, statute regulating hours of employment in mines and smelting works; State v. Haun, 61 Kan. 161, 47 L. R. A. 375, 59 Pac. 340, declaring void, statute requiring wages to be paid in cash, by check or draft; Shaver v. Pennsylvania Co. 71 Fed. 938, holding void, statute prohibiting railroad companies from requiring employees to agree to waive right to damages for personal injuries; Street v. Varney Electrical Supply Co. 160 Ind. 346, 61 L. R. A. 160, 98 Am. St. Rep. 325, 66 N. E. 895, holding statute requiring municipal corporations to pay more for common labor employed on public improvements than it is worth in market, void, as interfering with freedom of contract.

Cited in footnotes to Adams v. Brenan, 42 L. R. A. 718, which holds invalid, public contract providing that only union labor shall be employed; Curran v. Galen, 37 L. R. A. 802, which holds agreement that all members of employers' association shall be members of labor association illegal.

Special statutes and due process of law.

Cited in St. Louis v. Karr, 85 Mo. App. 614, holding ordinance allowing superintendent of workhouse to confine prisoner beyond maximum term prescribed by charter, void; State v. Walsh, 136 Mo. 405, 35 L. R. A. 233, 37 S. W. 1112,

holding statute prohibiting pool selling except within limits of race course void as special law; State v. Thomas, 138 Mo. 102, 39 S. W. 481, holding act prohibiting betting on contests outside of state, exempting, by implication, contests within state, void; State v. Buchardt, 144 Mo. 84, 46 S. W. 150, holding it unlawful to inflict different species of punishment in different parts of state for same offense; State *ex rel.* Wyatt v. Ashbrook, 154 Mo. 394, 48 L. R. A. 271, 77 Am. St. Rep. 765, 55 S. W. 627, declaring unconstitutional, act fixing tax for each class of goods sold by merchants employing more than fifteen persons; Hunt v. Searcy, 167 Mo. 179, 67 S. W. 206, holding judgment of insanity, without notice to person adjudged insane, void; Henderson v. Koenig, 168 Mo. 374, 57 L. R. A. 663, 68 S. W. 72, holding act allowing fees to judges in certain districts and giving salaries to those in others void; Schmalz v. Wooley, 56 N. J. Eq. 655. 39 Atl. 539, holding void, statute protecting trade label of hat makers' union; Owen v. Baer, 154 Mo. 470, 55 S. W. 644 (dissenting opinion), majority holding act allowing certain cities to issue special tax bills in payment of sewers, when two thirds of voters consent, void.

Distinguished in State v. Gregory, 170 Mo. 605, 71 S. W. 170, upholding statute providing that contractors purchasing materials on credit, representing that they will be used in certain building, and who shall, without authority, use them in another building with intent to defraud material man, shall be guilty of misdemeanor.

Validity of beer inspection act.

Cited in State *ex rel.* Anheuser-Busch Brewing Asso. v. Eby, 170 Mo. 525, 71 S. W. 52, holding act requiring fee to be paid to state by manufacturers for inspection of beer, void, as it amounts to a tax.

Priority of liens.

Cited in Vilas v. McDonough Mfg. Co. 91 Wis. 618, 30 L. R. A. 782, 51 Am. St. Rep. 925, 65 N. W. 488 (dissenting opinion), majority holding mechanic's lien for machinery placed in unfinished mill superior to prior mortgage.

29 L. R. A. 260, STATE v. CROOK, 115 N. C. 760, 20 S. E. 513.

Suspension and satisfaction of sentence.

Cited in State v. Griffis, 117 N. C. 710, 23 S. E. 164, holding that suspension of sentence upon payment of costs, by justice of peace without defendant's consent, entitles him to appeal for trial *de novo;* State v. Whitt, 117 N. C. 807, 23 S. E. 452, holding that court may enforce judgment for failure to pay costs after suspension at preceding term; Neal v. State, 104 Ga. 513, 42 L. R. A. 192, footnote p. 190, 69 Am. St. Rep. 175, 30 S. E. 858, holding void, attempt to suspend execution of sentence after pronouncing it; People *ex rel.* Boenert v. Barrett, 202 Ill. 296, 63 L. R. A. 85, footnote p. 82, 95 Am. St. Rep. 230, 67 N. E. 23, which denies court's power to indefinitely suspend sentence after conviction; Miller v. Evans, 115 Iowa, 103, 56 L. R. A. 102, footnote p. 101, 91 Am. St. Rep. 143, 88 N. W. 194, which denies defendant's right to relief for failure to execute mittimus under judgment sentencing to imprisonment on failure to pay fine, until lapse of time of imprisonment.

Cited in footnote to Weber v. State, 41 L. R. A. 472, which sustains power of court to suspend sentence and set aside suspension at any time during term.

Indeterminate sentence.

Cited in footnote to Miller v. State, 40 L. R. A. 109, which upholds statute for indeterminate sentence of criminals.

Imprisonment for debt.

Cited in note (34 L. R. A. 656) on constitutionality of imprisonment for debt.

29 L. R. A. 262, HOOPER v. CENTRAL TRUST CO. 81 Md. 559, 32 Atl. 505.

Cross-bill in equity.

Cited in Chappell v. Chappell, 86 Md. 545, 39 Atl. 984, holding cross-bill in equity not new suit, but defense.

Receiver's debts as prior lien.

Cited in Diamond Match Co. v. Taylor, 83 Md. 406, 34 Atl. 1015, holding vendors' claims for goods sold to receiver continuing business of insolvent corporation, prior to claims of creditors; Hanna v. State Trust Co. 30 L. R. A. 204, 16 C. C. A. 590, 36 U. S. App. 61, 70 Fed. 6, holding that court cannot empower receiver at suit of second mortgagee, to borrow money to continue business on certificates made paramount liens; Baltimore Bldg. & L. Asso. v. Alderson, 32 C. C. A. 548, 61 U. S. App. 636, 90 Fed. 148, denying court's power to make receiver's certificates for wages prior to creditor's liens; United States Invest. Corp. v. Portland Hospital, 40 Or. 534, 56 L. R. A. 630, 67 Pac. 194, holding that receiver cannot, without consent of lienors, make debts incurred by continuing business take precedence over prior mortgage.

Priority of claim for wages.

Cited in footnote to Drennen & Co. v. Mercantile Trust & D. Co. 39 L. R. A. 623, which holds employee of manufacturing or mining company entitled to priority for wages earned within six months before receiver appointed.

Promoters right to compensation or profits.

Cited in Tompkins v. Sperry, Jones & Co. 96 Md. 582, 54 Atl. 254, holding that promoters who own most of stock of corporation not bound to account for profits.

Cited in footnote to Hayward v. Leeson, 49 L. R. A. 725, which denies right of corporate promoters to remuneration for services, unless voted to them, or full statement incorporated in prospectus.

Cancelation of corporate stock.

Cited in footnote to Yeiser v. United States Board & Paper Co. 52 L. R. A. 724, which sustains right of corporation to secure cancelation of stock paid for out of secret profits by subscribers from sale of property to corporation.

29 L. R. A. 273, MASON v. UNION MILLS PAPER MFG. CO. 81 Md. 446, 48 Am. St. Rep. 524, 32 Atl. 311.

Attachment by nonresident of assets of foreign corporation.

Cited in Hodgson v. Southern Bldg. & L. Asso. 91 Md. 447, 46 Atl. 971, and Linville v. Hadden, 88 Md. 598, 43 L. R. A. 224, 41 Atl. 1097, holding that nonresident creditors of foreign corporation in hands of receiver may attach property in this state.

Absence from state as affecting statute of limitations.

Cited in McConnell v. Spicker, 15 S. D. 101, 87 N. W. 574, holding that statute of limitations does not run against note executed outside of state by one who

afterwards removed to state during time elapsing after note was due and before maker moved into state; Van Schuyver v. Hartman, 1 Alaska, 435, holding that statute of limitations of territory begins to run from time of debtor's removal to such territory.

Cited in footnotes to Hogg v. Hartley, 54 L. R. A. 215, which holds personal judgment against one previously leaving state not excused, by absence, from statute of limitations; George v. Butler, 57 L. R. A. 396, which sustains right of grantee of mortgaged premises to plead limitations against foreclosure, though debt not barred as to mortgagor because of absence from state.

29 L. R. A. 278, BIBBINS v. CLARK, 90 Iowa, 230, 57 N. W. 884, 59 N. W. 290.

Priority of claims for taxes.

Followed in Bibbins v. Polk County, 100 Iowa, 495, 69 N. W. 1007, holding personal property tax inferior to prior mortgage.

Cited in Smith v. Skow, 97 Iowa, 641, 66 N. W. 893, holding mortgage lien superior to liquor tax; *Re* Ott, 95 Fed. 279, holding liquor license tax not superior to claims of creditors of bankrupt; Des Moines Brick Mfg. Co. v. Smith, 108 Iowa, 309, 79 N. W. 77, holding street-curbing certificates superior to lien for street paving; Minnesota v. Central Trust Co. 36 C. C. A. 217, 94 Fed. 247, holding lien of taxes on personal property, assessed after receipt of tax books, superior to prior or subsequent private lien; Lobban v. State, 9 Wyo. 380, 64 Pac. 82, and Gifford v. Callaway, 8 Colo. App. 366, 46 Pac. 626, holding personal property taxes not superior to prior real estate mortgage; Harrington v. Valley Sav. Bank, 119 Iowa, 314, 93 N. W. 347, holding that purchaser of land sold for general taxes takes title superior to lien of special assessment; Larson v. Hamilton County, 123 Iowa, 486, 99 N. W. 133, holding tax lien not defeated by sale of stock of goods in bulk after assessment and before levy.

Cited in notes (29 L. R. A. 249) on priority of state or United States in payment from assets of debtor; (35 L. R. A. 373, 377) on superiority of lien of local assessment over prior lien.

Distinguished in California Loan & T. Co. v. Weis, 118 Cal. 494, 50 Pac. 697, holding title of purchaser under sale for personal property tax paramount to lien of prior mortgage.

Subrogation to claim for taxes.

Cited in footnotes to Mercantile Trust Co. v. Hart, 35 L. R. A. 352, which denies right of county treasurer paying cash for taxes, for which checks are received, to be subrogated to rights of state or city in the taxes paid; Allen v. Perrine, 41 L. R. A. 351, which denies sheriff's claim of subrogation to lien of tax which he accounted for, but failed to collect, as against prior mortgagee; Walters v. Charleston Mills, 48 L. R. A. 503, which holds purchaser on foreclosure voluntarily paying claim for taxes before sale affirmed, subrogated to claim for valid part of taxes.

Annotation in 29 L. R. A. 278, referred to particularly in Sperry v. Butler, 75 Conn. 374, 53 Atl. 899, holding that, in absence of statute, private persons should not be subrogated, by judicial intervention, to rights of municipality in foreclosure of tax lien.

Objections raised for first time on appeal.

Cited in Des Moines Sav. Bank v. Morgan Jewelry Co. 123 Iowa, 435, 99 N. W.

121, holding that objection as to form of proceedings cannot be raised on appeal for first time.

Distinguished in Smith v. McQuiston, 108 Iowa, 367, 79 N. W. 130, holding that objection to failure to present to board claim for overpaid taxes cannot be raised on appeal for first time.

Demurrer to suit in equity instead of at law.

Cited in McCormick Harvesting Mach. Co. v. Markert, 107 Iowa, 342, 78 N. W. 33, overruling demurrer that suit should have been brought at law instead of in equity.

Contents of tax certificate.

Cited in Union Cent. L. Ins. Co. v. Chapin, 113 Iowa, 416, 85 N. W. 791, holding delinquent tax certificate, failing to show treasurer's authority to issue, defective.

Recovery of taxes illegally collected.

Cited in Carton v. Uinta County, 10 Wyo. 438, 69 Pac. 1013, denying taxpayer's right to recover taxes alleged to be illegally collected, where county has received no more than it was equitably entitled to.

29 L. R. A. 287, MONTGOMERY v. LANSING CITY ELECTRIC R. CO. 103 Mich. 46, 61 N. W. 543.

Liability for injury by street car or locomotive.

Cited in McClellan v. Ft. Wayne & B. I. R. Co. 105 Mich. 103, 62 N. W. 1025, affirming recovery for motorman's negligence in not stopping car upon seeing fright of horse; Bedell v. Detroit, Y. & A. R. Co. 131 Mich. 670, 92 N. W. 349, sustaining right to recover for motorman's negligence in failing to stop car upon seeing bicyclist dismount on tracks, apparently without hearing signals; Buckley v. Flint & P. M. R. Co. 119 Mich. 587, 78 N. W. 655, holding evidence of engineer and fireman that they ought to have seen plaintiff, if upon track, but did not, not proof of gross negligence; Lyons v. Bay Cities Consol. R. Co. 115 Mich. 117, 73 N. W. 139 (dissenting opinion), majority holding act of fellow workmen in trying to push decedent from track with broom insufficient to apprise motorman of former's deafness, so as to require him to stop car to avoid collision.

Cited in footnote to Everett v. Los Angeles Consol. Electric R. Co. 34 L. R. A. 350, which sustains motorman's right to assume that bicyclist in front of car will get out of danger.

Contributory negligence on street car track.

Cited in Manor v. Bay Cities Consol. R. Co. 118 Mich. 6, 76 N. W. 139, holding it not contributory negligence to drive close to car tracks when road narrow; Ryan v. La Crosse City R. Co. 108 Wis. 136, 83 N. W. 770, holding it contributory negligence for eight-year-old boy to cross car tracks without looking for approaching cars; Graff v. Detroit Citizens' Street R. Co. 109 Mich. 86, 67 N. W. 815, denying recovery to one injured while attempting to cross electric railway in front of rapidly moving car; Tunison v. Weadock, 130 Mich. 159, 89 N. W. 703 (dissenting opinion), majority holding it question for jury whether one is guilty of contributory negligence in driving close to street car tracks without taking notice whether there is sufficient room for car to pass.

Distinguished in Fritz v. Detroit Citizens' Street R. Co. 105 Mich. 54, 62 N. W. 1007, holding it contributory negligence to turn suddenly upon street car tracks

in middle of block, without looking back; Laufer v. Bridgeport Traction Co. 68 Conn. 491, 37 L. R. A. 539, 37 Atl. 379, holding one driving on car tracks on left side of bridge not guilty of negligence in crossing before approaching car, when left space too narrow.

Proximate cause of injury.

Cited in footnotes to Rider v. Syracuse Rapid Transit R. Co. 58 L. R. A. 125, which holds proximate cause to be that which, in natural sequence, unbroken by new cause, produced event; Missouri P. R. Co. v. Columbia, 58 L. R. A. 399, which holds placing of heavy doors on platform, which are blown on track by severe gale, not proximate cause of derailment of engine.

Proof of special injury without specific allegation.

Followed in Beath v. Rapid R. Co. 119 Mich. 518, 78 N. W. 537, holding that allegation of injury to hip renders evidence of resulting disease to sciatic nerve admissible; Snyder v. Albion, 113 Mich. 280, 71 N. W. 475, holding evidence of result of injuries admissible under declaration for personal injuries.

Cited in Strudgeon v. Sand Beach, 107 Mich. 503, 65 N. W. 616, holding that averment that plaintiff has become confirmed invalid allows recovery for loss of ability to follow vocation; McKormick v. West Bay City, 110 Mich. 268, 68 N. W. 148, holding proof of pain in head within allegation of injury to back and spine; Fye v. Chapin, 121 Mich. 681, 80 N. W. 797, holding evidence of resulting epilepsy admissible under averment of permanent injury; Samuels v. California Street Cable R. Co. 124 Cal. 296, 56 Pac. 1115, holding that uterine trouble may be shown under allegation of permanent bodily injury; Croco v. Oregon Short Line R. Co. 18 Utah, 319, 44 L. R. A. 288, 54 Pac. 985, denying that plaintiff is required to plead all physical injuries sustained or aggravated by company's negligence; Denver & R. G. R. Co. v. Roller, 49 L. R. A. 90, 41 C. C. A. 42, 100 Fed. 758, holding damages for aggravation of other injuries, due to collision, recoverable without special allegation.

29 L. R. A. 292, IRVIN v. IRVIN, 169 Pa. 529, 32 Atl. 445.

Effect of illegal consideration on contract.

Cited in Rodenbaugh v. Rodenbaugh, 17 Pa. Super. Ct. 621, Affirming 31 Pittsb. L. J. N. S. 286, 7 Northampton Co. Rep. 391, denying that wife's agreement to withhold evidence in divorce suit will defeat action for money due under separation contract; Barnhart v. Goldstein, 27 Ind. App. 104, 59 N. E. 1067, denying vendor's right to recover on note given for slot machine sold for gambling purposes.

Parol evidence to vary writing.

Cited in Harness v. Eastern Oil Co. 49 W. Va. 248, 38 S. E. 662, holding oral agreement not to assign lease inadmissible to vary terms of instrument; Providence Washington Ins. Co. v. Board of Education, 49 W. Va. 377, 38 S. E. 679, holding verbal agreement waiving right to rebuild or repair after fire inadmissible to contradict express terms of policy.

29 L. R. A. 297, DONOVAN v. HARTFORD STREET R. CO. 65 Conn. 201, 32 Atl. 350.

When one becomes a passenger.

Cited in Exton v. Central R. Co. 62 N. J. L. 13, 56 L. R. A. 511, 42 Atl. 486,

holding one going to baggage room after purchase of ticket entitled to protection, as passenger, from injury by cabmen; Keator v. Scranton Traction Co. 191 Pa. 108, 71 Am. St. Rep. 758, 43 Atl. 86, holding one given transfer, a passenger while walking block to second car.

Recovery as affected by proof of facts not pleaded.

Cited in Whiting v. Koepke, 71 Conn. 80, 40 Atl. 1053, holding that failure to plead consent to accept materials defeats foreclosure of mechanic's lien; Stein v. Coleman, 73 Conn. 530, 48 Atl. 206, denying right to recover where complaint contains no allegation that defendant threw water by artificial means upon adjoining land, and evidence shows water conducted there through spouts.

Negligence, question for jury.

Cited in Sprague v. New York & N. E. R. Co. 68 Conn. 354, 37 L. R. A. 641, 36 Atl. 791, holding it question for jury whether company's schedule adequate to prevent collision between irregular trains; Wood v. Danbury, 72 Conn. 73, 43 Atl. 554, holding decision of jury as to absence of contributory negligence, final.

Presumption of negligence.

Cited in footnote to Springer v. Ford, 52 L. R. A. 930, which sustains presumption of negligence from injury to passenger by unexplained breaking of elevator appliance.

29 L. R. A. 303, SAVANNAH v. MULLIGAN, 95 Ga. 323, 51 Am. St. Rep. 86, 22 S. E. 621.

Municipal power to abate nuisance or prevent public injury.

Cited in Schoen v. Atlanta, 97 Ga. 701, 33 L. R. A. 805, 25 S. E. 380, upholding city's power to require removal of carcass as nuisance *per se*.

Cited in footnotes to Chicago v. Union Stockyards & T. Co. 35 L. R. A. 281, which denies right of city to remove railroad tracks of stockyards company, though nuisance created by mode of use; Wallace v. Richmond, 36 L. R. A. 554, which denies power of city council to order destruction of all intoxicating liquor in city in anticipation of riot, and pledge city's faith to pay for same; Aitken v. Wells River, 41 L. R. A. 566, which denies liability of village for trustees' destruction of property to avert imminent public injury.

Cited in notes (38 L. R. A. 161) on municipal power over buildings and other structures as nuisances; (36 L. R. A. 595, 606) on power of municipal corporations to define, prevent, and abate nuisances.

Distinguished in Western & A. R. Co. v. Atlanta, 113 Ga. 549, 54 L. R. A. 301, 38 S. E. 996, enjoining city's removal of depot floor for failure to give notice to company to abate nuisance.

29 L. R. A. 305, SEBREE DEPOSIT BANK v. MORELAND, 96 Ky. 150, 28 S. W. 153.

29 L. R. A. 317, KERNOHAN v. MANSS, 53 Ohio St. 118, 41 N. E. 258.

Priority of payment.

Cited in Wohlgemuth v. Standard Drug Co. 14 Ohio C. C. 320, holding oral agreement as to order of payment of notes secured by mortgage not binding on assignees without notice; Lee v. Kellogg, 108 Mich. 537, 66 N. W. 380, holding

that purchaser of forged notes and mortgage acquires no rights as against prior assignee of genuine instruments, although unrecorded; Southern Commercial Sav. Bank v. Slattery, 166 Mo. 638, 66 S. W. 1066, denying that possession of mortgage and notes entitles holder to security as against pledgee of like notes previously negotiated.

Provisions in mortgage as affecting note.

Cited in note (35 L. R. A. 536) on negotiability of note secured by mortgage as affected by provisions in mortgage.

29 L. R. A. 321, SCHROEDER v. FLINT & P. M. R. CO. 103 Mich. 213, 50 Am. St. Rep. 354, 61 N. W. 663.

Recovery for negligence of fellow servant.

Cited in Petaja v. Aurora Iron Min. Co. 106 Mich. 468, 32 L. R. A. 438, 58 Am. St. Rep. 505, 64 N. W. 335, denying trammer's right to recover for shift boss's failure to notify timberman to timber open space in mine; Findlay v. Russel Wheel & Foundry Co. 108 Mich. 290, 66 N. W. 50, holding foreman who works with men, fellow servant of one injured by former's working drum improperly; Thomas v. Ann Arbor R. Co. 114 Mich. 63, 72 N. W. 40, holding that foreman represents master in selection of rope in distant warehouse; Andre v. Winslow Bros. Elevator Co. 117 Mich. 563, 76 N. W. 86, denying right to recover for foreman's negligence in failing to stop elevator; Frazee v. Stott, 120 Mich. 628, 79 N. W. 896, denying master's liability for employees' misplacement of guide board to rollers; Anderson v. Michigan C. R. Co. 107 Mich. 605, 65 N. W. 585 (dissenting opinion), majority holding company liable to brakeman for section men's failure to repair track; Mikolojczak v. North American Chemical Co. 129 Mich. 82, 88 N. W. 75, denying right to recover for injuries to servant, resulting from failure of foreman to give warning of fall of salt in mine, where latter had authority to discharge and hire, but was subject to superintendent's orders; Wellihan v. National Wheel Co. 128 Mich. 10, 87 N. W. 75, holding operator of spoke lathe entitled to recover for injuries resulting from foreman's starting machine while former was oiling it, if latter started it to see whether it worked properly rather than to determine whether it was safe.

Who are fellow servants.

Cited in Morch v. Toledo, S. & M. R. Co. 113 Mich. 157, 71 N. W. 464, holding section foreman sent in place of road master to distribute ties, fellow servant of one throwing ties back from track; Lepan v. Hall, 128 Mich. 526, 87 N. W. 619, holding foreman of sawmill doing considerable manual labor, though having power to discharge and hire, fellow servant of sawyer.

Master's duty to provide safe place.

Cited in Balhoff v. Michigan C. R. Co. 106 Mich. 613, 65 N. W. 592, affirming brakeman's recovery for injuries from derailment of car, caused by formation of ice in depression in track.

Vice principalship with reference to rank of servant.

Cited in note (51 L. R. A. 520, 521, 524, 526, 563, 613) on vice principalship considered with reference to superior rank of negligent servant.

— With reference to act causing injury.

Cited in note (54 L. R. A. 39, 42) on vice principalship as determined with reference to character of act which caused injury.

29 L. R. A. 327, SAN BERNARDINO v. SOUTHERN P. CO. 107 Cal. 524, 40 Pac. 796.

Corporate taxation.

Cited in notes (57 L. R. A. 92) on taxation of corporate franchise in United States; (60 L. R. A. 685) on corporate taxation and the commerce clause.

29 L. R. A. 330, TODD v. ELECTION COMRS. 104 Mich. 474, 62 N. W. 564, 64 N. W. 496.

Use of candidate's name on ballot.

Cited in Stephenson v. Election Comrs. 118 Mich. 417, 42 L. R. A. 222, 74 Am. St. Rep. 402, 76 N. W. 914, holding tickets nominated by rival factions entitled to place on official ballot in adjoining columns; State *ex rel.* Runge v. Anderson, 100 Wis. 533, 42 L. R. A. 243, footnote p. 239, 76 N. W. 482, and State *ex rel.* Bateman v. Bode, 55 Ohio St. 233, 34 L. R. A. 500, 60 Am. St. Rep. 696, 45 N. E. 195, sustaining statute prohibiting use of candidate's name on ballot more than once; Murphy v. Curry, 137 Cal. 481, 59 L. R. A. 98, footnote p. 97, 70 Pac. 461, which holds void, statute requiring nominee of more than one party to choose on which ticket name shall be printed.

Cited in footnote to State *ex rel.* Blydenburgh v. Burdick, 34 L. R. A. 845, which denies right to have name of candidate for elector of president appear on ballot more than once.

Validity of statute requiring official stamp on ballots.

Cited in Slaymaker v. Phillips, 5 Wyo. 498, 47 L. R. A. 858, 42 Pac. 1049 (dissenting opinion), majority sustaining requirement of indorsement of initials of judge of election on ballots.

Retroactive statute.

Cited in *Re* Beecher, 113 Mich. 671, 72 N. W. 11, denying that statute as to purchase of premises leased by decedent, to settle estate, affects legatee's vested rights.

29 L. R. A. 337, OHIO GAS FUEL CO. v. ANDREWS, 50 Ohio St. 695, 35 N. E. 1059.

Liability for escape or explosion of dangerous agencies.

Cited in Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co. 60 Ohio St. 567, 45 L. R. A. 659, 71 Am. St. Rep. 740, 54 N. E. 528, affirming liability for damage caused by explosion of nitroglycerin, regardless of negligence; Langabaugh v. Anderson, 68 Ohio St. 143, 62 L. R. A. 952, 67 N. E. 286, holding lessor of oil land not liable for damages caused by oil escaping from tanks, thence down hill into creek, where it came into contact with fire which followed back trail of oil and burned building.

Cited in footnotes to Ryan v. Los Angeles Ice & Cold Storage Co. 32 L. R. A. 524, which holds negligence shown by explosion of generator of refrigerating machine while inexperienced employee is attempting to stop leak; Hatcher v. Dunn, 36 L. R. A. 689, which holds inspector of oil not absolutely liable for explosion due to incorrectly branding it; Purdy v. Westinghouse Electric & Mfg. Co. 51 L. R. A. 881, which holds that use of barrels formerly containing explosive substance, for shipping iron, does not render employer liable for injury to employee by explosion; Tyler v. Moody, 54 L. R. A. 417, which denies necessity

of alleging knowledge of falsity of warranty of safety of acetylene gas machine in action for breach; Vieth v. Hope Salt & Coal Co. 57 L. R. A. 410, which denies liability for injury to neighbor by explosion of steam boiler operated on one's own premises with care and skill.

Cited in note (29 L. R. A. 718) on negligence in manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives.

— Gas.

Cited in Consumers' Gas Trust Co. v. Perrego, 144 Ind. 359, 32 L. R. A. 149, footnote p. 146, 43 N. E. 306, affirming liability for explosion caused by escape of gas from main, reaching building by penetrating soil; Anderson v. Standard Gaslight Co. 17 Misc. 627, 40 N. Y. Supp. 671, holding company liable for failure to discover leak in meter, gas from which became ignited causing fire; German-American Ins. Co. v. Standard Gaslight Co. 34 Misc. 595, 70 N. Y. Supp. 384, holding company liable for fire resulting from servant's applying lighted match to locate leak in gas pipe.

Cited in footnotes to Evans v. Keystone Gas Co. 30 L. R. A. 651, which holds company liable for injury to shade trees by negligent escape of natural gas from street main; Schmeer v. Gaslight Co. 30 L. R. A. 653, which holds gas company, before turning on gas in apartment house, must see that pipes are safe; Consolidated Gas Co. v. Crocker, 31 L. R. A. 785, which holds failure of gas company to exercise care to discover and remedy leak, negligence; Pine Bluff Water & Light Co. v. Schneider, 33 L. R. A. 366, which requires gas company with notice of break in pipes, to take precautions against injury; Richmond Gas Co. v. Baker, 36 L. R. A. 683, which holds gas company liable for escape of gas from cracked elbow in pipe, repair of which has been unsuccessfully attempted; Dow v. Winnipesaukee Gas & Electric Co. 42 L. R. A. 569, which holds proprietor of gas plant liable for damage to greenhouse plants by escaping gas; Barrickman v. Marion Oil Co. 44 L. R. A. 92, which holds gas company liable for furnishing natural gas at so great a pressure as to set building on fire; McKenna v. Bridgewater Gas Co. 47 L. R. A. 790, which denies gas company's liability for explosion due to blundering act of employee of other company.

Cited in note (29 L. R. A. 342) on liability for negligence in escape and explosion of gas.

Municipal power over nuisances.

Cited in note (38 L. R. A. 657) on municipal power over nuisances relating to trade or business.

29 L. R. A. 342, LEBANON LIGHT, HEAT & POWER CO. v. LEAP, 139 Ind. 443, 39 N. E. 57.

Liability for escape of gas and other explosives.

Cited in Indiana Natural & Illuminating Gas Co. v. McMath, 26 Ind. App. 156, 57 N. E. 593, affirming right to recover for injuries due to explosion of gas escaping from pipes laid on surface of highway; Consumers' Gas Trust Co. v. Perrego, 144 Ind. 359, 32 L. R. A. 149, 43 N. E. 306, affirming right to recover for explosion caused by escape of gas from main 80 feet distant; Lebanon Light, Heat & Power Co. v. Griffin, 139 Ind. 477, 39 N. E. 62, holding gas company negligent in leaving gas pipe loose in street, poorly jointed and subject to high pressure of gas, which was escaping and burning several feet high.

Cited in footnote to Purdy v. Westinghouse Electric & Mfg. Co. 51 L. R. A. 881, which holds that use of barrels formerly containing explosive substance, for shipping iron, does not render employer liable for injury to employee by explosion.

Cited in note (29 L. R. A. 718) on negligence in manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives.

Municipal power over nuisances.

Cited in note (38 L. R. A. 657) on municipal power over nuisances relating to trade or business.

29 L. R. A. 355, McGAHAN v. INDIANAPOLIS NATURAL GAS CO. 140 Ind. 335, 49 Am. St. Rep. 199, 37 N. E. 601.

Negligence as to use of match to locate gas leak.

Cited in People's Gaslight & Coke Co. v. Amphlett, 93 Ill. App. 202, holding it not contributory negligence *per se* to use lighted match in locating source of escaping gas.

Liability for injury from explosives.

Cited in Consumers' Gas Trust Co. v. Perrego, 144 Ind. 359, 32 L. R. A. 149, 43 N. E. 306, affirming liability for explosion caused by escape of gas from main 80 feet away.

Cited in footnote to Purdy v. Westinghouse Electric & Mfg. Co. 51 L. R. A. 881, which holds that use of barrels formerly containing explosive substance, for shipping iron, does not render employer liable for injury to employee by explosion.

Cited in note (29 L. R. A. 718) on negligence in manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives.

Proximate cause of injury.

Cited in Lake Shore & M. S. R. Co. v. Wilson, 11 Ind. App. 504, 38 N. E. 343, holding open switch proximate cause of fireman's death by collision with cars on side track; Alexandria Min. & Exploring Co. v. Irish, 16 Ind. App. 540, 44 N. E. 680, holding death caused by explosion of gas, proximate result of defective pipes; Enochs v. Pittsburgh, C. C. & St. L. R. Co. 145 Ind. 638, 44 N. E. 658, holding obstruction of street by train not proximate cause of injury to one tripping over stone in passing around train; New York, C. & St. L. R. Co. v. Perriguey, 138 Ind. 428, 37 N. E. 976, holding failure to obey orders and take siding, and not defective condition of head light, proximate cause of injury resulting from collision which might have been avoided if head light not defective.

Sufficiency of notice.

Cited in note (59 L. R. A. 274) on sufficiency of general allegations of negligence.

Municipal power over nuisances.

Cited in note (38 L. R. A. 657) on municipal power over nuisances relating to trade or business.

29 L. R. A. 360, KOUNTZE v. KENNEDY, 147 N. Y. 124, 2 N. Y. Anno. Cas. 327, 69 N. Y. S. R. 388, 49 Am. St. Rep. 651, 41 N. E. 414.

Fraudulent representations.

Cited in Dayton v. American Steel Barge Co. 76 App. Div. 462, 79 N. Y. Supp. 1130, Affirming 36 Misc. 230, 73 N. Y. Supp. 316, holding agent's agreement to

reduce commissions, prompted by innocent misstatement of vendee's agent as to sale, void; Parfitt v. Ferguson, 3 App. Div. 186, 38 N. Y. Supp. 466, holding burden of showing is fraud upon him alleging it; L. D. Garrett Co. v. Astor, 67 App. Div. 597, 73 N. Y. Supp. 966, holding complaint failing to allege knowledge of false statements insufficient; Walsh v. Hyatt, 74 App. Div. 23, 77 N. Y. Supp. 8, holding evidence of false representations as to power of dredge properly rejected in absence of allegation of fraud; Lovelace v. Suter, 93 Mo. App. 438, 67 S. W. 737, denying bank's liability for cashier's deceit as to safety of investment, made under belief of truth; Boddy v. Henry, 113 Iowa, 468, 53 L. R. A. 772, footnote p. 769, 85 N. W. 771, denying that landowner's making of false representations as to quantity, under belief of their truth, constitutes deceit; Nolan v. Harned, 13 App. Div. 161, 43 N. Y. Supp. 329 (dissenting opinion), majority holding mistake, not amounting to fraudulent representation, as to encroachment of house on lot sold, sufficient to avoid contract of sale.

Cited in footnotes to James v. Crosthwait, 36 L. R. A. 631, which holds banker not necessarily relieved from liability for loss incurred on credit falsely entered on customer's pass book, though originally intended to mislead; Williams Transp. Line v. Darius Cole Transp. Co. 56 L. R. A. 939, which denies right to rely on false representations as to speed of steamboat, if warranty as to speed inserted in contract.

Cited in note (35 L. R. A. 432, 435) on expression of opinion as fraud.

— Intentional or actual fraud.

Cited in Forster v. Wilshusen, 14 Misc. 521, 35 N. Y. Supp. 1083, rescinding contract for purchase of real property for false statements of amount of rentals; Enright v. Fellheimer, 25 Misc. 665, 56 N. Y. Supp. 366, holding proof of actual fraud as to solvency necessary to support replevin action; Second Nat. Bank v. Curtiss, 2 App. Div. 512, 37 N. Y. Supp. 1028, affirming liability for attesting forged signature to assignment of stock certificate; Mendenhall v. Stewart, 18 Ind. App. 267, 47 N. E. 943, affirming right to recover for false attestation of signature to letter of credit; Talmadge v. Sanitary Security Co. 31 App. Div. 501, 52 N. Y. Supp. 139, holding that equity will rescind subscription induced by false representation as to amount of stock already subscribed; Taylor v. Commercial Bank, 68 App. Div. 462, 73 N. Y. Supp. 924, holding representations as to solvency of debtor of bank to induce credit, made by cashier without knowledge of facts, to enable banks to collect debt, actionable; Arnold v. Richardson, 74 App. Div. 584, 77 N. Y. Supp. 763, holding that vendor relying upon treasurer's statement made to financial agency, which omitted liabilities on accommodation notes, may rescind sale; Hadcock v. Osmer, 153 N. Y. 608, 47 N. E. 923, Affirming 4 App. Div. 437, 38 N. Y. Supp. 618, holding that false representation of solvency, made without knowledge of financial condition, constitutes actual fraud; Summers v. Metropolitan L. Ins. Co. 90 Mo. App. 700, holding proof of intentional misrepresentation in application for insurance necessary to defeat action; Hindman v. First Nat. Bank, 57 L. R. A. 119, 50 C. C. A. 636, 112 Fed. 944, holding bank falsely certifying to deposit of capital stock to induce issue of license to insurance company liable to purchasers of stock relying thereon; Worthington v. Herrmann, 89 App. Div. 628, 85 N. Y. Supp. 1151, holding actual fraud necessary to support action for fraudulent representations; Spier v. Hyde, 92 App. Div. 482, 87 N. Y. Supp. 285, holding contract avoided by misrepresentations as to terms of existing contract for disposal of corporate stock, and as to number of

shares that would be put in pool; Warfield v. Clark, 118 Iowa, 75, 91 N. W. 833, holding that negligent misstatement as to financial condition of insurance company, required to be filed, will not support action for intentional fraud by one purchasing stock; Benedict v. Guardian Trust Co. 91 App. Div. 107, 86 N. Y. Supp. 370, upholding right to recover for fraudulent statements in prospectus as to earnings of mining company.

Cited in footnote to James v. Crosthwait, 36 L. R. A. 631, which holds bank liable for loss incurred in reliance on false entry of credit on bank book, induced by conduct authorizing belief that credit is genuine.

29 L. R. A. 365, COM. v. FORREST, 170 Pa. 40, 32 Atl. 652.

Bicycle law.

Cited in Ordway v. Cornelius, 23 Pa. Co. Ct. 282, holding ordinance prohibiting use of bicycles on certain streets, except by those giving bond, unreasonable; Richardson v. Danvers, 176 Mass. 414, 50 L. R. A. 127, 79 Am. St. Rep. 320, 57 N. E. 688, holding bicycle not a carriage; State *ex rel.* Bettis v. Missouri P. R. Co. 71 Mo. App. 391, holding that carrier may refuse to carry bicycles as ordinary baggage.

Cited in footnotes to Myers v. Hinds, 33 L. R. A. 356, which holds bicyclist liable for running into pedestrian in narrow path; Davis v. Petrinovich, 36 L. R. A. 615, which holds license tax on bicycles used for pleasure unauthorized; Moore v. District of Columbia, 41 L. R. A. 208, which holds reasonableness of ordinance prohibiting riding bicycle with handle bars more than 4 inches below saddle, a question of fact; Wheeler v. Boone, 44 L. R. A. 821, which holds riding tricycle on sidewalk not within ordinance prohibiting bicycles.

Cited in note (47 L. R. A. 296, 297) on bicycle law.

29 L. R. A. 367, NEW YORK, N. H. & H. R. CO. v. BRIDGEPORT TRACTION CO. 65 Conn. 410, 32 Atl. 953.

Right to intersect tracks or right of way.

Cited in footnote to Chester Traction Co. v. Philadelphia, W. & B. R. Co. 44 L. R. A. 269, which holds imperious necessity for additional street railway crossing over railroad not shown by increase of traffic, preventing quick movement of cars.

— Right to compensation.

Approved in Chicago, B. & Q. R. Co. v. Steel, 47 Neb. 743, 66 N. W. 830, holding railroad company having permanent easement in street not entitled to compensation as condition to crossing of tracks by trolley company.

Cited in New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co. 70 Conn. 616, 40 Atl. 607, holding that trolley company must compensate railroad company as condition of crossing parcel of land acquired by latter by deed and condemnation; Consolidated Traction Co. v. South Orange & M. Traction Co. 56 N. J. Eq. 584, 40 Atl. 15, denying street car company's right to compensation for construction of crossing over tracks by another company.

Cited in footnote to Southern R. Co. v. Atlanta R. & Power Co. 51 L. R. A. 125, which sustains right of street railway to cross steam railroad tracks without compensation.

Cited in note (29 L. R. A. 485) on right of railroad company to compensation for laying street railway across railroad track on street crossing.

Injunction against construction of street railway.

Cited in footnote to General Electric Co. v. Chicago, I. & L. R. Co. 58 L. R. A. 231, which sustains right of railroad company to injunction against construction, under invalid ordinance, of street railway which would specially injure former company's access to its freight house.

Legislative control over city streets.

Cited in Central R. & Electric Co.'s Appeal, 67 Conn. 209, 35 Atl. 32, holding that legislature may give street railway company right to use street without consent of municipality.

General act as affecting special.

Cited in Shea v. New York, N. H. & H. R. Co. 66 Conn. 271, 33 Atl. 918, denying that passage of general act relating to appeals affects provision of city charter as to same subject.

29 L. R. A. 376, WOOD v. AUBURN, 87 Me. 287, 32 Atl. 906.

Compulsory service by public service corporations.

Cited in footnotes to Indiana Natural & Illuminating Gas Co. v. State, 57 L. R. A. 761, which denies right of natural gas company to discriminate against single consumer by enforcing meter rate, instead of flat rate, against him; Gardner v. Providence Teleph. Co. 55 L. R. A. 113, which sustains right to deprive customer of telephone service on refusal to discontinue use of extension instruments not furnished by it.

Distinguished in Rushville Co-op. Teleph. Co. v. Irvin, 27 Ind. App. 67, 59 N. E. 327, sustaining company's right to discontinue telephone service for nonpayment of dues; Mackin v. Portland Gas Co. 38 Or. 127, 49 L. R. A. 599, 61 Pac. 134, upholding rule against supply of gas at one set of premises till payment for supply at another.

— By water company.

Cited in Kelsey v. Fire & Water Comrs. 113 Mich. 221, 37 L. R. A. 678, footnote p. 675, 71 N. W. 589, denying owner's right to require supply of water to each tenant as separate consumer; McGregor v. Case, 80 Minn. 216, 83 N. W. 140, refusing to enjoin cutting off consumer's water supply for nonpayment of excessive rate; Crumley v. Watauga Water Co. 99 Tenn. 427, 41 S. W. 1058, holding that water company cannot refuse to supply consumer because of nonpayment of note taken for rates; Turner v. Revere Water Co. 171 Mass. 335, 40 L. R. A. 660, 68 Am. St. Rep. 432, 50 N. E. 634, holding rule of water company against turning on water until payment of bills of previous tenants, void; Jones v. Nashville, 109 Tenn. 567, 72 S. W. 985, sustaining ordinance forbidding city employees from providing water to consumers until past indebtedness is paid.

Cited in footnotes to American Waterworks Co. v. State, 30 L. R. A. 447, which sustains power to compel private water company to furnish water to patrons without discrimination; State *ex rel.* Milsted v. Butte City Water Co. 32 L. R. A. 697, which denies right of water company to refuse to supply water to tenant; Bienville Water-Supply Co. v. Mobile, 33 L. R. A. 59, which authorizes injunction against water company shutting off supply of water for public purposes; Ladd v. Boston, 40 L. R. A. 171, which upholds removal of water meter

though fixtures so arranged as to cost consumer, after removal, twenty times as much as others pay.

Establishment and regulation of municipal water supply.

Cited in note (61 L. R. A. 118) on establishment and regulation of municipal water supply.

29 L. R. A. 378, STATE *ex rel.* LITTLE v. UNIVERSITY OF KANSAS, 55 Kan. 389, 40 Pac. 656.

Powers and liabilities of public institutions.

Cited in footnotes to Washingtonian Home v. Chicago, 29 L. R. A. 798, which holds corporation composed of private individuals not restricted from conducting business for private benefit, private corporation within prohibition of donations by municipalities; Smith v. Cornelius, 30 L. R. A. 747, which holds lease for ninety-nine years by public corporation of state property to private person, *ultra vires;* Gross v. Kentucky Board of Managers, 43 L. R. A. 703, which sustains right to sue state board of managers of World's Fair Exposition without consent of state; Maia v. Eastern State Hospital, 47 L. R. A. 577, which denies liability of state hospital for injuries to inmate from negligence or misconduct of persons in charge; Moody v. State's Prison, 53 L. R. A. 855, which denies liability of state to prison guard for injuries by defective ladder; Trevett v. Prison Asso. 50 L. R. A. 564, which holds prison association, not controlled by state, liable for its torts; Lane v. Minnesota State Agri. Soc. 29 L. R. A. 708, which denies exemption from liability for negligence of state agricultural society as public corporation; Overholser v. National Home for Disabled Volunteer Soldiers, 62 L. R. A. 936, which holds national home for disabled soldiers a part of United States government not subject to action sounding in tort.

— Universities.

Cited in People *ex rel.* Jerome v. State University, 24 Colo. 179, 49 Pac. 286, denying regents' power to change location of department of state university; *Re* Royer, 123 Cal. 623, 44 L. R. A. 369, footnote p. 364, 56 Pac. 461, sustaining power of state university to take bequest.

Cited in footnote to Oklahoma Agri. & M. College v. Willis, 40 L. R. A. 677, which denies power to sue agricultural and mechanical college created by, and existing under, statute.

Legislative power over educational corporations.

Cited in footnotes to Sterling v. University of Michigan, 34 L. R. A. 150, which denies legislative power to designate where department of state university shall be located; Watson Seminary v. County Court, 45 L. R. A. 675, which holds charter provisions of educational corporation changeable at will of legislature.

Creation of de facto corporation.

Cited in Marion Bond Co. v. Mexican Coffee & Rubber Co. 160 Ind. 561, 65 N. E. 748, holding *de facto* corporation created by organization under particular statute, and including powers which such statute does not authorize.

Quo warranto against corporations.

Cited in note (63 L. R. A. 761, 764) on quo warranto against corporations for making illegal charges in course of authorized business.

29 L. R. A. 386, HOCKING VALLEY COAL CO. v. ROSSER, 53 Ohio St. 12, 53 Am. St. Rep. 622, 41 N. E. 263.

Special legislation.

Cited in Mykrantz v. Globe Bldg. & L. Asso. 19 Ohio C. C. 57, holding void, statute exempting building and loan associations from operation of usury laws; State *ex rel.* Schwartz v. Ferris, 53 Ohio St. 338, 30 L. R. A. 224, 41 N. E. 579, holding void, tax upon inheritances exceeding $20,000; Palmer v. Tingle, 55 Ohio St. 445, 45 N. E. 313, declaring unconstitutional, statute giving to subcontractors, laborers, and material men lien on owner's property; Williams v. Donough, 65 Ohio St. 506, 56 L. R. A. 769, 63 N. E. 84, declaring invalid, statute protecting insurance benefits from attachment; O'Connell v. Menominee Bay Shore Lumber Co. 113 Mich. 126, 71 N. W. 449, holding void, statute authorizing service of process in adjoining counties in certain cases; Johnson v. Goodyear Min. Co. 127 Cal. 15, 47 L. R. A. 343, 78 Am. St. Rep. 17, 59 Pac. 304, holding statute giving employees of corporation lien for wages, void; Mahoney v. Kinney, 5 Ohio N. P. 338, holding statute relating to chattel mortgages not void for want of uniformity, when it is not limited to any locality, but operates upon all alike.

Cited in note (60 L. R. A. 322) on constitutional equality in United States in relation to corporate taxation.

Distinguished in Snell v. Cincinnati Street R. Co. 60 Ohio St. 269, 54 N. E. 270, Reversing 16 Ohio C. C. 707, holding statute giving change of venue in suit by or against corporation in county where more than fifty stockholders reside, valid.

— Allowance for attorney's fee.

Cited in Permanent Sav. & L. Co. v. Sennt, 4 Ohio N. P. 347, denying right of purchaser at tax sale to recover attorney's fees for filing cross petition; Dell v. Marvin, 41 Fla. 227, 45 L. R. A. 202, footnote p. 201, 79 Am. St. Rep. 171, 26 So. 188, sustaining statute giving to successful plaintiff attorney's fees in suit to foreclose mechanic's lien, but not to defendant; Los Angeles Gold Mine Co. v. Campbell, 13 Colo. App. 7, 56 Pac. 246, and Davidson v. Jennings, 27 Colo. 195, 48 L. R. A. 343, 83 Am. St. Rep. 49, 60 Pac. 354, declaring unconstitutional, act giving attorney's fees in suit to foreclose mechanic's lien; Openshaw v. Halfin, 24 Utah, 430, 91 Am. St. Rep. 796, 68 Pac. 138, holding statute providing for attorney's fee in suit to compel mortgagee to execute release, void; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 116, 43 L. ed. 917, 19 Sup. Ct. Rep. 609, sustaining act giving attorney's fee in action against railroad company for damage by fire; Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 716, 55 L. R. A. 265, footnote p. 263, 89 Am. St. Rep. 393, 87 N. W. 714, sustaining requirement for payment of attorney's fee on successful appeal by land owner from award in eminent domain; Dodge v. Morrow, 14 Ind. App. 537, 41 N. E. 967, refusing to consider statute allowing attorney's fee, as involving constitutional question; Vogel v. Pekoc, 157 Ill. 347, 30 L. R. A. 494, footnote p. 491, 42 N. E. 386 (dissenting opinion), majority sustaining statute allowing attorney's fees in suits for wages.

Cited in footnotes to Cameron v. Chicago, M. & St. P. R. Co. 31 L. R. A. 553.

which holds valid, act allowing attorneys' fees in actions against railroad companies for taking land without making compensation; Turner v. Boger, 49 L. R. A. 590, which holds provision for attorneys' fees in trust deed void; Atkinson v. Woodmansee, 64 L. R. A. 325, which holds void, provision for recovery of attorney's fee by successful plaintiff in action to enforce laborer's or artisan's lien.

29 L. R. A. 390, STATE v. HAUG, 95 Iowa, 413, 64 N. W. 398.

Rights of fishery.

Cited in notes (39 L. R. A. 582) on governmental control over right of fishery; (60 L. R. A. 504) on right to fish.

29 L. R. A. 393, PEOPLE *ex rel.* HECKER-JONES-JEWELL MILL. CO. v. BARKER, 147 N. Y. 31, 69 N. Y. S. R. 337, 41 N. E. 435.

Taxation of nonresidents.

Cited in People *ex rel.* Barney v. Barker, 16 App. Div. 267, 44 N. Y. Supp. 718, requiring nonresident to show indebtedness to residents in excess of value of other than taxable property, to obtain statutory exemption; People *ex rel.* Yellow Pine Co. v. Barker, 23 App. Div. 526, 48 N. Y. Supp. 553, holding foreign corporations taxable upon credits and bills receivable for goods sold in state; *Re* King, 71 App. Div. 583, 76 N. Y. Supp. 220, holding firm having manufacturing plant in state, and sales department elsewhere, resulting in excess of indebtedness over assets in state, not subject to transfer tax.

Corporate taxation.

Cited in People *ex rel.* Hyde v. Miller, 90 App. Div. 600, 85 N. Y. Supp. 522, holding corporation not entitled to deduct liabilities and assets employed out of state for purpose of franchise tax assessment.

Cited in note (58 L. R. A. 577) on taxation of capital stock of corporations in United States.

Construction of court's decisions.

Cited in Irvine v. F. H. Palmer Mfg. Co. 3 App. Div. 388, 39 N. Y. Supp. 245, holding that language of decisions must be construed with reference to facts of each case.

29 L. R. A. 398, *Re* PRYOR, 55 Kan. 724, 49 Am. St. Rep. 280, 41 Pac. 958.

Regulation of rates, tolls, and prices.

Cited in Wabaska Electric Co. v. Wymore, 60 Neb. 202, 82 N. W. 626, holding city of second class without implied authority to regulate electric light rates.

Cited in footnotes to Louisville Gas Co. v. Dulaney, 36 L. R. A. 125, which denies right to charge meter rent to small consumers of gas in addition to maximum charge; Muncie Natural Gas Co. v. Muncie, 60 L. R. A. 822, which sustains city's power to stipulate as to maximum rates for gas.

Cited in note (33 L. R. A. 181) on legislative power to fix tolls, rates, or prices.

29 L. R. A. 401, BARBER ASPHALT PAVING CO. v. HARRISBURG, 12 C. C. A. 100, 28 U. S. App. 108, 64 Fed. 283.

Liability of city for failure to make assessment to pay contractor.

Cited in Barber Asphalt Paving Co. v. Denver, 19 C. C. A. 143, 36 U. S. App.

499, 72 Fed. 339, holding municipal corporation primarily liable for improvements which it contracts that street railway companies shall pay by assessment; Ft. Dodge Electric Light & Power Co. v. Ft. Dodge, 115 Iowa, 575, 89 N. W. 7, holding city liable to contractor for amount of certificates illegally assessed against street railway company; Gable v. Altoona, 200 Pa. 19, 49 Atl. 367, denying that illegality of assessment provided for payment of bonds relieves city from liability; Heller v. Garden City, 58 Kan. 267, 48 Pac. 841, holding city liable generally, after refusal to make assessment according to contract to pay for local improvements.

Cited in footnotes to German American Sav. Bank v. Spokane, 38 L. R. A. 259, which denies city's liability to action on street-grade warrants because of officer's delay in providing fund; Weston v. Syracuse, 43 L. R. A. 678, which holds city liable for wrongful refusal to accept contract as completed and make assessments to pay contractor; Pontiac v. Talbot Paving Co. 48 L. R. A. 326, which denies city's liability to contractor for refusal to make new special assessment after original assessment set aside; Louisville v. Bitzer, 61 L. R. A. 434, which sustains city's liability to contractor for street improvement, notwithstanding agreement to look only to abutting property.

Invalidity of contract as affecting recovery.

Distinguished in Gillette-Herzog Mfg. Co. v. Canyon County, 85 Fed. 398, denying right to recover for bridge constructed under void contract.

29 L. R. A. 404, SHORT v. STATE, 80 Md. 392, 31 Atl. 322.

Poll taxes.

Cited in Galloway v. Tavares, 37 Fla. 62, 19 So. 170, holding council without power to pass ordinance requiring male residents to work on roads.

Cited in footnotes to Ratliff v. Beale, 34 L. R. A. 472, which denies right to sell nontaxable property to pay poll tax; Kansas City v. Whipple, 35 L. R. A. 747, which holds requirement to compel tax from all male residents, except those voting at general city election, void; Russell v. Ayer, 37 L. R. A. 246, which holds constitutional provision for levying capitation tax equal to tax on property valued at $300, not self-executing.

29 L. R. A. 416, DUVAL COUNTY v. JACKSONVILLE, 36 Fla. 196, 18 So. 339.

Highway taxation.

Cited in footnotes to Simon v. Northup, 30 L. R. A. 171, which upholds legislative power to require city to incur debt for bridges and ferries: Byram v. Marion County, 33 L. R. A. 476, which authorizes taxation of city property for free gravel roads or turnpikes within county.

Tax on county property to support troops.

Cited in State *ex rel.* Milton v. Dickenson, 44 Fla. 638, 60 L. R. A. 545, 33 So. 514 (dissenting opinion), majority holding statute requiring counties to levy tax to provide armories for state soldiers void.

Character of title to act.

Cited in State *ex rel.* Atty. Gen. v. Burns, 38 Fla. 387, 21 So. 290, holding that title to act must give synopsis of its provisions.

29 L. R. A. 423, BALD EAGLE VALLEY R. CO. v. NITTANY VALLEY R. CO. 171 Pa. 284, 50 Am. St. Rep. 807, 33 Atl. 239.

Covenants running with land.

Cited in Kelly v. Nypano R. Co. 23 Pa. Co. Ct. 179, holding that equity will compel railroad company to maintain fence under deed containing covenant to erect fences; Landell v. Hamilton, 175 Pa. 337, 34 L. R. A. 230, 38 W. N. C. 244, 34 Atl. 663, denying that change in use of premises from residence to business purposes affects building restriction; Electric City Land & Improv. Co. v. West Ridge Coal Co. 187 Pa. 512, 41 Atl. 458, enjoining grantor's assignee from conducting mining operations contrary to condition in deed.

Cited in footnote to Doty v. Chattanooga U. R. Co. 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad.

Validity of contracts for traffic and purchase of stock.

Cited in Cumberland Valley R. Co. v. Gettysburg & H. R. Co. 177 Pa. 562, 39 W. N. C. 81, 35 Atl. 952, decreeing specific performance of contract between connecting railroad companies relating to through tickets and interchange of traffic and cars; Northern C. R. Co. v. Walworth, 193 Pa. 215, 44 Atl. 253, holding contract for purchase by railroad company of stock of another not against public policy when lines not competing; Bangor & P. R. R. Co. v. American Bangor Slate Co. 203 Pa. 8, 52 Atl. 40, Affirming 8 Northampton Co. Rep. 146, holding contract between railroad president and president of slate company, to ship all of latter's products over former's road, void.

Cited in footnote to Jacobson v. Wisconsin, M. & P. R. Co. 40 L. R. A. 389, which sustains making of joint rates for through shipments over connecting railroads.

Powers of electric light company as to rates.

Cited in Mercur v. Media Electric Light, Heat & Power Co. 19 Pa. Super. Ct. 525, 8 Del. Co. Rep. 386, upholding right of electric light company to classify customers as to rate, on basis of location and amount of power used.

Sufficiency of consideration.

Cited in Erie Forge Co. v. Pennsylvania Iron Works Co. 22 Pa. Super. Ct. 555, holding resumption of business relations between two parties sufficient consideration to support contract to "mark off" disputed account.

Judgment upon demurrer.

Cited in Graeff v. Felix, 24 Pa. Co. Ct. 667, granting final decree upon overruling demurrers as unfounded.

Distinguished in Corbet v. Oil City Fuel Supply Co. 5 Pa. Super. Ct. 20, 40 W. N. C. 482, allowing defendant to answer upon overruling demurrer which was not interposed to cause delay.

29 L. R. A. 429, IRELAND v. GLOBE MILL. & REDUCTION CO. 19 R. I. 180, 61 Am. St. Rep. 756, 32 Atl. 921.

Attachment or levy upon stock in foreign corporation.

Approved in Pinney v. Nevills, 86 Fed. 97, denying right to attach stock of foreign corporation owned by nonresident, in absence of statute.

Cited in Simpson v. Jersey City Contracting Co. 165 N. Y. 203, 55 L. R. A.

809, 58 N. E. 896 (dissenting opinion), majority upholding right to attach interest in stock of foreign corporation pledged by nonresident to resident; Caffery v. Choctaw Coal & Min. Co. 95 Mo. App. 185, 68 S. W. 1049, holding execution issued from territorial court against shares of stock of foreign corporation void.

Cited in note (55 L. R. A. 803) on attachment of shares of stock in foreign corporation.

Restrictions on transfer of stock.

Later appeals in 20 R. I. 190, 38 L. R. A. 299, 38 Atl. 116, holding contract by proposed stockholder to offer stock to corporation before others not binding; and 21 R. I. 10, 79 Am. St. Rep. 769, 41 Atl. 258, denying that assignee is bound by by-law assented to by assignor, relating to sale of stock.

Cited in Victor G. Bloede Co. v. Bloede, 84 Md. 142, 33 L. R. A. 109, 57 Am. St. Rep. 373, 34 Atl. 1127, holding by-law restricting right to transfer shares of stock, invalid.

Cited in footnotes to Craig v. Hesperia Land & Water Co. 35 L. R. A. 306, which holds refusal to transfer stock on books not justified by existence of unpaid assessment; Carter v. Producers' Oil Co. 39 L. R. A. 100, which holds right of member of limited partnership to purchase additional shares limited by rule requiring re-election to membership as to such shares; Spurgeon v. Santa Ana Valley Irrigation Co. 39 L. R. A. 701, which holds purchaser at sale of delinquent stock for assessments not affected by by-law restricting transfers.

29 L. R. A. 431, SANDERS v. POTTLITZER BROS. FRUIT CO. 144 N. Y. 209, 63 N. Y. S. R. 76, 43 Am. St. Rep. 757, 39 N. E. 75.

Sufficiency of negotiations to support contract.

Cited in Zeltner v. Irwin, 21 Misc. 14, 46 N. Y. Supp. 852, holding that mailing letter of acceptance completes contract when proposition sent by mail; Phenix Ins. Co. v. Schultz, 25 C. C. A. 459, 42 U. S. App. 483, 80 Fed. 337, denying that contract is completed by mailing indefinite letter of acceptance; William Wicke Co. v. Kaldenberg Mfg. Co. 21 Misc. 80, 46 N. Y. Supp. 937, and Wilbur v. Collin, 4 App. Div. 419, 38 N. Y. Supp. 848, enforcing oral agreement as to lease, when nothing left except to reduce contract to writing; People v. St. Nicholas Bank, 3 App. Div. 549, 38 N. Y. Supp. 379, holding that instrument reciting terms of lease and agreement to exchange leases constitutes valid lease; Nicholls v. Granger, 7 App. Div. 116, 40 N. Y. Supp. 99, refusing to enforce formal agreement, when minds of parties fail to meet on all terms; Arnold v. Rothschild's Sons Co. 37 App. Div. 570, 56 N. Y. Supp. 161, denying that negotiations had through broker establishes completed lease; Day v. Dow, 46 App. Div. 150, 61 N. Y. Supp. 793, holding agreement providing it shall be "put in legal form upon demand of either party" definite; Franke v. Hewitt, 56 App. Div. 501, 68 N. Y. Supp. 968, denying that oral negotiations constitute lease, where parties contemplated reduction to writing; Disken v. Herter, 73 App. Div. 455, 77 N. Y. Supp. 300, holding agreement as to services, determined upon orally, not unenforceable when nothing left except to reduce to writing; Boysen v. Van Dorn Iron Works Co. 94 App. Div. 96, 87 N. Y. Supp. 995, holding proposal and acceptance of offer to furnish materials for public improvement sufficient to constitute contract, although formal instrument was to be executed later; Brauer v. Oceanic Steam Nav. Co. 178 N. Y. 343, 70 N. E. 863, holding telegraphic correspondence

partly confirming oral agreement relating to cattle space in steamer, but lacking certain important parts of contract, insufficient; Post v. Davis, 7 Kan. App. 221, 52 Pac. 903, holding that letters and telegrams may constitute enforceable agreement when nothing remains but execution of formal instrument; American Lighting Co. v. McCuen, 92 Md. 706, 48 Atl. 352, holding enforceable contract formed by acceptance of bid for lighting streets.

Formal instrument as curing defective preliminary contract.

Cited in Gough v. Loomis, 123 Iowa, 648, 99 N. W. 295, holding uncertainty of description in preliminary contract for sale of land cured by execution of correct formal instrument.

Date of transfer of chose in action.

Cited in Roberts v. First Nat. Bank, 8 N. D. 484, 79 N. W. 1049, holding that transfer of account dates as of time of oral agreement to assign.

Telegrams as writings within statute of frauds.

Cited in note (50 L. R. A. 247, 248) on telegrams as writings to make contract within statute of frauds.

What laws govern.

Cited in Wilson v. Lewiston Mill Co. 150 N. Y. 322, 55 Am. St. Rep. 680, 44 N. E. 959, construing contract for sale of cotton by broker in state to manufacturer in another state as governed by latter's statute of frauds.

29 L. R. A. 438, STEWART v. WHEELING & L. E. R. CO. 53 Ohio St. 151, 41 N. E. 247.

Subrogation to rights under mortgage.

Cited in Columbus, S. & H. R. Co.'s Appeal, 48 C. C. A. 305, 109 Fed. 207, denying junior mortgagee's right to be subrogated to rights of senior lienors after purchase upon foreclosure sale by reorganized company.

Cited in footnote to Dorrah v. Hill, 32 L. R. A. 631, which sustains right of one loaning money on invalid deed of trust to be subrogated to prior valid deed paid off with money loaned.

Sale or assessment of portion of railroad property.

Cited in footnotes to Central Trust Co. v. Moran, 29 L. R. A. 212, which denies right to enforce judgment against railroad by levy on only part of its property; Connor v. Tennessee C. R. Co. 54 L. R. A. 687, which denies power to sell section of railroad separate from franchise, to enforce contractor's lien.

Assessments for local improvements.

Cited in footnote to Cincinnati, L. & N. R. Co. v. Cincinnati, 49 L. R. A. 566, which denies right to assess entire cost of land taken for highway, on remaining land of same owner.

29 L. R. A. 444, STATE *ex rel.* KELLOG v. MISSOURI P. R. CO. 55 Kan. 708, 29 Am. St. Rep. 278, 41 Pac. 964.

Mandamus to compel operation of railroad.

Cited in footnotes to Southern R. Co. v. Franklin & P. R. Co. 44 L. R. A. 297, which authorizes mandatory injunction to compel continued operation of leased railroad; State *ex rel.* Bridgeton v. Bridgeton & M. Traction Co. 45 L. R. A.

837, which holds street railway company's duty to operate road enforceable by mandamus.

29 L. R. A. 445, KUHN v. PORT TOWNSEND, 12 Wash. 605, 50 Am. St. Rep. 911, 41 Pac. 923.

Annexation of territory.

Cited in Frace v. Tacoma, 16 Wash. 70, 47 Pac. 219, holding that private owner cannot question validity of annexation of territory to city in action to restrain collection of taxes.

Cited in footnote to State *ex rel.* Childs v. Crow Wing County, 35 L. R. A. 745, which authorizes quo warranto to oust county from adjoining territory illegally annexed.

Effect of acquiescence in annexation.

Cited in State *ex rel.* Brown v. Pierre, 15 S. D. 569, 90 N. W. 1047, holding that signing petition for annexation and payment of taxes for three years bars action to vacate annexation proceedings.

Cited in footnote to State *ex rel.* West v. Des Moines, 31 L. R. A. 186, which refuses to disturb jurisdiction of city over territory annexed under void statute, after undisputed exercise of authority for several years.

Collateral attack on proceedings of council.

Cited in Shank v. Ravenswood, 43 W. Va. 246, 27 S. E. 223, holding record showing facts conferring jurisdiction on council not open to collateral attack.

Cited in footnote to Forsyth v. Hammond, 30 L. R. A. 576, which authorizes collateral attack on annexation by city council to city by proceedings in which no jurisdiction acquired.

Recovery of money paid to de facto city.

Cited in Providence v. Shackelford, 106 Ky. 383, 50 S. W. 542, denying right to recover money paid for liquor license to city of certain class, although statute placing such city in that class was subsequently declared void.

29 L. R. A. 449, WARD v. WARD, 40 W. Va. 611, 52 Am. St. Rep. 911, 2 S. E. 746.

Rights and liabilities of partners or cotenants.

Cited in Childers v. Neely, 47 W. Va. 75, 49 L. R. A. 470, 81 Am. St. Rep. 777, 34 S. E. 828, holding partner personally liable for loss caused by his negligence; Williamson v. Jones, 43 W. Va. 589, 38 L. R. A. 706, 64 Am. St. Rep. 891, 27 S. E. 410, holding cotenant accountable for taking petroleum from land; Cecil v. Clark, 47 W. Va. 406, 81 Am. St. Rep. 802, 35 S. E. 11, holding tenant accountable to cotenant for extraction of coal; Cain v. Cain, 53 S. C. 355, 69 Am. St. Rep. 863, 31 S. E. 278, holding cotenant in possession chargeable for excess of his share of rental value; Carson v. Broady, 56 Neb. 654, 71 Am. St. Rep. 691, 77 N. W. 80, allowing cotenant for permanent improvements made while in exclusive possession; Booth v. Booth, 114 Iowa, 80, 86 N. W. 51, refusing allowance for improvements by cotenant in nature of repairs; Gjerstadengen v. Hartzell, 9 N. D. 277, 81 Am. St. Rep. 575, 83 N. W. 230, denying cotenant's right to compensation for improvements by remote grantor; Danforth v. Moore, 55 N. J. Eq. 131, 35 Atl. 410, denying cotenant's right to contribution for repairs on property enjoyed in common; Solomon v. Rogers, 16 Pa. Super. Ct. 73,

denying liability for rent of cotenant in possession; Pulse v. Osborn, 30 Ind. App. 636, 64 N. E. 59, raising, without deciding, question as to cotenant's right on partition sale to compensation for improvements, and referring particularly to annotation in 29 L. R. A. 449.

Cited in footnotes to Cosgriff v. Foss, 36 L. R. A. 753, which denies allowance on partition for improvements made by one tenant in common; Paul v. Cragnas, 47 L. R. A. 540, which sustains right of lessee of undivided interest in mine to recover from other owners for exclusion from mine.

Cited in note (28 L. R. A. 829) on liability of cotenants to account for use and occupation and rents and profits.

Exceptions to commissioners' report.

Cited in McKendree v. Shelton, 51 W. Va. 517, 41 S. E. 909, refusing to consider depositions not properly incorporated into bill of exceptions; Martin v. Kester, 49 W. Va. 660, 39 S. E. 599, and Righter v. Riley, 42 W. Va. 635, 26 S. E. 357, accepting as true, facts not excepted to in commissioners' report.

Order of reference solely for depositions.

Cited in First Nat. Bank v. Parsons, 42 W. Va. 146, 24 S. E. 554, holding that order of reference should not be granted solely to enable parties to take depositions.

29 L. R. A. 463, CAPITAL GAS CO. v. YOUNG, 109 Cal. 140, 41 Pac. 869.

Public officer's right to recover on contract with public he represents.

Cited in footnotes to Berka v. Woodward, 45 L. R. A. 420, which denies right of recovery to officer on implied contract with city for materials furnished it; Sylvester v. Webb, 52 L. R. A. 518, which sustains contract to erect school building by member of building committee and selectmen of town.

— For injury by defect in street.

Cited in footnote to Danville v. Robinson, 55 L. R. A. 162, which sustains right of member of city council to recover for injuries by defect in street.

Mutuality in contracts.

Cited in Gallagher v. Equitable Gaslight Co. 141 Cal. 706, 75 Pac. 329, holding agreement to discontinue use of electricity in lighting hotel, and use gas, not void for lack of mutuality because time during which gas is to be used not stated, since expense was incurred in purchasing gas fixtures and piping hotel.

29 L. R. A. 465, ATCHISON, T. & S. F. R. CO. v. HENRY, 55 Kan. 715, 41 Pac. 952.

Master's liability for false arrest.

Cited in West Chicago Street R. Co. v. Luleich, 85 Ill. App. 652, affirming right of passenger to recover for wrongful arrest by conductor for alleged passing of counterfeit coin to him.

Cited in footnotes to Eichengreen v. Louisville & N. R. Co. 31 L. R. A. 702, which holds carrier liable for false imprisonment procured by railroad detective; Palmer v. Maine C. R. Co. 44 L. R. A. 673, which holds passenger's unreasonable refusal to tell whether name on mileage ticket is his own, no justification for procuring his arrest; Brunswick & W. R. Co. v. Ponder, 60 L. R. A. 714, which denies carrier's liability for failure to prevent illegal arrest

by officers, or for stopping train to permit removal; Markley v. Snow, 64 L. R. A. 685, which denies liability of employer for act of employee in causing arrest, long after commission of the crime, of one suspected of having set fire to building of employer.

— For assault.

Cited in Johnson v. Detroit, Y. & A. A. R. Co. 130 Mich. 455, 90 N. W. 274, holding railroad company liable for conductor's assault upon passenger while ejecting him for tendering alleged void ticket, and refusing to pay fare.

Cited in footnote to Kohner v. Capital Traction Co. 62 L. R. A. 875, which requires carrier, when peaceable passenger on street car is unlawfully assaulted by conductor, to show that injury was result of unavoidable accident.

29 L. R. A. 468, BURROWS v. DELTA TRANSP. CO. 106 Mich. 582, 64 N. W. 501.

Proof of due care as affecting presumption of negligence.

Cited in Louisville & N. R. Co. v. Marbury Lumber Co. 125 Ala. 257, 50 L. R. A. 626, 28 So. 438, holding presumption of negligence from fire set by sparks from locomotive insufficient to take case to jury when proof shows due care.

Restriction of time and place of selling liquors.

Cited in State v. Gerhardt, 145 Ind. 451, 33 L. R. A. 319, 44 N. E. 469, sustaining act restricting time and place of selling intoxicating liquors.

Erroneous instruction to jury.

Cited in De Gray v. New York & N. J. Teleph. Co. 68 N. J. L. 457, 53 Atl. 200, holding instruction in proceedings to determine value of land condemned, that jury are not bound to adopt opinions of witnesses, but may rely on their own experience, error.

29 L. R. A. 476, KRECKER v. SHIREY, 163 Pa. 534, 30 Atl. 440.

Powers and liabilities of religious organizations.

Followed in Bliem v. Schultz, 170 Pa. 566, 37 W. N. C. 170, 33 Atl. 337, holding church corporation liable for costs in unsuccessful suit.

Cited in Wanner v. Emanuel's Church, 174 Pa. 469, 37 Atl. 188, holding notes signed by *de facto* trustees of religious corporation valid; Long v. Harvey, 177 Pa. 479, 34 L. R. A. 171, 39 W. N. C. 124, 55 Am. St. Rep. 733, 35 Atl. 869, holding that majority of independent congregation cannot act with members of another congregation in removing officers; St. Paul's Reformed Church v. Hower, 191 Pa. 312, 43 Atl. 221, holding orthodox portion of congregation estopped from ejecting dissenters ten years after erection by latter of costly church; First Presby. Church v. Myers, 5 Okla. 824, 38 L. R. A. 693, 50 Pac. 70, holding that refusal of presbytery to sanction "call" terminates civil contract between congregation and minister-elect.

Cited in footnote to Franke v. Mann, 48 L. R. A. 856, which denies right of majority of church members to employ pastor whose teachings are inconsistent with those of sect to which local church belongs.

Distinguished in Zion Church v. Light, 7 Pa. Super. Ct. 230, 42 W. N. C. 252, holding that *de facto* trustees may maintain trespass for negligent burning of church.

— Relating to property.

Cited in Bose v. Christ, 193 Pa. 19, 44 Atl. 240, holding title to property of divided congregation in faction, though in minority, adhering to regular organization; Trinity M. E. Church v. Harris, 73 Conn. 225, 50 L. R. A. 640, 47 Atl. 116, holding that trust property held by unincorporated society may be claimed by trustees after consolidation with other societies.

Cited in footnotes to Smith v. Pedigo, 32 L. R. A. 838, which denies right of majority of church abandoning its religious faith, to hold church property; Park v. Champlin, 31 L. R. A. 141, which sustains right of minority of religious society to prevent transfer of property by majority.

Distinguished in Fredericks v. Huber, 180 Pa. 577, 40 W. N. C. 125, 37 Atl. 90, dispossessing one faction of church property conveyed to other faction by grantor after re-entry for condition broken.

Decisions of corporate tribunals.

Cited in note (49 L. R. A. 388, 398, 399) on conclusiveness of decisions of tribunals of associations or corporations.

Annulment of constitution of benefit society.

Cited in footnote to Supreme Lodge K. of P. v. La Malta, 30 L. R. A. 838, which holds all prior constitutions annulled by adoption and promulgation of constitution by proper body of benefit society.

29 L. R. A. 485, CHICAGO, B. & Q. R. CO. v. WEST CHICAGO STREET R. CO. 156 Ill. 255, 40 N. E. 1008.

Compensation for, or removal of, added burden to street — Electric poles and wires.

Cited in Goddard v. Chicago & N. W. R. Co. 104 Ill. App. 532, holding transmission of electric heat, light, and power on poles in street, additional servitude requiring compensation; Carpenter v. Capital Electric Co. 178 Ill. 35, 43 L. R. A. 647, 69 Am. St. Rep. 286, 52 N. E. 973, denying right of electric light company to string wires in private alley without compensation; La Crosse City R. Co. v. Higbee, 107 Wis. 402, 51 L. R. A. 929, 83 N. W. 701, holding trolley-wire pole not added burden to street; Jaynes v. Omaha Street R. Co. 53 Neb. 658, 39 L. R. A. 760, 74 N. W. 67, holding that erection of trolley poles, interfering with access to premises, entitles abutter to damages; Snyder v. Ft. Madison Street R. Co. 105 Iowa, 287, 41 L. R. A. 347, 75 N. W. 179, compelling removal of trolley pole unnecessarily placed in front of dwelling.

— Railways.

Cited in Chicago Office Building v. Lake Street Elev. R. Co. 87 Ill. App. 600, holding that construction of elevated road, impairing access to office building, entitles abutter to damages; Bond v. Pennsylvania Co. 171 Ill. 513, 49 N. E. 545, Reversing 69 Ill. App. 512, holding that abutter may enjoin construction of steam road in street when no compensation has been provided; Birmingham Traction Co. v. Birmingham R. & Electric Co. 119 Ala. 143, 43 L. R. A. 235, 24 So. 502; Ranken v. St. Louis & B. Suburban R. Co. 98 Fed. 482; Placke v. Union Depot R. Co. 140 Mo. 638, 41 S. W. 915,— holding electric street railway laid to grade not additional burden; Blodgett v. Northwestern Elev. R. Co. 26 C. C. A. 22, 53 U. S. App. 284, 80 Fed. 608, and Doane v. Lake Street Elev. R. Co. 165 Ill. 517. 36 L. R. A. 102, 56 Am. St. Rep. 265, 46 N. E. 520, denying

injunction to private owner against construction of elevated railroad; Peck v. Schenectady R. Co. 170 N. Y. 312, 63 N. E. 357 (dissenting opinion), majority holding use of street by trolley company an added burden.

Approach to bridge as new easement.

Cited in footnote to Boston & A. R. Co. v. Worcester, 55 L. R. A. 623, which holds use of part of railroad location outside of tracks for approach of highway bridge over tracks, to abolish grade crossing, not new easement on right of way.

Right of railway company to cross another's tracks, and duties connected therewith.

Followed in Pittsburgh, C. C. & St. L. R. Co. v. West Chicago Street R. Co. 156 Ill. 386, 40 N. E. 1014, denying compensation to railroad company for crossing tracks by street railway company.

Cited in General Electric R. Co. v. Chicago & W. I. R. Co. 184 Ill. 596, 56 N. E. 963, Affirming 79 Ill. App. 575, denying injunction to steam railroad company against street railway company crossing tracks at street crossing; General Electric R. Co. v. Chicago City R. Co. 66 Ill. App. 370, holding that street car company has no exclusive right to maintain tracks in street as against another company; Detroit, Ft. W. & B. I. R. Co. v. Railroad Comrs. 127 Mich. 230, 62 L. R. A. 154, footnote p. 149, 86 N. W. 842, requiring street car company crossing railroad tracks, to pay portion of expense for safety appliances, necessitated solely by railroad company; Louisville & N. R. Co. v. Bowling Green R. Co. 110 Ky. 796, 63 S. W. 4; Atchison, T. & S. F. R. Co. v. General Electric R. Co. 50 C. C. A. 426, 112 Fed. 691; Southern R. Co. v. Atlanta R. & Power Co. 111 Ga. 688, 51 L. R. A. 128, footnote p. 125, 36 S. E. 873,— sustaining right of street railway to cross tracks of steam railroad; Chicago, B. & Q. R. Co. v. Steel, 47 Neb. 745, 66 N. W. 830, holding railroad company having permanent easement in street not entitled to compensation as condition to trolley company's crossing tracks; Consolidated Traction Co. v. South Orange & M. Traction Co. 56 N. J. Eq. 584, 40 Atl. 15, denying street car company's right to compensation for construction of crossing over tracks of another; Central Pass. R. Co. v. Philadelphia, W. & B. R. Co. 95 Md. 443, 52 Atl. 752, holding that street railway company crossing railroad tracks must maintain crossing.

Cited in footnotes to New York, N. H. & H. R. Co. v. Bridgeport Traction Co. 29 L. R. A. 367, which sustains right to make grade crossing at intersection of steam and street railroads; Northern C. R. Co. v. Harrisburg & M. Electric R. Co. 34 L. R. A. 572, which denies street railway company's right to cross railroad at points other than street crossings; Chester Traction Co. v. Philadelphia, W. & B. R. Co. 44 L. R. A. 269, which holds that street railway crossing of steam railroad at grade should not be permitted when overhead crossing reasonably practicable; Pennsylvania R. Co. v. Greensburg, J. & P. Street R. Co. 36 L. R. A. 839, which holds railroad company over whose tracks highway is carried on bridge not entitled to contest, as abutting owner, street car company's right to place tracks on bridge.

Negligence in crossing tracks.

Cited in footnote to Cincinnati Street R. Co. v. Murray, 30 L. R. A. 508, which holds it negligence to run street car across railroad track without employee seeing that way is clear.

City's authority to regulate street car fare.

Cited in Chicago Union Traction Co. v. Chicago, 199 Ill. 484, 59 L. R. A. 645, 65 N. E. 451, sustaining city's power to regulate amount of street car fares and transfer tickets.

29 L. R. A. 492, HART v. WASHINGTON PARK CLUB, 157 Ill. 9, 48 Am. St. Rep. 298, 41 N. E. 620.

Presumption of negligence.

Cited in Cook v. Piper, 79 Ill. App. 294, holding that fall of cake of ice from rear of wagon upon child raises presumption of carelessness; Metropolitan West Side Elev. R. Co. v. McDonough, 87 Ill. App. 40, holding fall of bolt, injuring pedestrian underneath elevated railroad structure, prima facie negligence; Bjornson v. Saccone, 88 Ill. App. 11, holding *res ipsa loquitur* has no application to injury of subcontractor by collapse of building; Armour v. Golkowska, 95 Ill. App. 495, holding that fall of barrel from platform above servant, causing injury, raises presumption of negligence; Chicago City R. Co. v. Rood, 163 Ill. 484, 54 Am. St. Rep. 478, 45 N. E. 238, holding that injury to passenger by being hit by wagon while on street car creates no presumption of company's negligence; Chicago City R. Co. v. Eick, 111 Ill. App. 454, and Chicago City R. Co. v. Barker, 209 Ill. 326, 70 N. E. 624, holding that presumption as to street car company's negligence arises from collision between wagon and car which was running with no one attending it; Holliday v. Gardner, 27 Ind. App. 243, 61 N. E. 16 (dissenting opinion), majority holding statement of driver of runaway team that "he was glad he struck horse" insufficient to show negligence.

Sufficiency of allegations of negligence.

Cited in note (59 L. R. A. 275) on sufficiency of general allegations of negligence.

Liability for injury to spectator at, or on way to, public exhibition.

Cited in Hallyburton v. Burke County Fair Asso. 119 N. C. 529, 38 L. R. A. 157, footnote p. 156, 26 S. E. 114, denying right of action against fair association which was free from negligence, for injury to bystander by bolting of vicious horse from race track; Indianapolis Street R. Co. v. Dawson, 31 Ind. App. 608, 68 N. E. 909, holding street car company liable for conspiracy among its employees to assault colored people at exhibition given in company's park, where company, having knowledge of such conspiracy, transported colored people without warning them; Thornton v. Maine State Agri. Soc. 97 Me. 114, 94 Am. St. Rep. 488, 53 Atl. 979, holding agricultural society liable for death of one killed by stray bullet fired in shooting gallery on fair grounds.

Cited in footnotes to Richmond & M. R. Co. v. Moore, 37 L. R. A. 258, which holds street car company owning park liable for killing of boy by fall of pole used in balloon ascension; Thompson v. Lowell, L. & H. Street R. Co. 40 L. R. A. 345, which holds street railway company liable for injury to spectator at free exhibition of markmanship given by independent contractor on company's grounds Smith v. Benick, 42 L. R. A. 277, which denies liability of proprietor of public resort for negligence of balloonist, who was an independent contractor; Sebeck v. Plattdeutsche Volksfest Verein, 50 L. R. A. 199, which denies proprietor's liability for injury to spectator by explosion of bomb in hands of skilled person at exhibition; Mastad v. Swedish Brethren, 53 L. R. A. 803, which holds

proprietor of place of amusement required to use reasonable care to protect patrons from assaults by one rendered disorderly by liquor sold there; Clark v. Northern P. R. Co. 59 L. R. A. 508, which denies liability of railroad company permitting circus on its vacant land adjoining switch yard, for injury to person crossing yard to reach circus.

Duty to licensees.

Cited in Southern R. Co. v. Drake, 107 Ill. App. 16, holding employees of railroad contractor working on passage track on right of way, licensees while leaving dirt train to cross main track, toward whom railroad company owes duty of reasonable care; Sullivan v. Morrice, 109 Ill. App. 653, holding (*arguendo*) that contractors building house must not have premises in such condition as to injure licensee.

29 L. R. A. 496, DAVIS v. DODSON, 95 Ga. 718, 51 Am. St. Rep. 108, 22 S. E. 645.

29 L. R. A. 498, PULLMAN'S PALACE CAR CO. v. MARTIN, 95 Ga. 314, 22 S. E. 700.

Petition for rehearing denied in 95 Ga. 320, 22 S. E. 702.

Liability to sleeping car passengers.

Cited in footnotes to Pullman's Palace-Car Co. v. Hall, 44 L. R. A. 790, which denies liability for theft of passenger's valise from sleeping car through window; Pullman's Palace Car Co. v. Adams, 45 L. R. A. 767, which holds sleeping car company liable for theft of passenger's property, where porter went to sleep while on watch; Cooney v. Pullman Palace-Car Co. 53 L. R. A. 690, which holds sleeping car company liable for loss of passenger's valise intrusted to employees of company; Pullman's Palace Car Co. v. Hunter, 47 L. R. A. 286, which sustains liability for theft of diamond rings from woman while asleep in sleeping car.

Clerk's right to costs.

Cited in Waldrop v. Wolff, 114 Ga. 622, 40 S. E. 830, holding clerk not entitled to costs for transmitting unnecessary portions of record to appellate court.

29 L. R. A. 500, WHITTENTON MFG. CO. v. STAPLES, 164 Mass. 319, 41 N. E. 441.

Covenants running with land.

Cited in Lincoln v. Burrage, 177 Mass. 379, 52 L. R. A. 111, 59 N. E. 67, denying that covenant to pay part of expense of party wall runs with land; Clay v. Hart, 25 Misc. 114, 55 N. Y. Supp. 43, holding that no covenant runs with land to repair highway over mill race appurtenant to lands and extending across adjoining highway.

Grant of mill as including water rights.

Cited in Horne v. Hutchins, 71 N. H. 122, 51 Atl. 645, holding that conveyance of mill privileges carries right to reasonable use of power from reservoir upon which mills depend.

Cited in note (58 L. R. A. 490) on how far grant of mill includes water rights.

Easement by prescription.

Cited in footnotes to Kray v. Muggli, 45 L. R. A. 218, which denies prescriptive

right of riparian owners to maintenance of dam after proprietor chooses to abandon it; Boyce v. Missouri P. R. Co. 58 L. R. A. 442, which sustains conclusive presumption of prescriptive right by lost grant from adverse user of easement for statutory periods.

Right to benefit under grantee's covenant.

Cited in Pearson v. Bailey, 177 Mass. 319, 58 N. E. 1028, holding that grantee of part of mortgaged premises cannot compel grantee of balance to pay mortgage which he assumed; Trudeau v. Field, 69 Vt. 452, 38 Atl. 162, denying that covenant by subsequent grantee to rebuild dam inures to benefit of prior grantee of easement therein.

Negative easement.

Cited in First Nat. Bank v. Portsmouth Sav. Bank, 71 N. H. 550, 53 Atl. 1017, holding negative easement created by mutual covenant by owners of contiguous parts of building not to change front without other's consent.

Admissibility of practical construction of deed.

Cited in O'Connell v. Cox, 179 Mass. 254, 60 N. E. 580, holding evidence of parties treating fence as boundary admissible as to location of line; Richardson v. Watts, 94 Me. 484, 48 Atl. 180, holding practical construction by parties admissible to interpret doubtful conveyance.

Creation of estate in fee by will.

Cited in Roberts v. Crume, 173 Mo. 580, 73 S. W. 662, holding that will giving estate to daughter "and her heirs" transfers fee, and sale by daughter conveys title.

29 L. R. A. 507, BLOXHAM v. CONSUMERS' ELECTRIC LIGHT & STREET R. CO. 36 Fla. 519, 51 Am. St. Rep. 44, 18 So. 444.

Street railways as "railroads."

Cited in Railroad Comrs. v. Market Street R. Co. 132 Cal. 683, 64 Pac. 1065, holding street railway company not "transportation company;" Lincoln Street R. Co. v. McClellan, 54 Neb. 676, 69 Am. St. Rep. 736, 74 N. W. 1074, denying that statute imposing liability upon railroad companies for personal injuries applies to street railways; Massachusetts Loan & T. Co. v. Hamilton, 32 C. C. A. 48, 59 U. S. App. 403, 88 Fed. 590, denying that statute making judgment against railway corporation for personal injuries first lien includes street railways; Goddard v. Chicago, M. & St. P. R. Co. 104 Ill. App. 536, holding that statutory authority to consent to construction of horse, dummy, or street railroads does not include railroads carrying passengers, freight, mail, and express; Sams v. St. Louis & M. River R. Co. 174 Mo. 86, 61 L. R. A. 484, 73 S. W. 686, holding street railway not within provisions of statute making corporations owning or operating railroads liable to servant for injuries by coservant.

Cited in footnotes to Vail v. Broadway R. Co. 30 L. R. A. 626, which holds passenger on street car platform not passenger on "any railroad" so as to assume risk of injury; Savannah, T. & I. of H. R. Co. v. Williams, 61 L. R. A. 249, which holds chartered street railway a railroad company within statute as to liability for negligence of fellow servant; Diebold v. Kentucky Traction Co. 63 L. R. A. 637, which holds electric railway operated between two cities in different states, a trunk railway within prohibition against granting franchise except to highest bidder.

Injunction against collection of taxes.

Cited in footnote to Philadelphia Mortg. & T. Co. v. Omaha, 57 L. R. A. 150, which denies right to restrain city from enforcing tax against property on which money loaned in reliance on treasurer's mistaken marking of taxes as paid.

Sheriff's right to sell perishable property.

Cited in State *ex rel.* Merchants Nat. Bank v. Hull, 37 Fla. 585, 20 So. 762, holding that sheriff may sell perishable property remaining after dismissal of attachment.

29 L. R. A. 512, SKINNER v. SANTA ROSA, 107 Cal. 464, 40 Pac. 742.

Medium of payment.

Cited in footnotes to Hendry v. Benlisa, 34 L. R. A. 283, which holds payment of debt in Confederate money during Rebellion, valid; Stimson Mill Co. v. Braun. 57 L. R. A. 726, which holds void, statute taking protection from claims of subcontractors from owner contracting for payment with something other than money.

Cited in note (29 L. R. A. 593) on form of judgment and procedure in case of liability to make payment in coin.

— Gold coin.

Cited in Burnett v. Maloney, 97 Tenn. 715, 34 L. R. A. 546, footnote p. 541, 37 S. W. 689, denying right of county to issue bonds payable in gold coin.

Cited in footnotes to Murphy v. San Luis Obispo, 39 L. R. A. 444, which sustains power of city to issue bonds payable in gold coin only; Packwood v. Kittitas County, 33 L. R. A. 673, which holds authority to make county bonds payable in gold coin implied in authority to issue bonds; Dennis v. Moses, 4(L. R. A. 302, which denies power to take away right to contract for payment in gold coin; Blanck v. Sadlier, 40 L. R. A. 666, which holds undisclosed gold clause in mortgage on land, sold subject to mortgage, not defect authorizing cancelation of purchase.

When deposit is special.

Cited in footnote to Anderson v. Pacific Bank, 32 L. R. A. 479, which holds special deposit, requiring return on insolvency of bank, shown by depositing gold coin in pledge to secure bail bond obligation.

29 L. R. A. 524, CADY v. SCHULTZ, 19 R. I. 193, 61 Am. St. Rep. 763, 32 Atl. 915.

Right to exclusive use of trade-name.

Cited in Samuels v. Spitzer, 177 Mass. 228, 58 N. E. 693, holding "Manufacturers' Outlet Company" may enjoin another's use of "T. Outlet Company" as trade-name; Sapp v. New York Dental Parlors, 4 Lack. Legal News, 121, enjoining use of name "New York Dental Parlors" by another in same city; Continental Ins. Co. v. Continental Fire Asso. 96 Fed. 849, denying that insurance company is entitled to exclusive use of word "continental;" Shaver v. Heller & M. Co. 65 L. R. A. 884, 48 C. C. A. 58, 108 Fed. 830, holding that manufacturer of article termed "American Wash Blue" may enjoin use of word "American" applied to similar goods of others; Bissell Chilled Plow Works v. T. M. Bissell Plow Co. 121 Fed. 369, holding that transferee of Bissell Chilled Plow Works may enjoin use of word "Bissell" by Bissell Plow Company.

29 L. R. A. 526, McTWIGGAN v. HUNTER, 19 R. I. 265, 33 Atl. 5.

Power of municipal corporation — As to streets.

Cited in Smith v. Westerly, 19 R. I. 446, 35 Atl. 526, denying council's power to grant water company exclusive right to use streets for pipes.

— To exempt from taxation.

Cited in Crafts v. Ray, 22 R. I. 182, 49 L. R. A. 607, footnote p. 604, 46 Atl. 1043, sustaining exemption of manufacturing companies from taxation for term of years.

Cited in footnotes to Maine Water Co. v. Waterville, 49 L. R. A. 294, which sustains agreement by city to pay, for term of years, taxes assessed against water company supplying city; Auditor General v. Sage Land & Improv. Co. 56 L. R. A. 105, which holds tax on other land in township not rendered illegal by exemption of large tract deeded to state for nonpayment of taxes.

29 L. R. A. 530, ROBINSON v. ROCKLAND, T. & C. STREET R. CO. 87 Me. 387, 32 Atl. 994.

Carrier's right to refuse to carry lunatic.

Cited in Owens v. Macon & B. R. Co. 119 Ga. 233, 63 L. R. A. 948, 46 S. E. 87, holding that common carriers cannot absolutely refuse to transport person who is insane, but are entitled to reasonable notice and may insist that lunatic shall be attended.

29 L. R. A. 531, SOUTH BEND v. MARTIN, 142 Ind. 31, 41 N. E. 315.

License and interstate commerce.

Cited in Huntington v. Mahan, 142 Ind. 697, 51 Am. St. Rep. 200, 42 N. E. 463, holding ordinance prohibiting peddling without license unlawful as to agent of nonresident publisher distributing books to fill orders previously taken; Koepke v. Hill, 157 Ind. 179, 87 Am. St. Rep. 161, 60 N. E. 1039, holding ordinance imposing tax upon branch stores not within interstate commerce act; St. Paul v. Briggs, 85 Minn. 292, 89 Am. St. Rep. 554, 88 N. W. 984, holding wholesale agent delivering goods to dealers only, not peddler; Levy v. State, 161 Ind. App. 259, 68 N. E. 172, holding statute imposing license tax on transient merchants not void as interference with interstate commerce; *Re* Pringle, 67 Kan. 368, 72 Pac. 864, holding one taking orders from samples for stereoscopic views, to be shipped into state, not engaged in interstate commerce, when orders are not sent to other state, but are filled from goods, not in original packages, but sent him in bulk C. O. D.

Cited in footnotes to Singer Mfg. Co. v. Wright, 35 L. R. A. 497, which sustains state statute requiring every company selling sewing machines in state to pay license tax; State v. Coop, 41 L. R. A. 501, which holds purchase of frame for portrait in accordance with option included in order for making portrait in other state not within statute against peddling; State v. Wells, 48 L. R. A. 99, which holds one soliciting orders for goods and carrying goods to fill previous sales not a peddler; *Re* Wilson, 48 L. R. A. 417, which holds void, as applied to sale of original packages, territorial statute requiring license for sale of coal oil; Brownback v. North Wales, 49 L. R. A. 446, which holds valid as to residents, ordinance requiring license for sale of goods on street, or by soliciting orders from house to house; Racine Iron Co. v. McCommons, 51 L. R. A. 134,

which holds traveling agent taking orders and distributing contents of original package among customers not engaged in interstate commerce; Rosenbloom v. State, 57 L. R. A. 923, which sustains license tax on peddlers, though venders of own products exempt.

Jurisdiction of appellate court.

Cited in Greensburg v. Cleveland, C. C. & St. L. R. Co. 23 Ind. App. 145, 55 N. E. 46 (dissenting opinion), majority denying appellate court's jurisdiction of cases involving less than $50.

29 L. R. A. 539, McBURNEY v. YOUNG, 67 Vt. 574, 32 Atl. 492.

29 L. R. A. 541, ANDERSON v. BELL, 140 Ind. 375, 39 N. E. 735.

Distribution among kindred of half blood.

Cited in footnote to Ector v. Grant, 53 L. R. A. 723, which holds first cousin of half blood on maternal side entitled to whole estate as against second cousin of whole blood.

29 L. R. A. 568, CHICAGO v. BURCKY, 158 Ill. 103, 48 Am. St. Rep. 142, 42 N. E. 178.

Damages for, or injunction against, injury to easement.

Cited in Metropolitan West Side Elev. R. Co. v. Goll, 100 Ill. App. 332, holding necessary noise of passing of elevated trains not element of damage to abutter.

— By closing street.

Cited in Chicago v. Webb, 102 Ill. App. 236, holding owner entitled to recover for special damages caused by practically closing alley; Bloomington v. Winslow, 71 Ill. App. 341, and Winnetka v. Clifford, 201 Ill. 478, 66 N. E. 384, affirming owner's right to recover for damages occasioned by closing street; Chicago v. Baker, 30 C. C. A. 366, 58 U. S. App. 569, 86 Fed. 755, and Chicago v. Baker, 39 C. C. A. 320, 98 Fed. 833, holding owner entitled to damages for closing street where crossed by railroad track; Cram v. Laconia, 71 N. H. 44, 57 L. R. A. 284, footnote p. 282, 51 Atl. 635, denying right to recover for injury to abutting property, due to vacation of street.

Cited in footnotes to Mahler v. Brumder, 31 L. R. A. 695, which denies right of private action to enjoin obstruction of public cul-de-sac; Dantzer v. Indianapolis Union R. Co. 34 L. R. A. 769, which denies right to recover for vacation of part of street at some distance from property.

Judgment establishing highway boundary as res judicata.

Cited in footnote to Long v. Wilson, 60 L. R. A. 720, which holds judgment establishing boundary of highway in suit against owner on one side not conclusive on opposite owner.

Forfeiture of land for highway.

Cited in Huff v. Hastings Exp. Co. 195 Ill. 260, 63 N. E. 105, denying that city's use of plat of railroad land for viaduct amounts to dedication of strip for purpose of highway.

29 L. R. A. 571, BELL v. CASSEM, 158 Ill. 45, 41 N. E. 1089.

Bill in equity to collect money lost in gaming.

Cited in Gaby v. Hankins, 86 Ill. App. 534, expressing opinion that bill in

equity is maintainable to subject property used for gambling to payment of judgment.

29 L. R. A. 573, STATE v. SPEYER, 67 Vt. 502, 48 Am. St. Rep. 832, 32 Atl. 476.

Reasonableness of quarantine regulations.

Cited in State v. Kirby, 120 Iowa, 27, 94 N. W. 254, holding reasonableness of state regulations as to quarantine of infectious diseases for court to determine.

29 L. R. A. 576, ALPINE TWP. SCHOOL DIST. NO. 11 v. BATSCHE, 106 Mich. 330, 64 N. W. 196.

Occupancy by employee.

Cited in Davis v. Williams, 130 Ala. 534, 54 L. R. A. 750, 89 Am. St. Rep. 55, 30 So. 488, denying that agent's occupancy of principal's house as part of contract establishes relation of landlord and tenant.

29 L. R. A. 578, SPENCE v. NORFOLK & W. R. CO. 92 Va. 102, 22 S. E. 815.

Effect on title of delivery to carrier.

Distinguished in Northern P. R. Co. v. Lewis, 89 Ill. App. 33, holding vendor's right to stop goods *in transitu* in case of vendee's insolvency, insufficient interest to enable former to sue carrier for damage to them.

29 L. R. A. 582, ROBINSON v. CLAPP, 65 Conn. 365, 32 Atl. 939.

Property rights in, and care of, trees on boundary.

Followed without special discussion in Robinson v. Clapp, 67 Conn. 540, 52 Am. St. Rep. 298, 35 Atl. 504.

Cited in footnote to Kinney v. Kinney, 40 L. R. A. 626, which holds one planting hedge fence on boundary line not required to prevent its growing out over adjoining owner's land.

Title under quitclaim deed.

Cited in Schroeder v. Tomlinson, 70 Conn. 355, 39 Atl. 484, holding title of grantee under quitclaim deed, recorded during execution proceedings, good as against creditor.

Cited in footnote to Johnson v. Johnson, 59 L. R. A. 748, which holds grantee in quitclaim deed vested with title acquired by one giving warranty deed to his grantor after delivery of latter deed.

Implied easement.

Cited in footnote to Irvine v. McCreary, 49 L. R. A. 417, which holds that sale of building creates easement in alley across rear of adjacent lot belonging to grantor.

Damages for loss of light and air.

Cited in footnote to Townsend v. Epstein, 52 L. R. A. 409, which sustains abutter's right to relief against diminution of light and air by bridge over street.

29 L. R. A. 593, BELFORD v. WOODWARD, 158 Ill. 122, 41 N. E. 1097.

Payment from particular fund or in coin.

Cited in East St. Louis v. Canty, 65 Ill. App. 326, rejecting as surplusage, por-

tion of judgment limiting payment to certain funds; Cicero v. People, 105 Ill. App. 408, affirming order directing town to pay costs of improvements from tax surplus in treasury; Rae v. Homestead Loan & G. Co. 76 Ill. App. 549, sustaining bond payable in gold; Dorr v. Hunter, 183 Ill. 435, 56 N. E. 159, holding mortgage calling for payment in gold, valid.

Cited in note (29 L. R. A. 517) on special contracts and obligations to make payment in gold or silver.

29 L. R. A. 600, PHILADELPHIA v. PUBLIC SCHOOLS, 170 Pa. 257, 32 Atl. 1033.

Exemption of educational and charitable institutions from taxation.

Cited in Kittanning Academy v. Kittanning, 19 Pa. Co. Ct. 299, 6 Pa. Dist. R. 604, 28 Pittsb. L. J. N. S. 88, holding academy not exempt from taxes where master receives tuition fees and expenses are paid from endowment fund; Hartman v. Mitzel, 8 Pa. Super. Ct. 30, holding dwelling house leased for school purposes not exempt from taxation; New England Theosophical Corp. v. Boston, 172 Mass. 63, 42 L. R. A. 283, 51 N. E. 456, holding theosophical corporation subject to taxation.

Cited in footnotes to Kentucky Female Orphan School v. Louisville, 40 L. R. A. 119, which holds school for free education of female orphans exempt from taxation; Yale University v. New Haven, 43 L. R. A. 490, which holds college dormitories and dining halls exempt from taxation; Harvard College v. Assessors, 48 L. R. A. 547, which holds exempt from taxation, houses occupied by college presidents and professors, and dormitories and dining halls for students.

What constitutes charitable gift or institution.

Cited in footnotes to Alden v. St. Peter's Parish, 30 L. R. A. 232, which holds gift to rector, etc., of unincorporated religious society for church purposes, for a charitable use; People *ex rel.* New York Inst. for the Blind v. Fitch, 38 L. R. A. 591, which holds incorporated institution for blind, largely supported by state, subject to visitations and rules of board of charities.

29 L. R. A. 607, O'CONNOR v. CLARK, 170 Pa. 318, 32 Atl. 1029.

Estoppel to assert title.

Cited in City Bank v. Easton Boot & Shoe Co. 6 Northampton Co. Rep. 249, 42 W. N. C. 409, and City Bank v. Easton Boot & Shoe Co. 6 Northampton Co. Rep. 33, protecting bona fide purchaser of goods as against mortgagee of unfiled mortgage; Nonotuck Silk Co. v. Levy, 75 Ill. App. 58, denying that owner permitting debtor to use and control horse and wagon is estopped from claiming same against attaching creditor.

Fraud or loss as between two innocent parties.

Cited in Bair's Assigned Estate, 20 Pa. Super. Ct. 88, holding daughter executing release to mother so that she could convey good title has no claim in land as against mortgagee who loaned money to mother three years after execution of release, which she had recorded; Vanderslice v. Royal Ins. Co. 13 Pa. Super. Ct. 461, denying company's liability for premiums fraudulently collected by broker whom owners intrusted with policies; Howie v. Lewis, 14 Pa. Super. Ct. 242, holding maker guilty of negligence by leaving space for payee to fill in larger amount, so that he must bear the loss rather than innocent purchaser.

29 L. R. A. 608, DENVER CITY R. CO. v. DENVER, 21 Colo. 350, 52 Am. St. Rep. 239, 41 Pac. 826.

Exercise of taxing power.

Cited in Walsh v. Denver, 10 Colo. App. 411, 53 Pac. 458, holding butcher's license of $50 not excessive; Ogden City v. Crossman, 17 Utah, 79, 53 Pac. 985, sustaining license fee of $5 upon each telephone maintained within city; Phoenix Carpet Co. v. State, 118 Ala. 151, 72 Am. St. Rep. 143, 22 So. 627, sustaining statute imposing occupation tax upon corporations; State *ex rel.* School Dist. v. Boyd, 63 Neb. 832, 58 L. R. A. 110, 89 N. W. 417, construing as tax, money collected under ordinance adopted to raise revenue; Rosenbloom v. State, 64 Neb. 346, 57 L. R. A. 924, 89 N. W. 1053, holding law imposing license tax on peddlers is within city's taxing power.

Uniformity in license tax.

Cited in Stull v. De Mattos, 23 Wash. 77, 51 L. R. A. 895, 62 Pac. 451, sustaining ordinance providing different auctioneer's license tax for sale of different goods.

Cited in footnotes to Banta v. Chicago, 40 L. R. A. 611, which requires uniformity of license taxes on occupations, only as to class on which it operates; Knisely v. Cotterel, 50 L. R. A. 86, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; Harrodsburg v. Renfro, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; State v. Garbroski, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement for peddling license; Com. use of Titusville v. Clark, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real estate dealers, but not others, whose business is less than $1,000.

Corporate taxation.

Cited in note (60 L. R. A. 334) on constitutional equality in United States in relation to corporate taxation.

29 L. R. A. 612, PETERSON v. RUSSELL, 62 Minn. 220, 54 Am. St. Rep. 634, 64 N. W. 555.

Parol evidence as to indorsement.

Cited in Bowler v. Braun, 63 Minn. 36, 56 Am. St. Rep. 449, 65 N. W. 124, holding parol evidence inadmissible to vary legal effect of indorsement on note.

29 L. R. A. 616, PATTILLO v. ALEXANDER, 96 Ga. 60, 22 S. E. 646.

Presumption as to law of another state.

Cited in Massachusetts Ben. Life Asso. v. Robinson, 104 Ga. 277, 42 L. R. A. 271, 30 S. E. 918, upholding presumption of similarity of common law of another state as to incontestable clause in policy.

Cited in footnotes to First Nat. Bank v. National Broadway Bank, 42 L. R. A. 139, which denies presumption that statutory restrictions on alienation of interests of *cestui que trust* are law of other state; Aslanian v. Dostumian, 47 L. R. A. 495, which denies presumption that law merchant as to protest of draft prevails in Asiatic Turkey.

Notice of dishonor.

Cited in footnotes to Leonard v. Olson, 35 L. R. A. 381, which requires notice

to indorser of inability to make demand because of maker's removal from state; Williams v. Parks, 56 L. R. A. 759, which sustains notary's liability on bond for neglecting to give notice of dishonor; Oakley v. Carr, 60 L. R. A. 431, which holds notice of dishonor sufficient if sent to last indorser, who is agent for collection only, by first mail of day following dishonor.

Contract of indorsement.

Cited in Baldwin Fertilizer Co. v. Carmichael, 116 Ga. 763, 42 S. E. 1002, construing as indorsement, contract added to note and signed by payee that he "guarantees it as free from certain defenses, and guarantees payment when due."

29 L. R. A. 622, *Re* RICKER, 14 Mont. 153, 35 Pac. 960.

Executor's right to commissions.

Cited in footnote to *Re* Rutledge, 47 L. R. A. 721, which sustains surrogate's discretion in withholding commissions from executor neglecting duties.

29 L. R. A. 664, FERCHEN v. ARNDT, 26 Or. 121, 46 Am. St. Rep. 603, 37 Pac. 161.

Following trust funds.

Followed in Sharpe v. Hartman, 26 Or. 132, 40 Pac. 230, without discussion; Muhlenberg v. Northwest Loan & T. Co. 26 Or. 143, 29 L. R. A. 667, footnote p. 667, 38 Pac. 932, denying equitable lien in funds in receiver's hands in favor of special depositor who permitted bank to use money; Rockwell v. Portland Sav. Bank, 31 Or. 436, 50 Pac. 566, denying that money not called for under order of distribution passes to subsequent receiver of bank as particular funds; *Re* Bank of Oregon, 32 Or. 89, 51 Pac. 87, holding that assignee for creditors cannot use other funds than those collected to pay collection.

Cited in Shute v. Hinman, 34 Or. 581, 47 L. R. A. 266, 56 Pac. 412, holding that general deposit by administrator of estate's funds in bank destroys its identity; Dunham v. Siglin, 39 Or. 299, 64 Pac. 661, holding that *cestui que trust* may recover funds deposited in separate depository by deceased trustee; Drovers' & M. Nat. Bank v. Roller, 85 Md. 500, 36 L. R. A. 769, 60 Am. St. Rep. 344, 37 Atl. 30, denying that general assets of insolvent commission merchant are chargeable with lien in favor of owner, when proceeds from sales are dissipated; Bromley v. Cleveland, C. C. & St. L. R. Co. 103 Wis. 569, 79 N. W. 741, holding that trust ceases when trust money is so mixed with individual funds as not to be traceable; *Re* Mulligan, 116 Fed. 718, holding that owner cannot establish lien on balance of account, including moneys from sales of property intrusted to bankrupt; Bank Comrs. v. Security Trust Co. 70 N. H. 548, 49 Atl. 113, holding beneficial owner of trust fund not entitled to preference unless money traceable to specific property.

Distinguished in York v. York Market Co. 68 N. H. 420, 37 Atl. 1038, holding that treasurer's deposit of money with another corporation under his control impresses fund with equitable lien, upon latter's insolvency.

29 L. R. A. 667, MUHLENBERG v. NORTHWEST LOAN & T. CO. 26 Or. 132, 38 Pac. 932.

Equitable lien on trust funds.

Followed in Rockwell v. Portland Sav. Bank, 31 Or. 436, 50 Pac. 566, denying

that money not called for under order of distribution passes to subsequent receiver of bank as particular fund; *Re* Bank of Oregon, 32 Or. 89, 51 Pac. 87, denying power of assignee for creditors to use other funds than those collected to pay collection.

Cited in Dunham v. Siglin, 39 Or. 299, 64 Pac. 661, holding *cestui que trust* entitled to funds deposited in separate depository by deceased trustee; Hallam v. Tillinghast, 19 Wash. 27, 52 Pac. 329, denying that collection of draft by bank impresses proceeds with trust; Metropolitan Nat. Bank v. Campbell Commission Co. 77 Fed. 711, denying existence of equitable lien upon funds misappropriated by one holding them in trust, where they have lost their identity.

Cited in footnote to Ferchen v. Arndt, 29 L. R. A. 664, which denies power of consignors to impress with trust lien, funds of consignees in hands of receiver.

29 L. R. A. 668, COLE v. TUCKER, 164 Mass. 486, 41 N. E. 681.

Use of names on official ballot and voting lists.

Cited in Com. v. Rogers, 181 Mass. 187, 63 N. E. 421, holding statute requiring voting lists to be used as check lists in balloting at caucuses, valid; State *ex rel.* Crow v. Hostetter, 137 Mo. 645, 38 L. R. A. 216, 59 Am. St. Rep. 515, 39 S. W. 270, holding electors not restricted to names on official ballot.

Cited in footnote to State *ex rel.* McCarthy v. Moore, 59 L. R. A. 447, which sustains prohibition against placing on official ballot, name of unsuccessful candidate for party nomination at primary election.

Effect of omission of official stamp.

Cited in footnote to Moyer v. Van De Vanter, 29 L. R. A. 670, which authorizes counting of ballots cast in good faith, with official stamp or election officers' initials omitted.

Uniform application of statute.

Cited in Com. v. Danziger, 176 Mass. 291, 57 N. E. 461, sustaining act requiring pawnbrokers in cities or towns of 10,000 or more inhabitants to pay license.

29 L. R. A. 670, MOYER v. VAN DE VANTER, 12 Wash. 377, 50 Am. St. Rep. 900, 41 Pac. 60.

Marks on ballots.

Cited in State *ex rel.* Orr v. Fawcett, 17 Wash. 206, 49 Pac. 346, holding ballots marked "no" or "yes," valid; Kirkpatrick v. Deegans, 53 W. Va. 289, 44 S. E. 465, sustaining statute requiring identification of ballots cast by signature of poll clerks, although causing rejection of few ballots honestly cast; Horning v. Board of Canvassers, 119 Mich. 56, 77 N. W. 446, holding ballots inadvertently indorsed in lower right-hand corner, valid; Lynip v. Buckner, 22 Nev. 438, 30 L. R. A. 357, 41 Pac. 762, denying that unintentional omission to remove number strips invalidates ballots.

Cited in note (47 L. R. A. 807) on marking official ballot.

Distinguished in Orr v. Bailey, 59 Neb. 138, 80 N. W. 495, and Slaymaker v. Phillips, 5 Wyo. 481, 47 L. R. A. 852, 42 Pac. 1049 (approved in dissenting opinion), sustaining constitutionality of statute making void, ballots not properly indorsed.

Criticized in Miller v. Schallern, 8 N. D. 401, 79 N. W. 865, rejecting ballots cast without official stamp.

Effect of premature choice of officer.

Cited in Com. v. Rogers, 181 Mass. 192, 63 N. E. 421, denying that election of temporary warden a few minutes before hour named to fill vacancy renders caucus illegal.

Count of undersized ballots.

Cited in Conaty v. Gardner, 75 Conn. 53, 52 Atl. 416, authorizing count of ballots slightly under size.

Designation of office.

Cited in footnote to Page v. Kuykendall, 32 L. R. A. 656, which holds words "long term" after one of two names on ballot sufficient designation of office.

29 L. R. A. 673, TEBBE v. SMITH, 108 Cal. 101, 49 Am. St. Rep. 68, 41 Pac. 454.

Ballots as evidence.

Cited in DeLong v. Brown, 113 Iowa, 372, 85 N. W. 624, and Windes v. Nelson, 159 Mo. 67, 60 S. W. 129, holding ballots admissible in election contest after proof that they have been kept intact.

Distinguishing marks on ballots.

Cited in Lauer v. Estes, 120 Cal. 653, 53 Pac. 262, holding ballot containing heavy mark 2 inches below names, void; San Luis Obispo v. Fitzgerald, 126 Cal. 283, 58 Pac. 699, holding that printing by authorities of "yes" upon ballot vitiates election; Farnham v. Boland, 134 Cal. 153, 66 Pac. 200, holding that cross placed in square, with no name opposite, invalidates ballot; Moody v. Davis, 13 S. D. 92, 82 N. W. 410, holding that placing mark in circle at head of two different tickets invalidates ballot; Nicholls v. Barrick, 27 Colo. 441, 62 Pac. 202, holding ballots not invalidated by addition of word "fusion;" Parker v. Hughes, 64 Kan. 241, 56 L. R. A. 279, 91 Am. St. Rep. 216, 67 Pac. 637, denying that surplusage of marks in squares opposite name of candidate appearing upon two tickets invalidates ballots; Maddux v. Walthall, 141 Cal. 414, 74 Pac. 1026, holding ballots stamped after words "no nomination" void.

Cited in footnote to Dennis v. Caughlin, 29 L. R. A. 731, which holds that blurred spot or erasure on ballot, made with intent to correct mistake, does not defeat ballot.

Distinguished in Jennings v. Brown, 114 Cal. 309, 34 L. R. A. 45, footnote p. 45, 46 Pac. 77, holding validity of ballot not destroyed by addition of party name after candidate's.

Effect of innocent irregularities in election.

Cited in Hayes v. Kirkwood, 136 Cal. 402, 69 Pac. 30, denying that innocent irregularities of election board defeat election; Kenworthy v. Mast, 141 Cal. 273, 74 Pac. 841, holding election not invalidated by delay in opening polls, where officers acted in good faith, and where only one failed to vote, which vote could not have changed result.

Distinguished in Davis v. Grunig, 143 Cal. 339, 76 Pac. 1102, authorizing count of ballots in election honestly conducted, although election officers failed to return tally lists.

Marking official ballots.

Cited in footnote to Parker v. Orr, 30 L. R. A. 227, which holds provision as to marking ballot with cross not mandatory.

Cited in note (47 L. R. A. 823, 828, 841) on marking official ballot.

29 L. R. A. 678, FULTON v. FULTON, 52 Ohio St. 229, 49 Am. St. Rep. 720, 39 N. E. 729.

Obligation of parent to support child.

Cited in Wing v. Hibbert, 7 Ohio N. P. 126, holding mother liable for support of minor children after father's death.

— After divorce.

Followed without discussion in Douglas v. Douglas, 64 Ohio St. 606, 61 N. E. 1142.

Cited in Zilley v. Dunwiddie, 98 Wis. 435, 40 L. R. A. 583, footnote p. 579, 67 Am. St. Rep. 820, 74 N. W. 126, holding father liable to mother after divorce, for keeping of child awarded to father under decree; McCloskey v. McCloskey, 93 Mo. App. 400, 67 S. W. 669, holding father liable to mother for necessary disbursements for minor children after divorce.

Cited in footnotes to Brown v. Smith, 30 L. R. A. 680, which denies divorced wife's right to hold husband's estate liable for board of minor children awarded to her; Foss v. Hartwell, 37 L. R. A. 589, which denies divorced father's liability to subsequent husband of wife for support of child surreptitiously taken by mother; Keller v. St. Louis, 47 L. R. A. 391, which holds that duty of supporting child, which by divorce decree is given to mother, is still on father, if decree makes no provision.

29 L. R. A. 681, *Re* EDWARDS, 122 Mo. 426, 25 S. W. 904.

Sales by insolvent partnership.

Cited in McDonald v. Cash, 57 Mo. App. 549, denying that mere technical insolvency of partnership in active business makes sale to purchasing partner fraudulent; Kelly-Goodfellow Shoe Co. v. Vail Bros. 84 Mo. App. 99, upholding cash sale of goods purchased with knowledge of vendor's insolvency.

Validity of firm mortgage.

Cited in Noyes v. Ross, 23 Mont. 438, 47 L. R. A. 405, 75 Am. St. Rep. 543, 59 Pac. 367, upholding firm mortgage as security for previous loan used in purchase of stock.

Application of firm assets.

Cited in Freedman v. Holberg, 89 Mo. App. 345, upholding partner's right to use firm assets to discharge partnership debts before individual debts; Thayer v. Humphrey, 91 Wis. 293, 30 L. R. A. 555, footnote p. 549, 51 Am. St. Rep. 887, 64 N. W. 1007, holding that creditors of old and new firm may prove claims *pari passu* in preference to individual creditors of new firm; Bedford v. McDonald, 102 Tenn. 365, 52 S. W. 157, holding that firm creditor may follow note belonging to firm, sold by partner after fraudulent diversion of assets.

Cited in footnote to Vietor v. Glover, 40 L. R. A. 297, which denies right of subsequent creditors of insolvent firm to complain that note was given to withdrawing member for his share of assets.

— To individual debts.

Cited in Rogers & B. Hardware Co. v. Randell, 69 Mo. App. 345, sustaining mortgage executed by remaining partner to secure individual debt; Lester *ex rel.* Wright v. Givens, 74 Mo. App. 399, holding that individual creditor may sell partnership property subject to rights of firm creditors; A. G. Edwards & Son

Brokerage Co. v. Rosenheim, 74 Mo. App. 626, upholding garnishment of partnership debtors by individual creditor in absence of statement of claims of firm creditors; Sevier v. Allen, 80 Mo. App. 190, upholding bankrupt partner's transfer of stock in payment of purchase price notes; Rock Island Implement Co. v. Sloan, 83 Mo. App. 441, holding appropriation of firm property to pay individual debt, without partner's consent, void; Hutchinson v. Morris Bros. 86 Mo. App. 45, denying partner's right to encumber firm effects to satisfy copartner's liability for bail money, without latter's consent; Redenbaugh v. Kelton, 130 Mo. 570, 32 S. W. 67, holding partner's note, given to reimburse copartner for advancement to partnership, not firm note; Mansur-Tebbetts Implement Co. v. Ritchie, 159 Mo. 225, 60 S. W. 87, holding that assignee of trust deed executed by member of insolvent partnership to another as security for individual debt has no rights as against firm creditors.

Cited in footnotes to Standish v. Babcock, 30 L. R. A. 604, which authorizes retention of firm money received from one partner by creditor to satisfy debt from such partner; Jackson Bank v. Durfey, 31 L. R. A. 470, which denies right of insolvent members of insolvent firm to pay individual debts with firm property; Kincaid v. National Wall Paper Co. 54 L. R. A. 412, which sustains right of partners to appropriate, with other partners' consent, interest in firm to pay individual, in preference to firm, debts.

— Right to exemptions.

Cited in footnote to *Re* Spitz Bros. 34 L. R. A. 604, which denies right of members of firm to claim exemption out of firm property.

Transfers by insolvent.

Cited in Baker v. Harvey, 133 Mo. 662, 34 S. W. 853, holding insolvent's transfer of land in consideration that grantee discharge debts not fraudulent as to creditor not included.

Review on appeal.

Cited in Simmons Hardware Co. v. Greeley-Burnham Grocer Co. 64 Mo. App. 678, raising, without deciding, question as to review of evidence on appeal.

29 L. R. A. 695, REYNOLDS v. GREAT NORTHERN R. CO. 16 C. C. A. 435, 32 U. S. App. 577, 69 Fed. 808.

Contributory negligence.

Cited in McCain v. Chicago, B. & Q. R. Co. 22 C. C. A. 101, 40 U. S. App. 181, 76 Fed. 127, denying recovery to employee injured by placing hand upon ragged edge of engine wheel; Gilbert v. Burlington, C. R. & N. R. Co. 63 C. C. A. 30, 128 Fed. 532, holding brakeman's failure to use uncoupling lever on other car after one on first car failed to work, guilty of contributory negligence barring recovery from company for its negligence in failing to keep guard rails blocked, thereby causing brakeman to fall.

— At railroad crossing or on tracks.

Cited in Pyle v. Clark, 25 C. C. A. 192, 49 U. S. App. 260, 79 Fed. 747, and Chicago & N. W. R. Co. v. Andrews, 130 Fed. 72, holding failure to look and listen before crossing track, contributory negligence; Chicago, St. P. M. & O. R. Co. v. Rossow, 54 C. C. A. 315, 117 Fed. 493, holding one driving over frozen road with collar above ears, negligent in failing to stop and listen for trains; St. Louis &

S. F. R. Co. v. Barker, 23 C. C. A. 479, 40 U. S. App. 739, 77 Fed. 814 (dissenting opinion), majority holding it question for jury as to driver's duty to stop and listen at point where view of track obstructed; Southern Electric R. Co. v. Hageman, 57 C. C. A. 359, 121 Fed. 273 (dissenting opinion), majority holding one driving on street car tracks in evening to avoid muddy place about two hundred feet long not guilty of contributory negligence so as to bar recovery for injuries resulting from collision with rapidly moving car.

Duty to give signals at crossing.

Cited in Coulter v. Great Northern R. Co. 5 N. D. 574, 67 N. W. 1046, raising, without deciding, question as to requirement to give signals at private highway crossing.

Cited in footnotes to Wragge v. South Carolina & G. R. Co. 33 L. R. A. 191, which holds company liable for failure to give crossing signal, contributing to collision; Czech v. Great Northern R. Co. 38 L. R. A. 302, which holds company liable for failure to give signals at particularly dangerous farm crossings, when required in exercise of reasonable care; Louisville & N. R. Co. v. Bodine, 56 L. R. A. 506, which requires signals at private crossing used by public, by peculiarly dangerous special train.

Failure to obey rules or statute as excuse for, or cause of, liability.

Cited in Williams v. Lyman, 31 C. C. A. 513, 60 U. S. App. 25, 88 Fed. 240, denying that collector's neglect to comply with rules by examining deputy's account relieves sureties for deputy's defalcations; Mankey v. Chicago, M. & St. P. R. Co. 14 S. D. 473, 85 N. W. 1013, holding proof of company's failure to give statutory signals as cause of injury necessary to recovery.

Cited in footnote to Rosse v. St. Paul & D. R. Co. 37 L. R. A. 591, which holds railroad company liable for injury to young child from failure to keep track fenced, as required by law.

Direction of verdict.

Cited in Clark v. Zarniko, 45 C. C. A. 496, 106 Fed. 609; Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 375, 49 U. S. App. 548, 83 Fed. 641; Sipes v. Seymour, 22 C. C. A. 91, 40 U. S. App. 185, 76 Fed. 116; Motey v. Pickle Marble & Granite Co. 20 C. C. A. 368, 36 U. S. App. 682, 74 Fed. 157,—holding it duty of court to direct verdict for party clearly entitled to recover.

29 L. R. A. 700, FARMERS' CO-OP. MFG. CO. v. ALBEMARLE & R. R. CO. 117 N. C. 579, 53 Am. St. Rep. 606, 23 S. E. 43

Private remedy for public nuisance.

Cited in Reyburn v. Sawyer, 135 N. C. 336, 63 L. R. A. 935, footnote p. 931, 102 Am. St. Rep. 555, 47 S. E. 761, sustaining right of owner of island to maintain action to redress private injury resulting from interference with access to property, caused by fishing net stretched across navigable channel.

Cited in footnotes to South Carolina S. B. Co. v. Wilmington, C. & A. R. Co. 33 L. R. A. 542, which denies steamboat owner's right of action for obstruction of navigation of river; Griffith v. Holman, 54 L. R. A. 178, which denies private individual's right to abate public nuisance consisting of fence across navigable stream.

What waters are navigable.

Cited in State v. Baum, 128 N. C. 605, 38 S. E. 900, holding use of cove as shorter and safer route proves its navigability.

Cited in note (42 L. R. A. 327) on what waters are navigable.

Right to obstruct navigation.

Cited in note (59 L. R. A. 66, 84) on right to obstruct or destroy navigation.

29 L. R. A. 703, KIRKPATRICK v. BROWNFIELD, 97 Ky. 558, 53 Am. St. Rep. 422, 31 S. W. 137.

Eligibility of elector.

Cited in footnote to State *ex rel.* Goodell v. McGeary, 44 L. R. A. 446, which holds that building and furnishing new house with intention of living in same does not make owner elector of ward while renting elsewhere.

29 L. R. A. 705, ROBERTS v. MITCHELL, 94 Tenn. 277, 29 S. W. 5.

Judgment as offset.

Cited in footnote to Cleveland v. McCanna, 41 L. R. A. 852, which denies right to set off judgment, where entire property of one debtor is less than statute exempts from seizure.

Attorney's fees and expenses.

Cited in McDougall v. Hazleton Tripod-Boiler Co. 31 C. C. A. 495, 60 U. S. App. 209, 88 Fed. 225, holding expenses included in rule giving attorney's lien for services.

Cited in footnote to Loofbourow v. Hicks, 55 L. R. A. 874, which holds lien for attorney's fees allowed by judgment of foreclosure enforceable against land bid in by mortgagee or assignee.

29 L. R. A. 706, BILLS v. HIBERNIA INS. CO. 87 Tex. 547, 47 Am. St. Rep. 121, 29 S. W. 1063.

Construction of insurance policies.

Followed in Delaware Ins. Co. v. Harris, 26 Tex. Civ. App. 547, 64 S. W. 867, holding policy covering various articles not void because of insured's failure to disclose encumbrance on one, which was unknown to him at time.

Cited in Brown v. Palatine Ins. Co. 89 Tex. 595, 35 S. W. 1060, denying that failure to record sales of day preceding fire, violation of covenant to record business transacted; British-America Assur. Co. v. Miller, 91 Tex. 419, 39 L. R. A. 547, 66 Am. St. Rep. 901, 44 S. W. 60, holding that insurance on personal property while contained in certain building does not cover property while in other place where family staying temporarily; Phoenix Assur. Co. v. Munger Improved Cotton Mach. Mfg. Co. 92 Tex. 303, 49 S. W. 222, defining warranty as statement susceptible of no construction other than that parties intended that policy should not be binding unless true.

— Severability of policy.

Cited in German Ins. Co. v. Luckett, 12 Tex. Civ. App. 144, 34 S. W. 173, denying that failure to disclose mortgage upon one article vitiates policy as to rest; Roberts v. Sun Mut. Ins. Co. 13 Tex. Civ. App. 70, 35 S. W. 955, holding that breach of iron-safe clause forfeits insurance as to goods alone, when policy sev-

erable; Georgia Home Ins. Co. v. McKinley, 14 Tex. Civ. App. 11, 37 S. W. 606, denying that violation of provision of policy relating to merchandise bars recovery for loss of building.

Cited in footnotes to Dumas v. Northwestern Nat. Ins. Co. 40 L. R. A. 358, which holds entirely void, policy for certain amount on furniture as a whole, for breach of condition as to part; Southern F. Ins. Co. v. Knight, 52 L. R. A. 70, which holds policy on different classes of property for premium payable in gross sum, indivisible.

Distinguished in Sullivan v. Hartford F. Ins. Co. 89 Tex. 667, 36 S. W. 73, holding that false swearing as to value of goods defeats recovery for loss on house; Curlee v. Texas Home F. Ins. Co. 31 Tex. Civ. App. 471, 73 S. W. 831, holding entire policy covering house and personal property avoided by existence of vendor's lien on land, antedating construction of house.

29 L. R. A. 708, LANE v. MINNESOTA STATE AGRI. SOC. 62 Minn. 175, 64 N. W. 382.

Liability for injury or death of persons at, or on way to, public entertainment.

Reaffirmed on second appeal in Lane v. Minnesota State Agri. Soc. 67 Minn. 66, 69 N. W. 463, sustaining right to recover for entry of track bolter in race without informing rider of horse's habits; Indianapolis Street R. Co. v. Dawson, 31 Ind. App. 608, 68 N. E. 909, holding street car company liable for conspiracy among its employees to assault colored people at exhibition given in company's park, where company had knowledge of such conspiracy but transported colored people without warning them; Thornton v. Maine State Agri. Soc. 97 Me. 114, 94 Am. St. Rep. 488, 53 Atl. 979, holding agricultural society liable for death of one killed by stray bullet fired in shooting gallery on fair grounds.

Cited in footnotes to Richmond & M. R. Co. v. Moore, 37 L. R. A. 258, which holds street car company owning park liable for killing of boy by fall of pole used in balloon ascension; Hallyburton v. Burke County Fair Asso. 38 L. R. A. 156, which denies right of action against fair association, which was free from negligence, for injury to bystander by bolting of vicious horse from race track; Thompson v. Lowell, I. & H. Street R. Co. 40 L. R. A. 345, which holds street railway company liable for injury to spectator at free exhibition of markmanship given by independent contractor on company's grounds; Smith v. Benick, 42 L. R. A. 277, which denies liability of proprietor of public resort for negligence of balloonist, who was independent contractor; Sebeck v. Plattdeutsche Volksfest Verein, 50 L. R. A. 199, which denies proprietor's liability for injury to spectator by explosion of bomb in hands of skilled person at exhibition; Mastad v. Swedish Brethren, 53 L. R. A. 803, which holds proprietor of place of amusement required to use reasonable care to protect patrons from assaults by one rendered disorderly by liquor sold there; Clark v. Northern P. R. Co. 59 L. R. A. 508, which denies liability of railroad company permitting circus on its vacant land adjoining switch yard, for injury to person crossing yard to reach circus.

Duty of master to warn servant.

Cited in note (44 L. R. A. 56) on duty of master to instruct and warn servants as to perils of employment.

Powers and liabilities of public institutions.

Cited in footnotes to *Re* Royer, 44 L. R. A. 364, which sustains power of state

university to take bequest; Oklahoma Agri. & M. College v. Willis, 40 L. R. A. 677, which denies power to sue agricultural and mechanical college created by and existing under statute; Maia v. Eastern State Hospital, 47 L. R. A. 577, which denies liability of state hospital for injuries to inmate from negligence or misconduct of persons in charge; Trevett v. Prison Asso. 50 L. R. A. 564, which holds prison association, not controlled by state, liable for its torts; Moody v. State's Prison, 53 L. R. A. 855, which denies liability of state to prison guard for injury by defective ladder; Overholser v. National Home for Disabled Volunteer Soldiers, 62 L. R. A. 936, which holds national home for disabled soldiers, a part of United States government, not subject to action sounding in tort.

— Legislative control of.

Cited in footnote to Watson Seminary v. County Court, 45 L. R. A. 675, which holds charter provisions of educational corporation changeable at will of legislature.

29 L. R. A. 712, STATE MUT. F. INS. CO. v. BRINKLEY STAVE & HEADING CO. 61 Ark. 1, 54 Am. St. Rep. 191, 31 S. W. 157.

Failure to comply with statute as affecting contract.

Cited in American Bldg. & L. Asso. v. Rainbolt, 48 Neb. 452, 67 N. W. 493, holding failure of foreign loan association to comply with statute not ground for rescinding contract; Vermont Loan & T. Co. v. Hoffman, 5 Idaho, 384, 37 L. R. A. 511, 95 Am. St. Rep. 186, 49 Pac. 314, holding loan of money without license valid, though misdemeanor.

— Of insurance.

Cited in Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co. 149 Mo. 178, 50 S. W. 281, holding that foreign insurance company will be subrogated to owner's rights against railroad for destruction of property, although no certificate obtained in state.

Cited in footnote to Swing v. Munson, 58 L. R. A. 223, which holds insurance contract, valid where made, not enforceable in state where property located, whose laws directly violated.

Conflict of laws as to insurance contracts.

Cited in note (63 L. R. A. 837, 852) on conflict of laws as to contracts of insurance.

What laws govern.

Cited in Franklin L. Ins. Co. v. Galligan, 71 Ark. 300, 100 Am. St. Rep. 73, 73 S. W. 102, holding that contract of insurance, made in state and to be performed therein, is governed by its statutes relating to misrepresentations.

Cited in footnote to Cravens v. New York L. Ins. Co. 53 L. R. A. 305, which holds life policies of foreign company, taking effect on delivery and collection of premium, governed by law of state of delivery, notwithstanding provision in policy.

29 L. R. A. 714, STATE v. SWETT, 87 Me. 99, 47 Am. St. Rep. 306, 32 Atl. 806.

Knowledge as element of crime.

Cited in State v. Rogers, 95 Me. 102, 85 Am. St. Rep. 395, 49 Atl. 564, holding knowledge of character of article not necessary to sustain conviction for sale of oleomargarine.

Game laws.

Cited in Dickhaut v. State, 85 Md. 464, 36 L. R. A. 767, 60 Am. St. Rep. 332, 37 Atl. 21, holding possession during close season of game killed in another state, lawful.

Cited in footnotes to Selkirk v. Stevens, 40 L. R. A. 759, which holds game killed by Indians on reservation, and sold to other Indian, subject to game laws of state after taken from reservation; State v. Schuman, 47 L. R. A. 153, which sustains statute prohibiting sale, or keeping for sale, of trout; People v. Buffalo Fish Co. 52 L. R. A. 803, which holds void, act prohibiting possession of certain fish during close season.

Cited in note (39 L. R. A. 590) on governmental control over right of fishery.

29 L. R. A. 718, JUDSON v. GIANT POWDER CO. 107 Cal. 549, 48 Am. St. Rep. 146, 40 Pac. 1020.

Presumption of negligence.

Cited in McCurrie v. Southern P. Co. 122 Cal. 562, 55 Pac. 324, holding that sudden jerking of train, causing door to close on passenger's hand, raises presumption of negligence; Chico Bridge Co. v. Sacramento Transp. Co. 123 Cal. 183, 55 Pac. 780, holding that collision of barge with bridge creates presumption of carrier's negligence; Knott v. McGilvray, 124 Cal. 132, 56 Pac. 789, holding that fall of tool from building upon walk raises presumption of negligence; Bosqui v. Sutro R. Co. 131 Cal. 400, 63 Pac. 682, holding derailment of trolley car, injuring passenger, prima facie proof of negligence; Harrison v. Sutter Street R. Co. 134 Cal. 550, 55 L. R. A. 609, 66 Pac. 787, holding that mere fact of injury to passenger by collision of car with wagon raises no presumption of negligence against both; Rowe v. Such, 134 Cal. 574, 66 Pac. 862, holding that injury by collision with runaway creates no presumption of negligence; Vorbrich v. Geuder & P. Mfg. Co. 96 Wis. 281, 71 N. W. 434, holding unexpected revolution of machine, injuring operator, prima facie proof of negligence; Raney v. Lachance, 96 Mo. App. 484, 70 S. W. 376, holding that breaking of window caused by swinging of timbers raises no presumption as to negligence of one or both servants; Kahn v. Triest-Rosenberg Cap Co. 139 Cal. 344, 73 Pac. 164, holding that injury to goods, due to overflow of water from boiler on upper floor, caused by breaking of cap on water pipe projecting into fire box, creates prima facie case of negligence; Bradford Glycerine Co. v. Kizer, 51 C. C. A. 528, 113 Fed. 898, holding that spontaneous explosion of nitroglycerin creates presumption of impurity; Beall v. Seattle, 28 Wash. 604, 61 L. R. A. 593, 92 Am. St. Rep. 892, 69 Pac. 12, holding that explosion of boiler under walk, unexplained, raises presumption of negligence.

Cited in footnote to Esberg-Gunst Cigar Co. v. Portland, 43 L. R. A. 435, which holds bursting of water main three times under ordinary pressure, evidence of negligence.

Negligence or nuisance in respect to explosives.

Cited in Kinney v. Koopman, 116 Ala. 324, 37 L. R. A. 501, footnote p. 497, 67 Am. St. Rep. 119, 22 So. 593, holding storing of explosives in wooden building in populous part of city, negligence.

Cited in footnotes to Ryan v. Los Angeles Ice & Cold Storage Co. 32 L. R. A. 524, which holds negligence shown by explosion of generator of refrigerator while inexperienced employees are attempting to stop leak; Fuchs v. St. Louis, 34 L. R. A. 118, which holds city liable for explosion of sewer with obstructed outlet,

from formation of gases from oil poured into same during fire; Hatcher v. Dunn, 36 L. R. A. 689, which holds inspector of oil not absolutely liable for incorrectly branding it; Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co. 45 L. R. A. 658, which holds owner of nitroglycerin liable for injuries by explosion, though free from negligence.

Distinguished in Kleebauer v. Western Fuse & Explosives Co. 138 Cal. 502, 60 L. R. A. 381, 94 Am. St. Rep. 62, 71 Pac. 617, holding storage of gunpowder in quantities necessary for business not nuisance *per se*.

Municipal control over nuisance.

Cited in notes (38 L. R. A. 311) on municipal power over nuisances affecting safety, health, and personal comfort; (38 L. R. A. 642) on municipal power over nuisances relating to trade or business.

Burden of proof as to negligence.

Cited in Dieterle v. Bekin, 143 Cal. 687, 77 Pac. 664, holding that in action for loss of goods by burning of warehouse, burden of proof to show freedom from negligence is upon warehouseman after proof of his negligence as to place and manner of storing property.

29 L. R. A. 729, GOODLOE v. MEMPHIS & C. R. CO. 107 Ala. 233, 54 Am. St. Rep. 67, 18 So. 166.

Master's liability for acts of servant.

Cited in Steele v. May, 135 Ala. 489, 33 So. 30, holding master liable for injury to goods caused by servant's negligence in allowing bath tub to overflow.

— For assault.

Cited in Case v. Hulsebush, 122 Ala. 217, 26 So. 155, holding tax collector liable for assault by deputy while collecting taxes; Holler v. Ross, 68 N. J. L. 329, 59 L. R. A. 946, 96 Am. St. Rep. 546, 53 Atl. 472, denying liability for shooting trespasser who refused to leave, by one employed to watch

Cited in footnotes to St. Louis S. W. R. Co. v. Jones, 39 L. R. A. 784, which holds carrier liable for conductor's unreasonably beating passenger who slapped his face; Haver v. Central R. Co. 43 L. R. A. 84, which holds carrier liable for malicious assault by employee on passenger; McDermott v. American Brewing Co. 52 L. R. A. 684, which denies master's liability for assault by servant to protect his own interests; Birmingham R. & Electric Co. v. Baird, 54 L. R. A. 752, which holds carrier liable for conductor's assault on passenger; Kohner v. Capital Traction Co. 62 L. R. A. 875, which requires carrier, when peaceable passenger on street car is unlawfully assaulted by conductor, to show that injury was result of unavoidable accident.

29 L. R. A. 731, DENNIS v. CAUGHLIN, 22 Nev. 447, 58 Am. St. Rep. 761, 41 Pac. 768.

Tampering with ballots as affecting canvass.

Cited on second appeal in Dennis v. Caughlin, 23 Nev. 191, 44 Pac. 818, holding that rule that ballots control canvass does not apply when ballots are tampered with.

Distinguishing marks on ballots.

Cited in McMahon v. Polk, 10 S. D. 305, 47 L. R. A. 840, 73 N. W. 77, denying

that blurred cross vitiates ballot; State *ex rel.* Orr v. Fawcett, 17 Wash. 208, 49 Pac. 346, holding ballots having cross at left instead of right of name, valid.

Cited in footnotes to Buckner v. Lynip, 30 L. R. A. 354, which holds that failure of inspectors to take number strips from ballot does not prevent counting same; Jennings v. Brown, 34 L. R. A. 45, which holds legality of ballot not destroyed by addition of party name after candidate's name.

Distinguished in Howser v. Pepper, 8 N. D. 497, 79 N. W. 1018, denying that cross in square and at head of column vitiates ballot.

Marking ballots.

Cited in footnote to Parker v. Orr, 30 L. R. A. 227, which holds provision as to marking ballot with cross not mandatory.

Cited in note (47 L. R. A. 816, 817, 820, 822, 825, 826, 833) on marking official ballot.

29 L. R. A. 734, OTTUMWA v. ZEKIND, 95 Iowa, 622, 58 Am. St. Rep. 447, 64 N. W. 646.

Uniformity of license tax or privileges.

Cited in Levy v. State, 161 Ind. 261, 68 N. E. 172, holding constitutional privilege as to uniformity of taxation not violated by statute exempting sheriffs, assignees, and receivers from payment of transient merchant license tax.

Cited in footnotes to Broadfoot v. Fayetteville, 39 L. R. A. 245, which sustains statute discriminating in favor of nonresidents of city as to allowing stock to run at large; Knisely v. Cotterel, 50 L. R. A. 86, which sustains statute fixing different rates of license for retailers, wholesalers, and sellers on board of trade; Harrodsburg v. Renfro, 51 L. R. A. 897, which holds void, ordinance imposing greater license fee for sale of liquors on main street of town than elsewhere; State v. Garbroski, 56 L. R. A. 570, which holds void, statute exempting veterans from requirement of peddling license; Com. use of Titusville v. Clark, 57 L. R. A. 348, which holds void, exemption from license tax of contractors and real estate dealers, but not others, whose business is less than $1,000.

Reasonableness of license fee.

Cited in Burlington v. Unterkircher, 99 Iowa, 405, 68 N. W. 795, holding annual license fee of $10 for each hack not unreasonable; Iowa City v. Newell, 115 Iowa, 58, 87 N. W. 739, holding transient merchant's license fee of $50 reasonable; Stull v. DeMattos, 23 Wash. 76, 51 L. R. A. 895, 62 Pac. 451, holding auctioneer's license fee of $25 per day valid exercise of taxing power; Easterly v. Irwin, 99 Iowa, 697, 68 N. W. 919, holding taxation for revenue not authorized under power to license, and tax for such purpose would be unreasonable; Springfield v. Jacobs, 101 Mo. App. 343, 73 S. W. 1097, holding ordinance imposing license tax of $50 per day on person conducting transient clothing or jewelry business, unreasonable.

Cited in note (30 L. R. A. 426, 431) on limit of amount of license fees.

License as to mortgage sale.

Cited in Iowa City v. Newell, 115 Iowa, 58, 87 N. W. 739, holding sale under mortgage, as agent, no excuse for failure to obtain license.

29 L. R. A. 737. ELLISON v. ALBRIGHT, 41 Neb. 93, 59 N. W. 703.

Certificate of tax sale as presumption of assessment.

Cited in Merrill v. Wright, 41 Neb. 355, 59 N. W. 787, holding that treasurer's certificate of tax sale raises no presumption of assessment of taxes.

Jury's determination of damages.

Cited in Ellison v. Brown, 43 Neb. 69, 61 N. W. 97, holding instruction that jury may determine general damages from malicious prosecution, when no special damages shown, proper.

29 L. R. A. 743, CAPITAL CITY WATER CO. v. STATE, 105 Ala. 406, 18 So. 62.

Forfeiture of charter for misuse.

Cited in footnotes to State *ex rel.* Sheets v. Mt. Hope College Co. 52 L. R. A. 365, which authorizes dissolution of educational institution for sale of diplomas without regard to merit; State *ex rel.* Mylrea v. Janesville Water Power Co. 32 L. R. A. 391, which holds right to forfeit water company's franchise for overbonding wrongful issue of stock, lost by delay; Palestine Water & Power Co. v. Palestine, 40 L. R. A. 203, which holds flagrant disregard of duty to furnish wholesome water, ground for forfeiting water company's franchise.

Municipal regulation of water supply.

Cited in Weatherly v. Capital City Water Co. 115 Ala. 179, 22 So. 140, holding that city may compel continuance of water supply during pendency of dissolution proceedings.

Cited in footnote to Du Bois v. Du Bois City Waterworks Co. 34 L. R. A. 92, which holds cancelation of contract by city for water supply not justified by inadequacy of supply.

Cited in note (61 L. R. A. 87, 93) on establishment and regulation of municipal water supply.

Dissolution of municipal corporation.

Cited in West End v. State, 138 Ala. 391, 36 So. 423, holding information sufficient complaint on which to institute proceedings to dissolve municipal corporation unlawfully organized.

29 L. R. A. 751, STEPHENS v. SOUTHERN P. CO. 102 Cal. 86, 50 Am. St. Rep. 17, 41 Pac. 783.

Validity and effect of contracts against liability for negligence.

Cited in South Carolina & G. R. Co. v. Carolina, C. G. & C. Ry. Co. 93 Fed. 560, sustaining contract exempting from liability connecting railroad company operating receiver's road without direct compensation.

— For fires.

Cited in American Cent. Ins. Co. v. Chicago & A. R. Co. 74 Mo. App. 102, upholding contract releasing railroad company from damages by fire to elevator erected on right of way by lessee; Greenwich Ins. Co. v. Louisville & N. R. Co. 112 Ky. 605, 56 L. R. A. 479, footnote p. 477, 99 Am. St. Rep. 313, 66 S. W. 411, sustaining contract releasing company from liability for injury by fire to building permitted to occupy right of way; Ordelheide v. Wabash R. Co. 175 Mo. 346, 75 S. W. 149, sustaining contract indemnifying railroad company against loss

by fire communicated by its locomotives to elevator constructed on right of way; Missouri, K. & T. R. Co. v. Carter, 95 Tex. 477, 68 S. W. 159, holding contract exempting railroad company from liability for damage by fires not prohibited by statute forbidding carrier to limit liability by contract.

Cited in footnotes to King v. Southern P. Co. 29 L. R. A. 755, which holds covenant in lease of railroad property against liability for loss by fire not binding on agent of lessee; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 30 L. R. A. 193, which holds valid, stipulation against liability for negligence in setting fire to leased buildings erected on right of way.

29 L. R. A. 755, KING v. SOUTHERN P. CO. 109 Cal. 96, 41 Pac. 786.

Contracts against liability for negligence.

Cited in Walker Bros. v. Missouri P. R. Co. 68 Mo. App. 473, affirming recovery for loss of goods of third person in building permitted to occupy right of way on condition that owner assume risk; Greenwich Ins. Co. v. Louisville & N. R. Co. 112 Ky. 605, 56 L. R. A. 479, footnote p. 477, 99 Am. St. Rep. 313, 66 S. W. 411, sustaining contract releasing company from liability for injury by fire to building permitted to occupy right of way.

Cited in footnotes to Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 30 L. R. A. 193, which holds valid, stipulation against liability for negligence in setting fire to leased buildings erected on right of way; Northern P. R. Co. v. McClure, 47 L. R. A. 149, which holds covenant releasing railroad company from injury by fire to lessee of warehouse inures to transferee's benefit.

Action by tenant for failure to fence tracks.

Cited in Walther v. Sierra R. Co. 141 Cal. 289, 74 Pac. 840, sustaining tenant's right to maintain action against railroad company for killing mule "upon line of road which passes through or along property of owner," for failure to build fences.

Reversal for excessive damages.

Cited in footnote to Smith v. Times Pub. Co. 35 L. R. A. 819, which sustains statute authorizing reversal for excessive damages, though motion for new trial denied below.

29 L. R. A. 757, LAKE ERIE & W. R. CO. v. MACKEY, 53 Ohio St. 370, 53 Am. St. Rep. 640, 41 N. E. 980.

Contributory negligence of children.

Cited in footnotes to Graney v. St. Louis, I. M. & S. R. Co. 38 L. R. A. 633, which denies negligence *per se* of twelve-year-old boy in standing so near passing train as to be drawn under by current of air; Gleason v. Smith, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve-year-old boy using street as playground.

Allegations as to negligence.

Cited in note (59 L. R. A. 212, 213, 228) on sufficiency of general allegations of negligence.

29 L. R. A. 761, BANK OF NEWPORT v. COOK, 60 Ark. 288, 46 Am. St. Rep. 171, 30 S. W. 35.

Contracts infected with usury.

Cited in McCauley v. Workingman's Bldg. & Sav. Asso. 97 Tenn. 436, 35 L. R. A. 248, 56 Am. St. Rep. 813, 37 S. W. 212, holding loans made by association at uniform premium, without competitive bidding, infected with usury; Security Sav. & L. Asso. v. Elbert, 153 Ind. 202, 54 N. E. 753, holding building and loan contracts not usurious; Shannon v. Georgia State Bldg. & L. Asso. 78 Miss. 974, 57 L. R. A. 805, 84 Am. St. Rep. 657, 30 So. 51, and Sokoloski v. New South Bldg. & L. Asso. 77 Miss. 165, 26 So. 361, holding contract stipulating for 6 per cent interest and 6 per cent as premiums, usurious; Union Sav. Bank & T. Co. v. Dottenheim, 107 Ga. 614, 34 S. E. 217, holding monthly notes, comprising loan and interest for full period, usurious.

Effect of taking illegal interest.

Cited in note (56 L. R. A. 709) on forfeiture or other effect of taking or receiving illegal interest by national bank.

Carrier's discrimination between localities.

Cited in Little Rock & Ft. S. R. Co. v. Oppenheimer, 64 Ark. 296, 44 L. R. A. 362, 43 S. W. 150 (dissenting opinion), majority holding railroad company not liable for discrimination between materially different localities in facilities for transportation.

What law governs question of usury.

Cited in National Mut. Bldg. & L. Asso. v. Brahan, 80 Miss. 425, 57 L. R. A. 797, 31 So. 840, holding local law governs loan by foreign association on mortgage covering land there, notes payable elsewhere.

29 L. R. A. 770, HODGES v. WESTERN U. TELEG. CO. 72 Miss. 910, 18 So. 84.

Right to lay pipes in street.

Cited in *Re* Johnston, 137 Cal. 122, 69 Pac. 973, holding ordinance requiring persons desirous of laying pipes in street to procure permit, void.

29 L. R. A. 772, ARMSTRONG v. AUSTIN, 45 S. C. 69, 22 S. E. 763.

Index of records.

Cited in Greenwood Loan & Guarantee Asso. v. Childs, 67 S. C. 256, 45 S. E. 167, holding deed written upon record to be properly recorded, although not indexed.

Cited in footnote to Hilpipre v. Claude, 46 L. R. A. 171, which holds indexing of adoptive instrument under child's original, and also under adopted, name sufficient.

Failure to docket case in time.

Distinguished in Steffens v. Bulwinkle, 48 S. C. 363, 26 S. E. 666, denying right to try case not docketed in time, although ordered on calendar by trial judge.

29 L. R. A. 777, STATE *ex rel.* REALTY CO. v. COOLEY, 62 Minn. 183, 64 N. W. 379.

Exemption from taxation.

Cited in State v. Bishop Seabury Mission, 90 Minn. 96, 95 N. W. 882, holding endowment fund exempt from taxation, under provisions of Constitution.

Cited in footnotes to Maine Water Co. v. Waterville, 49 L. R. A. 294, which sustains agreement by city to pay, for term of years, taxes assessed against water company supplying city; Gate City Gardens v. Atlanta, 54 L. R. A. 806, which denies exemption, as public property, to armory owned by volunteer military force.

Reduction for omission from tax lists.

Cited in State v. Lakeside Land Co. 71 Minn. 288, 73 N. W. 970, holding taxpayer entitled to no reduction because of omissions from tax lists.

29 L. R. A. 778, FARRELL v. ST. PAUL, 62 Minn. 271, 54 Am. St. Rep. 641, 64 N. W. 809.

29 L. R. A. 782, BICKERDIKE v. ALLEN, 157 Ill. 95, 41 N. E. 740.

Defense to revival of judgment.

Cited in Cassill v. Morrow, 13 S. D. 113, 82 N. W. 418, denying that failure to oppose application for revival of dormant judgment bars equitable defense to suit.

Findings as to jurisdiction.

Cited in Figge v. Rowlen, 185 Ill. 239, 57 N. E. 195, holding findings as to jurisdictional facts, necessary for service by publication, conclusive.

Presumption as to receipt of mail.

Cited in Hart Bros. v. West Chicago Park, 186 Ill. 475, 57 N. E. 1036, dissenting opinion by Magruder, J., who holds mailing notices properly addressed, prima facie evidence of receipt by sendees.

Sufficiency of service of process.

Cited in note (50 L. R. A. 582, 586, 588) on what service of process is sufficient to constitute due process of law.

Sufficiency of affidavit.

Cited in Reedy v. Camfield, 159 Ill. 261, 42 N. E. 833, holding decree of foreclosure not invalid because affidavit for publication failed to state that diligent inquiry was made, when decree recites that defendant could not be found; Iroquois Furnace Co. v. Wilkin Mfg. Co. 181 Ill. 592, 54 N. E. 987, holding statement of nonresidence of defendant sufficient in affidavit of attachment, although there is no averment of incorporation in state of residence; Turner v. St. John, 8 N. D. 261, 78 N. W. 340, and Cox v. Stern, 170 Ill. 447, 62 Am. St. Rep. 385, 48 N. E. 906, denying that failure of officer to sign jurat invalidates affidavit.

29 L. R. A. 786, COM. v. PETTY, 96 Ky. 452, 29 S. W. 291.

State regulations of patent rights and copyrights.

Cited in Rumbley v. Hall, 107 Ky. 351, 54 S. W. 4, and Bohon v. Brown, 101 Ky. 359, 38 L. R. A. 504, footnote p. 503, 72 Am. St. Rep. 420, 41 S. W. 273, upholding statute requiring endorsement of words "peddler's note," on notes given for articles sold by peddlers; State v. Cook, 107 Tenn. 508, 62 L. R. A. 177, footnote p. 174, 64 S. W. 720, sustaining statute requiring notes given for patent rights to so state on their faces.

Cited in footnote to Mason v. McLeod, 41 L. R. A. 548, which sustains statute

requiring copy of patent to be filed with affidavit of validity, and that obligation of vendee shall contain words "given for a patent right."

— Taxation of.

Cited in State *ex rel.* Atty. Gen. v. Halliday, 61 Ohio St. 380, 49 L. R. A. 434, footnote p. 427, 56 N. E. 118, holding patented article leased by patentee taxable at true value; People *ex rel.* Edison Electric Illuminating Co. v. Brooklyn, 156 N. Y. 421, 42 L. R. A. 292, footnote p. 290, 51 N. E. 269, holding patent rights not subject to state tax.

Cited in footnotes to People *ex rel.* Johnson Co. v. Roberts, 45 L. R. A. 126, which holds copyrights exempt from state taxation; Crown Cork & Seal Co. v. State, 53 L. R. A. 417, which denies right of corporation to have assessment of stock limited to value of property other than patents; State v. Cook, 62 L. R. A. 174, which holds statute requiring notes for patent rights to so state on their faces, within police power.

Police regulation of electric companies.

Cited in note (31 L. R. A. 804) on police regulation of electric companies.

29 L. R. A. 794, WATERLOO MILL. CO. v. KUENSTER, 158 Ill. 259, 49 Am. St. Rep. 156, 41 N. E. 906.

Selection of collecting agent by bank.

Cited in Wilson v. Carlinville Nat. Bank, 187 Ill. 225, 52 L. R. A. 633, 58 N. E. 250, Affirming 78 Ill. App. 343, holding transmission of check by bank to reliable collecting bank makes latter drawee's agent for collection; Irwin v. Reeves Pulley Co. 20 Ind. App. 115, 48 N. E. 601, holding bank accepting for collection draft payable at distant bank bound to use ordinary diligence in selecting collector.

Cited in footnote to Second Nat. Bank v. Merchants' Nat. Bank, 55 L. R. A. 273, which holds bank negligent in sending note for collection to bank whose cashier is treasurer of corporation maker, without hearing from similar note previously sent.

29 L. R. A. 798, WASHINGTONIAN HOME v. CHICAGO, 157 Ill. 414, 41 N. E. 893.

City's power to make donations.

Cited in Cain v. Wyoming, 104 Ill. App. 545, holding that city has no power to donate site for waterworks plant not owned by it.

State control of charitable institutions.

Cited in footnote to People *ex rel.* New York Inst. for the Blind v. Fitch, 38 L. R. A. 591, which holds incorporated institution for blind, largely supported by state, subject to visitations and rules of board of charities.

Self-executing constitutional provisions.

Cited in Criswell v. Montana C. R. Co. 18 Mont. 173, 33 L. R. A. 556, footnote p. 554, 44 Pac. 525, holding act imposing liability on domestic railroad companies for fellow servant's negligence, abrogated by adoption of Constitution against special privileges to foreign corporations; Russell v. Ayer, 120 N. C. 196, 37 L. R. A. 251, 27 S. E. 133 (dissenting opinion), majority holding that constitutional provisions as to levy of capitation tax equal to tax on property of certain value does not overrule different ratio fixed by statute; Illinois C. R.

Co. v. Ihlenberg, 34 L. R. A. 397, footnote p. 393, 21 C. C. A. 552, 43 U. S. App. 726, 75 Fed. 879, holding constitutional provision that employee's knowledge of defect shall be no defense to action for injury, self-executing.

Cited in footnotes to Anderson v. Whatcom County, 33 L. R. A. 137, which holds constitutional provision for justices of peace receiving salary instead of fees, self-executing; State v. Kyle, 56 L. R. A. 115, which holds self-operating, constitutional amendment for criminal prosecution by indictment or information only.

29 L. R. A. 803, BARCHARD v. KOHN, 157 Ill. 579, 41 N. E. 902.

Right to levy on mortgaged chattels.

Cited in People use of Palmer v. Dickson, 65 Ill. App. 101, holding constable not liable for selling mortgaged property under execution before maturity of mortgage; Second Nat. Bank v. Gilbert, 174 Ill. 493, 66 Am. St. Rep. 306, 51 N. E. 584, holding sheriff liable for refusing to levy on mortgaged property in mortgagor's possession before maturity of mortgage.

Effect on mortgage of fraudulent certificate.

Cited in Fahndrich v. Hudson, 76 Ill. App. 644, holding that fraudulent certificate of acknowledgment vitiates chattel mortgage.

Nature and validity of chattel mortgage.

Cited in Hill v. Coats, 109 Ill. App. 268, holding that chattel mortgage is conditional sale of property only, title remaining in mortgagor till breach; Martin v. Sexton, 112 Ill. App. 212, holding agreement amounting to chattel mortgage, but which is not acknowledged or recorded, and which allows debtor to retain possession, valid as between parties, and as to third persons who have no prior lien.

Election of remedies.

Cited in Foster v. Van Ostern, 72 Ill. App. 312, denying that election to pursue remedy on note waives right to foreclose mortgage; First Nat. Bank v. George R. Barse Live Stock Commission Co. 198 Ill. 236, 64 N. E. 1097, Affirming 99 Ill. App. 202, holding dismissal of attachment by mortgagee, upon stipulation, no bar to other remedies to reach proceeds of sale of mortgaged cattle.

Cited in footnote to Lambert v. Nicklas, 44 L. R. A. 561, which holds agister's lien not lost by levying attachment on property.

Cited in note (50 L. R. A. 715) on waiver of lien by attachment or execution.

State court's jurisdiction of suit to foreclose lien on raft.

Cited in Knapp, S. & Co. v. McCaffrey, 177 U. S. 645, 44 L. ed. 925, 20 Sup. Ct. Rep. 824, Affirming 178 Ill. 114, 69 Am. St. Rep. 290, 52 N. E. 898, Which Affirmed 74 Ill. App. 92, sustaining bill in state court to foreclose common-law lien on raft for towage charges.

29 L. R. A. 808, DURKIN v. KINGSTON COAL CO. 171 Pa. 193, 50 Am. St. Rep. 801, 33 Atl. 237.

Statutes for benefit of women and workers in mines.

Followed in Com. v. Jones, 4 Pa. Super. Ct. 369, 40 W. N. C. 427, and Read v. Clearfield County, 12 Pa. Super. Ct. 427, sustaining act providing for safety of bituminous coal miners.

Cited in Com. v. Brown, 8 Pa. Super. Ct. 351, 43 W. N. C. 73, declaring void, act requiring weighing of bituminous coal before screening; Com. v. Beatty, 15 Pa. Super. Ct. 20, holding act regulating hours of employment of women, valid.

Liability to servant of third person.

Cited in footnote to Lawton v. Chilton, 45 L. R. A. 616, which holds subcontractor for transporting mails liable in tort for negligent injury to postal employee.

Injury from negligence of boss employed under statute.

Cited in Szotak v. Berwind-White Coal Min. Co. 36 Misc. 105, 72 N. Y. Supp. 647, denying right of recovery to miner injured through negligence of foreman made fellow servant by statute; Williams v. Thacker Coal & C. Co. 44 W. Va. 604, 40 L. R. A. 815, footnote p. 812, 30 S. E. 107, holding employer not liable for negligence of competent mine boss employed under requirement of statute.

Cited in footnotes to Wellston Coal Co. v. Smith, 55 L. R. A. 99, which holds miner intrusted with duties of mine boss not fellow servant of other miners; Schmalstieg v. Leavenworth Coal Co. 59 L. R. A. 707, which holds mine owner liable for injury to employee from negligence of fire boss whose employment required by statute.

Disapproved in National Protective Asso. v. Cumming, 170 N. Y. 324, 58 L. R. A. 139, 88 Am. St. Rep. 648, 63 N. E. 369, expressing, *obiter*, belief in constitutionality of statute making employer liable for injury to workman by negligence of fellow servant.

Liability of railroad company for negligence of certain servants.

Cited in footnote to Indianapolis Union R. Co. v. Houlihan, 54 L. R. A. 787, which sustains statute making railroad company liable to employees for injuries by negligence of specified servants.

Liability of municipality and abutter for defective walk.

Cited in Dutton v. Lansdowne, 198 Pa. 567, 53 L. R. A. 470, 8 Del. Co. Rep. 171, 82 Am. St. Rep. 814, 48 Atl. 494, Reversing 10 Pa. Super. Ct. 210, 44 W. N. C. 290, holding abutter primarily, municipality secondarily, liable for injuries resulting from defective walk.

29 L. R. A. 811, LEVY v. SUPERIOR COURT, 105 Cal. 600, 38 Pac. 965.

Protection against searches, seizures, and compulsory evidence.

Cited in Co-operative Bldg. & L. Asso. v. State, 156 Ind. 468, 60 N. E. 146, holding that mandamus will lie to permit assessor to examine books of loan association for assessment purposes.

Cited in footnotes to Newberry v. Carpenter, 31 L. R. A. 163, which holds taking boiler, engine, etc., as exhibits on prosecution for explosion of boiler, unreasonable seizure; State v. Griswold, 33 L. R. A. 227, which upholds use of envelope containing pictures only, as evidence against accused, although taken from house by trespasser; Williams v. State, 39 L. R. A. 269, which holds evidence obtained by forcibly entering and searching house and owner's person admissible to show possession of articles tending to establish guilt.

Cited in note (59 L. R. A. 465) on admissibility in evidence against accused of documents or other things taken from him.

Annotation in 29 L. R. A. 811, referred to particularly in Blum v. State, 94 Md. 385, 56 L. R. A. 327, 51 Atl. 26, holding account books of one charged with obtaining money under false pretenses inadmissible against him.

29 L. R. A. 825, NORFOLK & W. R. CO. v. WHEELER, 91 Va. 700, 22 S. E. 514.

Liability for injury to licensee.

Cited in footnote to Savannah, F. & W. R. Co. v. Waller, 34 L. R. A. 459, which denies liability of railroad company for injury to seven-year-old boy running under freight car to get ball at request of employee.

29 L. R. A. 827, LYNCHBURG NAT. BANK v. SCOTT BROS. 91 Va. 652, 50 Am. St. Rep. 860, 22 S. E. 487.

Rights of purchaser of note affected with usury.

Cited in Bradshaw v. Van Valkenburg, 97 Tenn. 320, 37 S. W. 88, holding bona fide purchaser not affected by usury between original parties to note.

Application of payments tainted with usury.

Cited in Greer v. Hale, 95 Va. 535, 64 Am. St. Rep. 814, 28 S. E. 873, and Munford v. McVeigh, 92 Va. 465, 23 S. E. 857, holding that court will eliminate usury and apply payments to sum actually loaned.

29 L. R. A. 830, SCHUFELDT v. SMITH, 131 Mo. 280, 52 Am. St. Rep. 628, 31 S. W. 1039.

Preferences by insolvent corporation.

Cited in Schufeldt v. Smith, 139 Mo. 372, 40 S. W. 887, upholding, on second appeal, trust deed of insolvent corporation to secure loan to partnership which was converted into corporation; State *ex rel.* Schroeder v. Perkins, 90 Mo. App. 612, holding unauthorized deed of trust by president of insolvent corporation invalid as to attaching creditors; Calihan v. Powers, 133 Mo. 498, 34 S. W. 848, upholding execution of chattel mortgage and assignment of accounts in payment of bona fide debt made day before general assignment; Kingman v. Cornell-Tebbetts Mach. & Buggy Co. 150 Mo. 304, 51 S. W. 727, holding trust deed securing separate debts of creditors good as to those accepting before attachment; Shields v. Hobart, 172 Mo. 514, 95 Am. St. Rep. 529, 72 S. W. 669, sustaining right of going corporation to prefer creditors.

Cited in footnote to Adams & W. Co. v. Deyette, 31 L. R. A. 497, which denies right to prefer debt for money borrowed by corporation to purchase its own stock.

— To officers or stockholders.

Cited in Pitman v. Chicago Lead Co. 93 Mo. App. 597, 67 N. W. 946, holding proof of validity of debt and preference by quorum of directors insufficient to uphold preference to director; State *ex rel.* Grimm v. Manhattan Rubber Mfg. Co. 149 Mo. 207, 50 S. W. 321, holding trust deed in favor of directors presumptively fraudulent; Hall v. Goodnight, 138 Mo. 584, 37 S. W. 916, holding insolvent corporation's payment of debt of beneficial owner of entire stock, void; Butler v. Harrison Land & Min. Co. 139 Mo. 478, 61 Am. St. Rep. 464, 41 S. W. 234, upholding deeds of trust to directors of insolvent corporation to pay honest debts; American Exch. Nat. Bank v. Ward, 55 L. R. A. 359, footnote p. 356, 49 C. C. A. 616, 111 Fed. 787, upholding chattel mortgage to secure just demands of directors of insolvent corporation; Levering v. Bimel, 146 Ind. 555, 45 N. E. 775, holding preference by insolvent corporation to director not fraudulent because voted on by such director; Nappanee Canning Co. v. Reid, 159 Ind. 625, 59 L. R. A. 202, footnote p. 199, 64 N. E. 870, sustaining right to prefer unse-

cured claims on which directors are liable; Corey v. Wadsworth, 118 Ala. 516, 44 L. R. A. 775, footnote p. 766, 25 So. 503, sustaining preference to stockholder, director, and president of insolvent corporation.

Cited in footnotes to Illinois Steel Co. v. O'Donnell, 31 L. R. A. 265, which holds valid, securities given to directors by insolvent going concern to obtain money loaned at time securities given; National Wall Paper Co. v. Columbia Nat. Bank, 56 L. R. A. 121, which denies right to prefer debt on which officers and directors are bound as sureties.

29 L. R. A. 834, PEOPLE *ex rel.* CHANDLER v. McDONALD, 5 Wyo. 526, 42 Pac. 15.

Ex post facto laws.

Cited in State v. Taylor, 134 Mo. 145, 35 S. W. 92, holding change in time allowed accused to challenge jurors, made after commission of crime, not *ex post facto* law; Willis v. State, 134 Ala. 450, 33 So. 226, holding statute relieving state of requirement of proving incorporation of corporation in criminal trials applicable to trial of offense alleged to have been committed before passage of act.

Cited in footnotes to State v. Richardson, 35 L. R. A. 238, which holds change in Constitution as to former jeopardy, favorable to prisoner, applicable to subsequent trial; State v. Kyle, 56 L. R. A. 115, which sustains statute authorizing prosecution by information of crimes already committed.

29 L. R. A. 839, SAN DIEGO WATER CO. v. SAN DIEGO FLUME CO. 108 Cal. 549, 41 Pac. 495.

Combinations or agreements to fix prices.

Cited in footnotes to National Harrow Co. v. Hench, 39 L. R. A. 299, which holds agreement by owner of patent with corporation organized by rival manufacturers, to sell no harrow for less than schedule price, invalid; Com. v. Grinstead, 56 L. R. A. 709, which holds agreement not to resell goods at less than specified price not within statute for suppression of conspiracies; John D. Park & Sons Co. v. National Wholesale Druggists' Asso. 62 L. R. A. 632, which sustains plan by which manufacturers of proprietary medicines shall sell at fixed prices, with rebate only to concerns which can be relied on to maintain price decided upon.

Contracts between corporations having common directors.

Cited in note (33 L. R. A. 790) on validity of contracts between corporations having common directors or officers.

Establishment and regulation of municipal water supply.

Cited in note (61 L. R. A. 75) on establishment and regulation of municipal water supply.

29 L. R. A. 844, PEOPLE'S HOME SAV. BANK v. SUPERIOR COURT, 104 Cal. 649, 43 Am. St. Rep. 147, 38 Pac. 452.

Vote by proxy.

Cited in footnote to Smith v. San Francisco & N. P. R. Co. 35 L. R. A. 309, which holds proxy for voting block of stock in accordance with desire of majority of purchasers, made by condition for voting same as majority determines.

Substitution of attorney.

Cited in Gage v. Atwater, 136 Cal. 172, 68 Pac. 581, holding that client may change attorney although latter has advanced money for expenses and his fee is contingent upon success.

29 L. R. A. 851, HARE v. MURPHY, 45 Neb. 809, 64 N. W. 211.

Third person's right to enforce claim or contract.

Cited in Union P. R. Co. v. Metcalf, 50 Neb. 461, 69 N. W. 961, holding that consignor paying charges has no right of action against carrier for failure to deliver goods; Tecumseh Nat. Bank v. Best, 50 Neb. 520, 70 N. W. 41, holding creditor's petition, alleging that successor of insolvent bank had assumed latter's liabilities for consideration, sufficient; Tweeddale v. Tweeddale, 116 Wis. 522, 61 L. R. A. 511, 96 Am. St. Rep. 1003, 93 N. W. 440, holding that where one makes contract with another for benefit of third person, latter may enforce it, regardless of his relation with first party.

Assumption of mortgage debt.

Later appeal in 60 Neb. 135, 82 N. W. 312, holding grantee in deed containing assumption clause not estopped to deny validity of such clause as against one purchasing mortgage in reliance on recitals in recorded instrument.

Cited in Gibson v. Hambleton, 52 Neb. 603, 72 N. W. 1033, and Martin v. Humphrey, 58 Neb. 417, 78 N. W. 715, holding grantee personally liable for mortgage debt assumed as part of purchase price; Morrill v. Skinner, 57 Neb. 171, 77 N. W. 375, holding that mortgagee may enforce grantee's promise to pay debt as part consideration for transfer; Graves v. Macfarland, 58 Neb. 804, 79 N. W. 707, holding purchaser of mortgaged premises who assumed debt, liable on deficiency judgment; Colchester Sav. Bank v. Brown, 75 Conn. 71, 52 Atl. 316, sustaining statute authorizing mortgagee to maintain action, in own name, against grantee of mortgaged premises who assumed and agreed to pay debt; McKay v. Ward, 20 Utah, 156, 46 L. R. A. 625, footnote p. 623, 57 Pac. 1024, and Enos v. Sanger, 96 Wis. 154, 37 L. R. A. 864, 65 Am. St. Rep. 38, 70 N. W. 1019, holding grantee assuming mortgage debt, personally liable for deficiency, although immediate grantor not liable; Stites v. Thompson, 98 Wis. 331, 73 N. W. 774, holding purchaser of mortgaged premises who assumes debt liable as principal, not as surety.

Cited in footnote to Knapp v. Connecticut Mut. L. Ins. Co. 40 L. R. A. 861, which upholds mortgagee's right to compel grantee of mortgagor by suit in equity to keep his agreement assuming the mortgage.

Retroactive statutes.

Cited in Thompson v. West, 59 Neb. 683, 49 L. R. A. 341, 82 N. W. 13, and Merrill v. Miller, 2 Herdman (Neb.) 632, 89 N. W. 606, denying that repeal of statute permitting deficiency judgments on foreclosure of mortgage affects actions pending.

29 L. R. A. 853, PAXTON & H. IRRIGATING CANAL & LAND CO. v. FARMERS' & M. IRRIG. & LAND CO. 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343.

Title of act.

Cited in State *ex rel.* Churchill v. Bemis, 45 Neb. 735, 64 N. W. 348, holding

authority to remove officers within title of act "defining, regulating, and prescribing powers of city governments;" State *ex rel.* Graham v. Tibbets, 52 Neb. 233, 66 Am. St. Rep. 492, 71 N. W. 990, holding act entitled "act to amend sections . . . " of prior act insufficient; Nebraska Loan & Bldg. Asso. v. Perkins, 61 Neb. 256, 85 N. W. 67, holding that title of act "to enable associations of people to raise funds to be loaned for building homesteads" indicates subject of legislation; State v. Heldenbrand, 62 Neb. 142, 89 Am. St. Rep. 743, 87 N. W. 25, holding prohibition against transfer of mortgaged property germane to title of act "to prevent fraudulent transfer of personal property;" State *ex rel.* Green v. Power, 63 Neb. 500, 88 N. W. 769, holding that "act providing for better protection of earnings of servants" comprehends punishment of one attaching exempt wages.

Appropriation of property for public or other purposes.

Cited in Ryan v. Louisville & N. Terminal Co. 102 Tenn. 117, 45 L. R. A. 306, 50 S. W. 744, sustaining railroad company's right to condemn land for terminal purposes; State *ex rel.* Board of Transportation v. Sioux City, O. & W. R. Co. 46 Neb. 698, 31 L. R. A. 53, 65 N. W. 766, holding act requiring carrier to haul freight over longer line, for same rate required of shorter line between same points, void, as illegal appropriation of property.

— Irrigation purposes.

Cited in Alfalfa Irrig. District v. Collins, 46 Neb. 415, 64 N. W. 1086, holding act authorizing issue of bonds by irrigation district constitutional; Cummings v. Hyatt, 54 Neb. 42, 74 N. W. 411, holding tax to pay interest on irrigation bonds valid; Perkins County v. Graff, 52 C. C. A. 247, 114 Fed. 445, holding validity of irrigation bonds not affected because water drawn from another state; Prescott Irrig. Co. v. Flathers, 20 Wash. 459, 55 Pac. 635, holding that irrigation corporation may condemn land for construction of ditches.

29 L. R. A. 859, MUNZER v. STERN, 105 Mich. 523, 55 Am. St. Rep. 468, 63 N. W. 513.

29 L. R. A. 861, DELL RAPIDS v. IRVING, 7 S. D. 310, 64 N. W. 149.

County or town as municipal corporation.

Cited in Western Town Lot Co. v. Lane, 7 S. D. 604, 65 N. W. 17, holding counties or towns not municipal corporations.

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